

# Essays

## WHO DIRECTS DIRECT DEMOCRACY?

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Lawmaking by direct democracy has become an increasingly important part of the legislative process at the state level. Voters in twenty-six states and the District of Columbia have the right to propose legislation through the initiative process, and voters in all states except Delaware must vote to approve changes to their state constitutions.<sup>1</sup> While the mechanisms of direct democracy are not new--many date to populist and progressive movements at the turn of the century--they are being used with greater frequency. During this decade, the number of proposed initiatives and referenda are projected to exceed the number proposed at the height of the progressive era (1910-19) by nearly one hundred,<sup>2</sup> and more are expected to pass during the 1990s than ever before.<sup>3</sup>

The appeal of popular lawmaking is no surprise given the growing public disillusionment with elected representatives. For example, in 1992, as part of a presidential campaign fueled by voter alienation, Ross Perot proposed that national leaders seek public input through frequent electronic town meetings and that a national referendum be required to adopt important tax and budget legislation.<sup>4</sup> At the same time that supporters of federal and state

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<sup>1</sup> THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 2-3 (Harvard 1989); see also *id.* at 2 (defining the different mechanisms of direct democracy: the initiative, the referendum, and the recall).

<sup>2</sup> David B. Magleby, *Let the Voters Decide?: An Assessment of the Initiative and Referendum Process*, 66 U COLO L REV 13, 27 Figure 1 (1995).

<sup>3</sup> *Id.*

<sup>4</sup> Michael Kelly, *Perot's Vision: Consensus by Computer*, NY TIMES A1 (June 6, 1992). See also JACK KEMP, *AN AMERICAN RENAISSANCE: A STRATEGY FOR THE 1980'S* 187-89 (Conservative 1979) (proposal by the 1996 Republican vice-presidential candidate for a constitutional amendment establishing a national initiative process); *Remarks by Representative Richard A. Gephardt, A Democratic*

term limits seek to transform legislatures into the domain of citizen-legislators,<sup>5</sup> eligible citizens already wield direct legislative power through their use of the initiative and the referendum. As Thomas Cronin observes, direct democracy is attractive to some reformers because of the "idealistic notion that populist democracy devices can make every citizen a citizen-legislator and move us closer to political and egalitarian democracy."<sup>6</sup>

In this essay, I dispute one of the central claims of supporters of direct democracy--that such lawmaking is freer from special interest domination than lawmaking by legislatures. I also challenge the supporters' claim that the availability of the initiative and the referendum provides a desirable safeguard to empower ordinary citizens, who believe that their voices are often unheard by elected representatives.<sup>7</sup> In fact, special interests, not ordinary citizens, generally frame the terms of the debate concerning ballot measures. Special interests have a comparative advantage in determining both what questions are placed on the ballot for popular decision and how those questions are drafted.

I am not arguing that special interests are more powerful in the context of direct democracy than in the halls of the state and national legislatures. Rather, I am merely suggesting that both forums may be susceptible to interest group pressures, although the specific groups that dominate each forum may differ, and that neither structure may facilitate the enactment of legislation that accurately reflects the popular will. Traditional lawmaking and direct lawmaking are different mechanisms used to aggregate and shape individual preferences, which may lead to different outcomes, but both are influenced disproportionately by those groups that can express their preferences more loudly or more clearly than other groups or individuals.

The judicial branch also plays a role in determining the direction of direct democracy. Judges must interpret popularly-enacted laws, which are often unclear in meaning or scope. Although most judges faced with questions concerning the interpretation of direct legislation claim to be following the directions of the voters, it seems unlikely that judges can accurately discern the "popular intent" or even that such a clear, monolithic intent actually exists. If intentionalism is not a legitimate interpretive method in this context, judges should rely on other techniques to decide the meaning of contested language. Very little scholarly attention has been directed to the appropriate method of interpreting laws passed by direct

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*Plan for America's Economy: Toward a Fairer, Simpler Tax Code* (July 6, 1995) (proposing that tax rates could be increased only after a national referendum).

<sup>5</sup> See generally Elizabeth Garrett, *Term Limitations and the Myth of the Citizen Legislator*, 81 CORNELL L REV 623 (1996) (discussing this goal which lies at the core of the term limits movement and disputing whether the adoption of federal term limits would achieve the objective).

<sup>6</sup> Cronin, *Direct Democracy* at 6 (cited in note 1).

<sup>7</sup> See, for example, DAVID D. SCHMIDT, *CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION* 29-30 (Temple 1989).

democracy.<sup>8</sup> At the conclusion of this essay, I offer some preliminary thoughts on this provocative question and on the role courts might play in ameliorating the deliberative shortcomings of direct democracy and in reducing the distorting influence of interest groups in the process.<sup>9</sup>

## I

Direct democracy is justified in part by the claim that it replaces the influence of organized and well-heeled special interests with the unmediated will of the people.<sup>10</sup> Minority interests are thought to play a reduced role in direct democracy--so much so that opponents of direct democracy fear that lawmaking by popular vote empowers the majority without sufficiently protecting minorities. Certainly, many recent high-profile ballot propositions that have adversely affected certain minority groups suggest that this concern is warranted.<sup>11</sup> But in many other cases, relatively small groups that can organize, amass substantial resources, and deploy their resources effectively can dominate the process of direct democracy. These small

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<sup>8</sup> Only one article on statutory interpretation in this context has been published in the law reviews, Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L J 107 (1995). The recent surge of academic interest in direct democracy has prompted a few scholars of statutory interpretation to turn their attention to direct democracy. See, for example, Philip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1996 ANN SURV AM L (1997) (forthcoming) (presenting an integrated theory of constitutional and statutory interpretation).

<sup>9</sup> Similarly, others have argued that the courts should adopt interpretive strategies to achieve related goals with respect to representative legislatures. See, for example, Hans A. Linde, *Due Process of Lawmaking*, 55 NEB L REV 195 (1976); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV L REV 4 (1996).

<sup>10</sup> See, for example, PATRICK B. MCGUIGAN, *THE POLITICS OF DIRECT DEMOCRACY IN THE 1980S: CASE STUDIES IN POPULAR DECISION MAKING* 120 (Free Congress Research and Educ Fnd 1985); Schmidt, *Citizen Lawmakers* at 30-33 (cited in note 7).

<sup>11</sup> See, for example, the California proposition prohibiting affirmative action programs, CA Const, Art I, <sect> 31, injunction vacated in *Coalition for Economic Equity v Wilson*, Nos 97-15030, 97-15031, 1997 US App LEXIS 6512 (9th Cir 1997); the Arizona proposition declaring English as the state's official language, AZ Const, Art XXVIII, ruled unconstitutional in *Yniguez v Arizona*, 69 F3d 920 (9th Cir 1995), dismissed as moot, *Arizonans for Official English v Arizona*, 117 S Ct 1055 (1997); the Colorado constitutional amendment affecting gays and lesbians, CO Const, Art II, <sect> 30b, ruled unconstitutional in *Romer v Evans*, 116 S Ct 1620 (1996). See also Jonathan R. Macey, *Chief Justice Rehnquist, Interest Group Theory, and the Founders' Design*, 25 RUTGERS L J 577, 582 (May 1994) (noting that Framers "rejected notions of direct democracy because majority interests trammel minority rights under such a system").

groups are involved on all levels--from drafting the direct legislation to collecting the signatures required to place a question on the ballot and from framing the debate during the campaign to influencing the eventual outcome.

Getting a question on the ballot is not easy. Most efforts to submit a question to the people fail to surmount the procedural hurdles standing in the way of ballot access. In all states that allow popular lawmaking, a group seeking a vote on a question must collect sufficient signatures to qualify a proposal for the ballot. Typically, signature thresholds are set as a percentage of the vote for Governor in the last election or as a percentage of the total votes cast in the preceding general election.<sup>12</sup> The average number of signatures required is 7.5 percent of registered voters, with requirements ranging from 2 percent in North Dakota for statutory initiatives to 15 percent in Wyoming for the same type of question.<sup>13</sup> These percentages can translate into a large number of signatures; for example, in California 430,000 signatures were needed to qualify a question for the 1996 ballot.<sup>14</sup>

According to some historians, in the early days of direct democracy, signature drives often were occasions for a great deal of public deliberation.<sup>15</sup> Supporters would bring petitions to meetings of civic groups and churches, and people would debate the merits of the proposal as they considered whether to sign. Whatever the truth of that rosy view of the past, such public discussion no longer accompanies most signature drives. Indeed, signature gatherers work diligently to avoid the delay inherent in public deliberation because they want to fill petitions with names as quickly as possible. Speed is particularly essential in states that impose time limits of 90 to 150 days for groups to gather signatures.<sup>16</sup>

Given these obstacles to success, groups are increasingly turning to professional signature-gatherers (as well as professional drafters, media consultants, and others with experience in the "initiative industry"). Professionals are typically not interested in fostering public discussion; they want to earn their money as quickly as possible and move on to the next job. In some states where signatures can be solicited by mail, direct mail firms work to compile lists of people who always return signature requests regardless of the topic of the petition. Those who gather signatures through the more traditional "booth-in-the-shopping-mall" method structure their interactions with the public to discourage extended discussion and to avoid

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<sup>12</sup> DAVID B. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* 41 (Johns Hopkins 1984).

<sup>13</sup> Magleby, 66 U. Colo. L. Rev. at 22 Table 1 (cited in note 2). Some states also impose geographic distribution requirements designed to force proponents to demonstrate broad support throughout the state. *Id.* at 21.

<sup>14</sup> Elaine Korry and Bob Edwards, *Ballot Initiatives Submitted by Internet*, National Public Radio's Morning Edition, Transcript No. 96110716-246 (Nov 7, 1996).

<sup>15</sup> Cronin, *Direct Democracy* at 207-19 (cited in note 1).

<sup>16</sup> *Id.* at 62.

even revealing what issue the petition proposes to place on the ballot. As one active participant in direct democracy in California explained: "Why try to educate the world when you're trying to get signatures?"<sup>17</sup>

Not only does the involvement of consultants affect the level and quality of public discussion, but the cost of such expertise is beyond the reach of many who seek ballot access. Professional agencies charge up to \$1.50 per name in California (but as low as 30 cents per name in North Dakota).<sup>18</sup> Put more concretely, at those prices, the cost of collecting enough signatures to qualify a question for the California ballot in 1996 exceeded \$600,000--a price tag that many truly grassroots groups find difficult to meet. When added to other expenses that must be incurred for ballot access, the cost in California can reach \$1 million before the campaign itself even begins.<sup>19</sup>

California is considering a reform proposal that is designed to reduce the importance of money in gathering signatures, but ultimately the reform, and others like it, is likely only to empower a greater number of interest groups without necessarily improving public deliberation or opening the process to truly populist movements. California's Secretary of State is working to allow signatures to be collected electronically over the Internet.<sup>20</sup> This proposal will reduce the cost of qualifying a question, although setting up a website and publicizing it will still require resources. Even if the price of getting sufficient signatures is reduced, as long as the price remains positive, interest groups will retain an advantage relative to unorganized interests. However, the reform will enable more groups to surmount the signature hurdle and force more popular votes on issues they support.

Despite potentially increasing the number of groups that can gain access to the process, a reform along the lines being considered in California may not improve the level of public discourse. Those surfing the Internet at home may be willing to read information about the proposal and discuss it with their friends or in chat rooms, but flashy websites can also be set up to encourage electronic signatures without generating much reflection. Interest groups, and their hired guns, will still want to gather as many signatures as easily and as quickly as possible. Such reforms do nothing to create

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<sup>17</sup> Id at 63 (quoting Ed Koupal, leader of California's People's Lobby). See also McGuigan, *Case Studies* at 110 (cited in note 10) (quoting Sue Thomas, Research Director of the National Center for Initiative Review: "The application of high tech political devices to direct democracy . . . takes the initiative out of the realm of 'grass roots' political activity and places it squarely in the field of a business venture.").

<sup>18</sup> See Korry and Edwards, *Ballot Initiatives* (cited in note 14); Cronin, *Direct Democracy* at 62 (cited in note 1). In 1988, the Supreme Court struck down a limitation on the use of paid signature-collectors as a violation of the First Amendment. *Meyer v Grant*, 486 US 414 (1988).

<sup>19</sup> Richard Briffault, *Distrust of Democracy*, 63 *TEX L REV* 1347, 1352 (1985) (reviewing Magleby, *Direct Legislation* (cited in note 12)).

<sup>20</sup> Korry and Edwards, *Ballot Initiatives* (cited in note 14).

economic incentives for proponents of ballot questions to structure their electronic presentation in a way that fosters reasoned and widespread discussion.

Even if electronic alternatives or other reforms are successful in decreasing the cost of ballot access, money will continue to be important during the campaign. First, supporters will expend resources to influence the drafting of the text of the proposition itself and of any voter information pamphlets that are disseminated by the state or local government. Even though the vast majority of voters do not read or understand the legalese of the actual ballot question or the dense prose that characterizes most information booklets, many courts use these sources as guides to meaning when they interpret the results of direct democracy.<sup>21</sup> Organized groups with expertise in drafting and the ability to influence officials who write pamphlets are better able to convince courts to adopt interpretations that further their policy agendas than are unskilled members of truly popular movements.

The bottom line is that informing the voters about the ballot question and convincing them to vote in a certain way are expensive. The public receives most of its information about initiatives and referenda through the media and paid advertising,<sup>22</sup> so groups will concentrate their resources on shaping the terms of the public debate through these avenues of information.<sup>23</sup> Campaign advertising is important in all kinds of elections, whether the public is voting for a ballot proposition or for a candidate, but in direct democracy, voters have fewer informational cues to help them. For example, in candidate elections, voters can glean helpful information from party affiliation and incumbency status. While campaigns concerning ballot questions may include similar information in the form of publicized endorsements by politicians and other elites, the number and saliency of these cues are substantially reduced. Professor Schacter puts this point another way. "The initiative process," she writes, "frequently combines increased information costs with decreased informational resources."<sup>24</sup>

A handful of studies suggests that the amount of money spent in a campaign is crucial in determining the outcome of the vote. It appears that disproportionate spending is more effective in opposition to a ballot

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<sup>21</sup> Schacter, 105 Yale L J at 122 Tables 1-3 (cited in note 8). See also *infra* text at notes 47 and 48 (discussing effect of this situation on choice of methods of statutory interpretation).

<sup>22</sup> *Id* at 130.

<sup>23</sup> The First Amendment blocks attempts to impose limitations on spending during campaigns for initiatives or referenda. See *First Nat'l Bank of Boston v Bellotti*, 435 US 765 (1978) (corporation's spending with respect to a ballot question protected by the First Amendment); *Citizens Against Rent Control v Berkeley*, 454 US 290 (1981) (striking down contribution limits in the context of ballot questions and distinguishing this case from contribution limits in candidate elections).

<sup>24</sup> Schacter, 105 Yale L J at 135 (cited in note 8).

question than in support of one.<sup>25</sup> But one-sided spending (spending that exceeded \$ 250,000 and was at least twice as high as spending by the opposing side) in support of ballot questions in California between 1968 and 1980 was also associated with a higher rate of passage than the overall passage rate for ballot questions during that time period.<sup>26</sup> Moreover, Professor Lowenstein discovered that one-sided spending campaigns were characterized by "gross exaggeration, distortion, and outright deception."<sup>27</sup>

My purpose in emphasizing the role of money and the groups who can raise it is not to argue that only the voices of wealthy special interests are heard through direct democracy. Such well-funded voices are loud, but so are the voices of other highly-motivated groups that can deploy cadres of dedicated volunteers. These groups have been successful in qualifying ballot proposals on topics like the death penalty, term limits, abortion, and nuclear weapons.<sup>28</sup> In addition, although full campaign coffers are helpful, they do not guarantee success. Most ballot questions fail. Even where there is one-sided spending in favor of a proposition, voters defeat the proposals two-thirds of the time.

Instead, my objective in addressing the influence of financial resources is two-fold. First, it is to make clear that, in enacting initiatives and referenda, unorganized and ordinary Americans play only a small role, just as they do elsewhere in politics. Ordinary citizens do not determine the agenda of direct democracy any more than they determine the agenda of the legislature. Rather, the salience of issues for public debate and decision in both forums turns largely on how organized interests spend their money to influence the media, to pay for advertising, and to put issues before the public.<sup>29</sup> Direct lawmaking requires resources, and organized groups are

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<sup>25</sup> See Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L REV 505, 544-46 (1982). See also Cronin, *Direct Democracy* at 110-11 (cited in note 1) (discussing similar results in a 1976 study done by John S. Shockley).

<sup>26</sup> Lowenstein, 29 UCLA L Rev at 550 Table 3 (cited in note 25).

<sup>27</sup> *Id.* at 570. Interestingly, at least one survey indicates that voters are aware of the influence of money on the results of direct democracy. So, a greater use of the initiative and referendum may not cure the public perception that government is controlled by private interests. See Cronin, *Direct Democracy* at 100 Table 5.2 (cited in note 1).

<sup>28</sup> See Schmidt, *Citizen Lawmakers* at 147-69 (cited in note 7) (case study of efforts to place nuclear weapons freeze questions on ballot). For a list of the various subjects covered by direct democracy, see McGuigan, *Case Studies* at 4 (cited in note 10). See also Michael T. Hayes, *Lobbyists and Legislators: A Theory of Political Markets* 74-75 (RUTGERS 1981) (distinguishing between groups "whose power base derives from money and those whose base derives from sheer numbers").

<sup>29</sup> For a discussion of the ability of certain groups to organize to affect political outcomes, see MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 33-36, 50-51 (Harvard 1965); DANIEL A. FARBER AND PHILIP P. FRICKEY, *LAW AND PUBLIC*

better able to raise and deploy those resources than are the putative citizen-lawmakers.

However, it does seem likely, as Professor Briffault argues, that the interest groups that succeed at direct democracy may be different from those who fare well in the legislatures.<sup>30</sup> The mechanics of enacting legislation differ in each forum, so one would expect that institutional differences among interest groups would make a difference in their ability to influence the relevant lawmakers. Further empirical work is necessary before we can determine which kinds of interest groups succeed in each realm and whether some interest groups dominate both kinds of lawmaking.

Second, merely analyzing the shortcomings of direct democracy does not answer the question of whether this form of lawmaking is desirable. To fully evaluate popular lawmaking, we must compare it with the alternative--governance by elected representatives. Moreover, our comparison must focus on the reality of the state and federal legislative processes, rather than on some idealized conception of representative democracy in which the legislature is comprised of men and women replete with wisdom and civic virtue who rise above current passions to pursue the public interest.<sup>31</sup> The framers of the federal Constitution realized that the real world legislature would often diverge from an ideal one. Accordingly, they constructed an institutional structure designed to constrain the influence of factions and to

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CHOICE: A CRITICAL INTRODUCTION 12-21 (Chicago 1991). For a discussion of collective action issues and the formation of interest groups in the context of direct democracy, see Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH L REV 930, 974-77 (1988). See also Garrett, 81 Cornell L Rev at 685-86 (cited in note 5) (discussing influence of interest groups in shaping the congressional agenda and determining which issues are politically salient).

<sup>30</sup> Briffault, 63 Tex L Rev at 1357 (cited in note 19); see also id at 1358 (noting that a significant number of initiatives have been supported by short-term interest groups that form to promote a particular policy during the election and then disband); KAY LEHMAN SCHLOZMAN AND JOHN T. TIERNEY, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* 402 (Harper & Row 1986) (emerging interest groups channel energy to social movements and protest activity). A number of the activist interest groups that Briffault identifies as succeeding in the direct democracy arena also have a great deal of influence in legislatures (for example, on issues like abortion and the death penalty). Briffault's observation frames the question in a way that is different from many supporters of direct democracy. He argues that the kind of interest group empowered is different, not that direct democracy eliminates the influence of organized special interests. See Briffault, 63 Tex L Rev at 1357-61 (cited in note 19).

<sup>31</sup> See also id at 1361-63 (criticizing Magleby's book for his failure to describe the legislative process accurately).



encourage deliberation even when enlightened leaders are not "at the helm."<sup>32</sup>

The structure of our government was intended to encourage lawmakers to shape public preferences and to resist the temptation merely to ratify whatever the public demanded in the heat of the moment.<sup>33</sup> However, with the rise of what Lawrence Grossman calls an "electronic republic,"<sup>34</sup> the structure the framers put into place to ensure public reflection seems increasingly fragile. In part because the views of their constituents can be learned quickly and relatively inexpensively, representatives are acting more often as the unquestioning agents of the electorate. Many political reforms currently under serious consideration are supported with the argument that they will force legislators to act more consistently with the wishes of the voters.<sup>35</sup> Representatives increasingly choose governmental policies according to the results of opinion polls and focus groups.<sup>36</sup> In short, modern

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<sup>32</sup> Of course, the most famous discussion of this design is found in Federalist No. 10. Federalist 10 (Madison) in Clinton Rossiter, ed, *The Federalist Papers* 80 (Penguin 1961). See also Cass R. Sunstein, *Beyond the Republican Revival*, 97 *YALE L J* 1539, 1548-49 (1988) (stating that "the belief in political deliberation is a distinctly American contribution to republican thought" and discussing the importance of public deliberation and reasoned decisionmaking); Marci A. Hamilton, *Discussion and Decisions: A Proposal to Replace the Myth of Self-Rule With an Attorneyship Model of Representation*, 69 *NYU L REV* 477, 532-36 (1994) (arguing that structure of Congress was designed to foster deliberation and the exercise of the legislator's independent judgment); HANNA PITKIN, *THE CONCEPT OF REPRESENTATION* 195 (Cal Press 1967) (interpreting Madison as arguing that legislators could withstand the influence of factions because the legislature provides a forum where interests could be balanced, controlled, and stalemated).

<sup>33</sup> See Cass R. Sunstein, *Democracy and Shifting Preferences*, in DAVID COPP, JEAN HAMPTON, AND JOHN E. ROEMER, EDs, *THE IDEA OF DEMOCRACY* 203 (Cambridge 1993) ("A central point here is that preferences are shifting and endogenous rather than exogenous, and as a result are a function of current information, consumption patterns, and general social pressures.").

<sup>34</sup> See generally LAWRENCE K. GROSSMAN, *THE ELECTRONIC REPUBLIC* (Viking 1995).

<sup>35</sup> One example of such a reform is the adoption of term limits, which is often justified with such arguments. See Garrett, 81 *Cornell L Rev* at 631-32 (cited in note 5).

<sup>36</sup> The Contract with America, which shaped the agenda of the 104th Congress, was formulated almost entirely on the basis of opinion surveys and polling data. Dan Balz and Charles R. Babcock, Gingrich, *Allies Made Waves and Impression: Conservative Rebels Harassed the House*, *WASHINGTON POST* A1, A14 (Dec 20, 1994). See also Richard Morin, *Taking the Pulse on Pulse-Takers*, *WASH POST NAT'L WKLY* Ed 37 (Sept 23-29, 1996) (polling data indicate that Americans prefer politicians to follow opinion polls more closely). But see Saul Levmore, *Precommitment Politics*, 82 *VA L REV* 567, 578 (1996) (noting some reasons that voters might not prefer that representatives faithfully followed survey results in all cases).

representative democracy may be operating more like a direct democracy, even in the absence of mechanisms like the initiative or the referendum.

One objective of any comparison of direct democracy and traditional lawmaking is to determine the proper allocation of decisions between the two ways of legislating.<sup>37</sup> The question is a comparative one: in particular cases, which method of aggregating and shaping public preferences can best meet the goals of a deliberative democracy that values reflection and reasoning before action is taken? In both cases, the preferences expressed by citizens are mediated. In direct democracy, the primary filter is that of the interest groups that draft the ballot question, shape the terms of the debate, and argue in courts for certain interpretations of the direct legislation. In the legislature, representatives filter and shape public desires, but they are not alone in this role. To the extent that surveys determine public policy, those who conduct the polls and interpret the results affect the way the public will be perceived.<sup>38</sup> And, as with direct democracy, interest groups determine much of the legislature's agenda and disproportionately influence legislative outcomes.

As we work to solve this puzzle, we must adopt a dynamic approach that takes account of the interactions between the two types of lawmaking.<sup>39</sup> For example, the availability of direct democracy may reduce the amount of legislative deliberation and discourage compromise if groups supporting a policy change believe they can prevail in a popular vote.<sup>40</sup> On the other hand, elected lawmakers may be more willing to address certain issues that concern their constituents if they know that supporters can circumvent them

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<sup>37</sup> As Richard Briffault observes, "We do not have to choose between the initiative and the legislature. . . . The real issue is how well they work together, or, given that even in initiative states government remains largely representative, whether the initiative corrects some of the defects of the legislative process." Briffault, 63 *Tex L Rev* at 1350 (cited in note 19).

<sup>38</sup> See Richard Morin, *A Pollster's Peers Cry Foul*, WASHINGTON POST NAT'L WEEKLY Ed 35 (Apr 28, 1997) (reporting that Frank Luntz, pollster associated with the Contract with America, was reprimanded by leading professional organization for refusing to disclose the wording of poll questions and violating ethical rules that mandate disclosure because it is necessary to evaluate poll results).

<sup>39</sup> Compare Dan M. Kahan, *The Theory of Value Dilemma: A Critique of the Economic Analysis of Criminal Law* (unpublished manuscript on file with the author) (discussing the "imperfection of each lawmaking institution relative to the others" and concluding that "the decision of no one of these institutions can be held forth as embodying the community's 'true' aggregate valuation, which is in fact more likely to emerge from overlapping jurisdiction and competition among these institutions").

<sup>40</sup> See, for example, Magleby, 66 *U Colo L Rev* at 29 (cited in note 2) ("State legislators have also turned to the initiative to promote issues they cannot get passed in the legislature. The temptation to pursue legislation in the public arena not only diverts legislators from the work of the legislature, but encourages legislators to duck tough issues and 'let the voters decide.'").

and go directly to the people.<sup>41</sup> Or an issue may become more salient for elected lawmakers once it has been the subject of a popular vote, even if the ballot question fails. At the very least, however, it is clear that our choice is not between lawmaking by citizens (direct democracy) and lawmaking by special interests (representative democracy) because neither process is free from the influence of organized groups that control large amounts of human and financial resources.

Finally, if both forms of lawmaking diverge significantly from their idealized versions, we must consider how to structure each to allow space for reasoned decision-making<sup>42</sup> and reduce the influence of special interests. I suspect that legislative decision-making is more conducive to such structures in most cases,<sup>43</sup> but the answer is far from evident. The traditional legislative process can be shaped by rules and procedures that are designed to allow an opportunity for focused and careful deliberation of important issues.<sup>44</sup> Members of Congress can delegate to committees or staff members the responsibility to oversee the drafting of legislative language and to watch for interest group activity that may be adverse to the public interest (or, more likely, to their constituents' interests). The already numerous hurdles that characterize the legislative process can be increased or strengthened, thereby raising the cost of lawmaking to interest groups and

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<sup>41</sup> See Briffault, 63 *Tex L Rev* at 1367-69, 1375 (cited in note 19). For example, it seems unlikely that the U.S. Congress would have voted on term limits proposals without the pressure brought to bear by direct democracy. See Garrett, 81 *Cornell L Rev* at 628-30 (cited in note 5). See also Elisabeth R. Gerber, *Legislative Response to the Threat of Popular Initiatives*, 40 *AM J POL SCI* 99 (1996) (finding that legislators in states that allow initiatives pass parental consent laws that more closely resemble states' median voters' preferences than legislators in states without initiatives).

<sup>42</sup> See Bernard Grofman, *Public Choice, Civic Republicanism, and American Politics: Perspectives of a "Reasonable Choice" Modeler*, 71 *TEX L REV* 1541, 1583 (1993) (Deliberation is an activity that "results in a sharing of information by individuals who have diverse experience or knowledge. Thus, like a jigsaw puzzle where different people have different pieces, the deliberative process may improve problem solving."). But see Gillette, 86 *Mich L Rev* at 944 (cited in note 29) (arguing that deliberation is only one check for deterring special interests and that its absence does not mean that other ways to protect the public interest are not sufficient to promote the public interest).

<sup>43</sup> Compare AMY GUTMANN AND DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 131 (Belknap 1996) ("From a deliberative perspective representation is not only necessary but also desirable. The number of people who at the same time can have even a simple conversation, let alone an extended moral argument, is limited.").

<sup>44</sup> See, for example, Elizabeth Garrett, *Enhancing the Procedural Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 *U KAN L REV* 1113, 1172-73 (1997) (discussing the Unfunded Mandates Reform Act as an example of a procedural framework to encourage congressional deliberation of certain issues).

checking some of the excesses of their behavior. Courts can use judicial doctrines, like clear statement rules, to encourage legislatures to articulate reasons for their decisions in the legislative language.<sup>45</sup>

Direct democracy can also be structured in a variety of ways to facilitate public discussion. Indeed, the term "direct democracy" encompasses a variety of different processes, some which contemplate a role for the legislature either before the public vote or as a response to the outcome. Additional safeguards can be adopted, such as requiring public hearings throughout the state before a vote on a ballot question or mandating two votes of the citizens in order to pass any proposition. The filter of representative democracy can be required for all initiatives by allowing time for legislative action and deliberation before the popular election. Disclosure rules can reveal the amount and source of special interest spending in a particular election. Then, either the press or opposing groups can use this information to highlight the question of interest group domination for a relatively uninformed populace. If we believe that truly grassroots movements require more time to garner support, very short time limits for signature gathering can be lengthened. Again, empirical work is needed to measure the effect of particular reforms on interest group activity. Such studies of direct democracy, which promise to provide the empirical foundation for thoughtful and effective reform, are certainly possible now, given the differences in procedures among states (and within states with regard to different types of ballot propositions).

## II

The structure of lawmaking--whether by the people directly or through their elected representatives--is shaped in large part by the courts that interpret the laws that are produced. Yet legal scholars have not focused much attention on the issues of interpretation that arise when a case concerns direct legislation. This gap in the literature is more surprising than the absence of study of the legislative process itself, because the latter is part of a general court-centric perspective of legal scholars who emphasize the role of the courts and largely ignore other legal institutions. The silence concerning the courts' role in direct democracy stems instead from the federal-centric perspective of our scholarship; direct democracy is exclusively a state and local concern unless it presents federal constitutional issues.<sup>46</sup> In this essay, I hope to raise some of the questions that we must

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<sup>45</sup> See, for example, *Gregory v Ashcroft*, 501 US 452, 467 (1991) ("We will not read the ADEA to cover state judges unless Congress has made it clear that judges are included . . . . It must be plain to anyone reading the Act that it covers judges."). See also Sunstein, 110 Harv L Rev at 27 (cited in note 9).

<sup>46</sup> As a result, there is a relatively substantial body of work on the constitutional issues raised by direct democracy. See, for example, Julian N. Eule, *Judicial Review*

address in this area and to suggest the kind of analysis that may be most fruitful.

Jane Schacter's study of state court decisions interpreting statutory initiatives demonstrates that most courts use "popular intent" as the best guide to meaning when they are faced with vague or ambiguous language in direct legislation. Of the fifty-three decisions from eleven jurisdictions that she analyzes, forty-five of them purport to apply some variant of intentionalism and claim to identify "collective intent," "the voters' intent," or "the people's intent."<sup>47</sup> Invocation of intent is problematic in the context of more traditionally-enacted statutes;<sup>48</sup> reliance on it to understand unclear language passed through direct democracy is entirely misguided. Techniques that might be used to interpret statutes passed by the legislature, such as identifying the intent of the median voter in certain circumstances or relying on statements of legislators who have incentives to send credible signals,<sup>49</sup> are simply unavailable for the interpretation of direct legislation. There is no principled way to impute a clear, consistent, or illuminating intent to the electorate.<sup>50</sup>

If intent is an unreliable guide, what method of interpretation should a court use? One alternative that is increasingly popular with judges is textualism, a method which emphasizes the "plain meaning" of the statutory language but also admits arguments based on textual coherence and certain

*of Direct Democracy*, 99 YALE L J 1503 (1990); Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH L REV 1 (1978); Hans A. Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR L REV 19 (1993).

<sup>47</sup> Schacter, 105 Yale L J at 117-18 (cited in note 8).

<sup>48</sup> The literature casting doubt on the concept of a discernible legislative intent is large and well-known. For one of the best and earliest discussions, see Max Radin, *Statutory Interpretation*, 43 HARV L REV 863 (1930). For recent analyses, influenced by the insights of public choice, see Farber and Frickey, *Law and Public Choice* at 47-55, 95-102 (cited in note 29); William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VAL REV 275, 297 (1988) (noting that "what seems most striking about the dialogue among public choice-inspired legal theorists writing about statutory interpretation is their piecemeal abandonment of the archeological approach").

<sup>49</sup> See McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP PROBS 3 (1994).

<sup>50</sup> See WILLIAM H. RIKER, *LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE* 233-41 (W.H. Freeman 1982); Schacter, 105 Yale L J at 124-26 (cited in note 8) (canvassing the "familiar issues that compromise the coherence of popular intent"). See also *US Term Limits, Inc v Thornton*, 115 S Ct 1842, 1911 (1995) (Thomas dissenting) ("Inquiries into legislative intent are even more difficult than usual when the legislative body whose unified intent must be determined consists of 825,162 Arkansas voters.").

canons of statutory construction.<sup>51</sup> Some of the justifications for a textual approach appear to be less compelling in the case of direct democracy, however. First, if the argument for textualism is tied to intent, that is, if the interpreter is using the text of direct legislation as the best indication of the voters' intent, the empirical data undermine this reasoning. The vast majority of voters do not read the text of a ballot question or any official explanation of it.<sup>52</sup> Ironically, the state judges who use intentionalist methods to interpret direct legislation privilege the text and official documents when they search for the voters' intent and ignore the sources of information like the press and paid advertising that are much more likely to have shaped public understanding.<sup>53</sup>

For many of its proponents, however, textualism is not primarily a way to understand intent; instead, they justify their use of this technique with rule of law arguments. For example, Justice Scalia explains that textualism can encourage lawmakers to act more responsibly: "I think we have an obligation to conduct our exegesis in a fashion which fosters the democratic process."<sup>54</sup> If lawmakers know that courts will rely only on the text and certain canons of construction that are laid out clearly and applied consistently, textualists argue, they will act accordingly. Legislatures will draft laws more precisely and will attempt to reflect the results of their deliberations in the statutory text, rather than in less accessible, and arguably more easily manipulated, sources like legislative history.<sup>55</sup> Moreover,

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<sup>51</sup> See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 23-29 (Princeton 1997). For discussions of textualism in the Supreme Court and the Circuit Courts of Appeal, see generally William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L REV 621 (1990); Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L REV 1597 (1991). For a similar approach in which plain textual meaning is a presumptive, rather than an absolute, interpretive norm, see Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 S CT REV 231 (1990); Frederick Schauer, *The Practice and Problems of Plain Meaning: A Response to Aleinikoff and Shaw*, 45 VAND L REV 715, 728-37 (1992).

<sup>52</sup> Magleby, *Direct Legislation* at 136-39 (cited in note 12).

<sup>53</sup> Schacter, 108 Yale L J at 130 (cited in note 8) (terming this phenomenon "the paradox of the inverted informational hierarchy").

<sup>54</sup> *United States v Taylor*, 487 US 326, 346 (1988) (Scalia concurring in the judgment). See Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV L REV 593, 639-40 (1995) (labeling such judges as "disciplinarians"); Zeppos, 12 Cardozo L Rev at 1637-38 (cited in note 51) (describing the reform agenda of Scalia's textualism). See also generally Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U CHI L REV 1175 (1989) (providing rule of law arguments supporting a textualist approach).

<sup>55</sup> See Cass R. Sunstein, *Democratic Formalism*, Yale L J (forthcoming review of Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton 1997)) (discussing this aspect of Justice Scalia's textualist approach and casting doubt on its ability to achieve these goals given institutional limitations).

textualism provides lawmakers with a strong incentive to monitor legislative language to ensure that it fairly reflects what they hope to accomplish and to detect any narrow, interest-group deals that would work to the detriment of their constituents.

This rule of law argument applies differently in the realm of popular lawmaking because the incentives imposed by textualism play out differently. If textualists hope to influence the behavior of citizen-legislators, they are unlikely to succeed. It is improbable that the voters will be aware of the judicial approach or will take the time to read the text. Even if voters attempt to respond to the prevailing interpretive method studies reveal that the language of ballot questions is too difficult and dense for most of the electorate to understand.<sup>56</sup> Moreover, voters do not have trustworthy agents on whom they can rely to read the language, assess its effect, and protect their interests. Unlike legislators, they do not have committees and staff to sift through the information provided by lobbyists and special interests, and they lack the expertise in many cases to make informed independent judgments. Instead, the average citizen gets her information from the media and from advertising paid for and written by interested parties. So, the incentives of textualism are unlikely to have much effect on citizen-legislators.

But perhaps textualists intend to direct their incentives toward the drafters of ballot questions, not the voters. Much direct legislation is shaped by professional organizations; thus, ballot proposals are drafted by repeat players who can learn the rules of statutory interpretation and behave accordingly.<sup>57</sup> Some states also provide groups seeking ballot access the services of state officials who have drafting experience<sup>58</sup> and who can be expected to respond to judicial incentives. Now the pertinent question becomes whether incentives placed on these more sophisticated players "foster the democratic process" or merely strengthen the hand of special interests who can hire the most expert legislative drafters.

The possibility that the textualist approach primarily will allow special interests more influence seems likely enough to cause some worry. Given the voters' general ignorance of the text and the legal landscape into which the direct legislation is enacted, experienced drafters can precisely set forth the text of legislation in a way that ensures textualist judges will interpret the law so as to benefit the group supporting it. Professor Schacter

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<sup>56</sup> Magleby, *Direct Legislation* at 138-39 and Table 7.4 (cited in note 12). See also *Comment, Interpretation of Initiatives by Reference to Similar Statutes: Canons of Construction Do Not Adequately Measure Voter Intent*, 34 SANTA CLARA L REV 945, 954 (1994) (contrasting legislator/legislative behavior with voter attention to official sources of information about a proposed initiative).

<sup>57</sup> See Briffault, 63 *Tex L Rev* at 1351 (cited in note 19) (describing the "initiative industry" which is characterized by "petition management" firms); Frickey, 1996 *Ann Surv Am L* (cited in note 8) (same); *supra* text at notes 15 through 17.

<sup>58</sup> Cronin, *Direct Democracy* at 208 (cited in note 1).

articulates this concern: "The unfamiliarity of legal terminology to many voters creates powerful leverage for the initiative's drafters, for it enables them to have an unseemly private dialogue of sorts with the courts, who also understand these terms."<sup>59</sup>

This concern is not merely academic. Cases in which courts have interpreted ballot initiatives reveal the possibility that textualist approaches could further empower sophisticated drafters. For example, a Maryland referendum drafted by county officials sought to limit the waiver of governmental immunity.<sup>60</sup> Fearing that courts would strike down the limitation, sever the limiting language from the rest of the amendment, and find that the referendum was a complete waiver of governmental immunity, the drafters included an inseverability clause. Indeed, because a state court had already struck down a similar immunity limitation,<sup>61</sup> the only real change wrought by the popular vote was the adoption of the inseverability clause. If the court had enforced the clause, then it would have found no waiver of governmental immunity, and the plaintiffs' tort suit against the county would have been dismissed. The court declined to enforce the plain language of the amendment<sup>62</sup> because it believed that the electorate could not have been aware of the presence or the effect of the inseverability clause. The court properly declined to participate in an unseemly textualist dialogue with the wily county officials.<sup>63</sup>

In initiative contests dominated by only one strong interest group, there may be no competing interest to sound the alarm to reveal overreaching or undesirable rent-seeking in the language of a ballot question. Even when an opposing group is active, its weapons are limited. Opponents can try to defeat the initiative, or they can qualify a contradictory question and hope that it is simultaneously enacted, thereby ensuring interpretive confusion that they may be able to use to their advantage.<sup>64</sup> They cannot seek

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<sup>59</sup> Schacter, 105 Yale L J at 128 (cited in note 8). See also Daniel M. Warner, *Direct Democracy: The Right of the People to Make Fools of Themselves? The Use and Abuse of Initiative and Referendum, A Local Government Perspective*, 19 SEATTLE U L REV 47, 78 (1995) ("But proponents of initiatives have no particular incentive to curb their legislation's extremism, especially considering that voters are not likely to read the proposal, either when they sign it or when it is on the ballot.")

<sup>60</sup> See *Surratt v Prince George's Cty*, 320 Md 439, 578 A2d 745 (Md App 1990).

<sup>61</sup> See *Prince George's Cty v Fitzhugh*, 308 Md 384, 519 A2d 1285 (Md App 1987).

<sup>62</sup> Courts have sometimes declined to enforce clear inseverability clauses enacted by legislatures, although for other reasons. See Israel E. Friedman, Comment, *Inseverability Clauses in Statutes*, 64 U CHI L REV 903, 905-06 (1997) (critiquing current judicial attitude and suggesting an alternate approach).

<sup>63</sup> But see *DaFonte v Up-Right, Inc.*, 2 Cal 4th 593, 596, 828 P2d 140 (1992) (adopting plain meaning approach to determine interpretation of complicated tort reform statute affecting joint and several liability, non-economic damages, and relationship with workers' compensation statute).

<sup>64</sup> For a discussion of the latter technique and the interpretive challenges such a strategy presents, see Eule, 99 Yale L J at 1517-18 (cited in note 46).



compromise to accommodate their concerns, however, because the text of a proposal cannot be changed once it has been placed on the ballot.

Thus, in an important way, the legislative process differs from direct lawmaking. Direct legislation, which is not filtered through a committee system and which may not provoke close scrutiny by informed persons, can be drafted by sophisticated players so that the self-serving text is pellucid. Textualist judges, who remain true to their method, help to guarantee that those who succeed in passing such clearly-worded initiatives will be richly rewarded. The traditional legislative process includes safeguards that often force interest groups to hide their deals, accept compromise language, and risk judicial interpretations contrary to their objectives.<sup>65</sup>

If we believe the notion of the "people's intent" to be meaningless, and we judge the fit between the objectives of textualism and the reality of direct lawmaking to be awkward, what interpretive method is left? Traditionally, the third method of interpretation is purposive; its proponents often draw on the insights of the legal process method of Professors Hart and Sacks.<sup>66</sup> The type of purposive approach I have in mind does not seek to identify the voters' actual purpose. If the purpose that guides interpretation must be that which animated the enactors, Professor Schacter is entirely correct to observe that "the purpose inquiry is wholly circular when the very question at issue is what purpose the voters had in passing a law. Shifting the inquiry to purpose does not solve so much as restate the basic problem by shifting the indeterminacy to a higher level of abstraction."<sup>67</sup>

Purposivism need not be tied to actual intent. Indeed, the Hart and Sacks approach to interpreting statutes is not so constrained. Instead, through a process of reasoned elaboration, interpreters resolve uncertainties about meaning in order to achieve purposes that they believe reasonable legislators acting reasonably would have been pursuing. A purposive interpretation is also an attempt to integrate the law coherently and harmoniously into the legal system as a whole.<sup>68</sup> Similarly, Jane Schacter and Philip Frickey, two

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<sup>65</sup> See Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM L REV 223, 251 (1986) (explaining why hidden-implicit deals are more commonplace in traditional legislation than openexplicit deals). See also Magleby, 66 U Colo L Rev at 40 (cited in note 2) (noting lack of non-judicial filters in the direct democracy context).

<sup>66</sup> See WILLIAM N. ESKRIDGE, JR. AND PHILIP P. FRICKEY, EDS, *HART AND SACKS'S THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (Foundation 1994). The authors spend little time on direct legislation. See *id* at 649-70.

<sup>67</sup> Schacter, 105 Yale L J at 146 (cited in note 8).

<sup>68</sup> Hart and Sacks, *The Legal Process* at 1374-78 (cited in note 66). See also WILLIAM N. ESKRIDGE, JR. AND PHILIP P. FRICKEY, *AN HISTORICAL AND CRITICAL INTRODUCTION TO THE LEGAL PROCESS* in *id* at LI, XCII (describing the purposive approach of Hart and Sacks); Frickey, 1996 Ann Surv Am L (cited in note 8) (noting that a normative, rather than descriptive, understanding best explains the

legal scholars who have written about interpreting direct legislation, favor purposive approaches that are informed by normative visions of the legislative process.<sup>69</sup> They seek to implement interpretive regimes that will compensate for shortcomings in the direct democracy process. Although their proposals are not direct applications of the legal process method--indeed, Professor Frickey argues that Hart and Sacks "embodied the ideal of republican legislative deliberation into their theory, which makes it hard to translate to ballot measures"<sup>70</sup>--their views of interpretation as a value-laden enterprise designed to improve the lawmaking process and rationalize its output seem to grow out of a legal process framework.

Guided by her metademocratic conception of statutory interpretation, Professor Schacter proposes that courts use two specific approaches when interpreting direct legislation.<sup>71</sup> First, she proposes opening up the litigation process beyond the adversaries in a particular case to encourage the participation of a wide range of interests.<sup>72</sup> In this way, informed public deliberation, which so frequently does not occur before a vote on a ballot proposition, will occur in the courtroom. Schacter's strategy, which may require courts to make judgments for which they are not well-suited or to oversee processes that are beyond their competence, should not be the first reaction to the problems that beset direct democracy. Rather, we should work to implement structures to shape the process of direct lawmaking, and perhaps consider judicial approaches that fit more comfortably within the institutional expertise of the courts, before we ask judges to embark on such a complex and unfamiliar task. If reforms are not adopted to encourage public discussion during the campaigns on ballot questions or if safeguards are not developed to allow clarification of and compromise regarding the text before it is enacted, perhaps courts will have to play the more activist role Professor Schacter envisions. Certainly, courts have done so in other instances (such as school desegregation, prison reform, and voting rights cases), although with varying degrees of success. Given the preliminary nature of her proposal, it seems likely that further refinement of Professor

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legal-process theory of Hart and Sacks); Peter Strauss, Comment, *Legal Process and Judges in the Real World*, 12 CARDOZO L REV 1653, 1659-60 (1991) ("Hart and Sacks were not naive enough to think they were describing an actual legislature; they were prescribing an attitude toward legislation that would be appropriate for a judge, despite the contrary reality such sophisticated observers knew even a half-hearted observer would quickly discover.").

<sup>69</sup> See generally, Schacter, 105 Yale L J at 107 (cited in note 8); Frickey, 1996 Ann Surv Am L (cited in note 8).

<sup>70</sup> Id.

<sup>71</sup> See Schacter, 108 Harv L Rev at 593 (cited in note 54); Schacter, 105 Yale L J at 161-62 (cited in note 8).

<sup>72</sup> Id at 155-56.

Schacter's ideas will indicate more concretely how judges will administer a proceeding that diverges radically from a traditional lawsuit.<sup>73</sup>

Second, Professor Schacter favors narrow interpretations of direct legislation when courts have reason to believe that the popular election was tainted by the campaign war chests and armies of volunteers controlled by organized and wealthy special interests.<sup>74</sup> Regardless of whether these judicial techniques would solve the problem of disproportionate interest group influence on ballot propositions,<sup>75</sup> her objective of structuring interpretation in order to improve the quality of public deliberation on direct legislation is precisely the sort of purposive goal that is needed in this area.

Professor Frickey's treatment is somewhat different because he seeks to integrate theories of constitutional and statutory interpretation. He argues that both should "attempt to achieve two goals, which are 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 the people as lawmakers."<sup>76</sup> Because courts have held attacks on direct lawmaking under the constitutional provision that guarantees a republican form of government to be nonjusticiable,<sup>77</sup> he urges courts to use substantive canons of construction to protect this under-enforced constitutional norm. Courts have relied on quasi-constitutional canons to enforce structural constitutional values such as federalism and separation of powers when they believe that more absolute protection would require them to venture into areas that lack judicially discoverable and manageable standards.<sup>78</sup> Professor Frickey also favors a sophisticated use of such canons in this context to allow courts to mediate the tension between the public values of republican government and the value of according due respect to the will of the people.<sup>79</sup>

While I find the interpretive approaches of both Schacter and Frickey attractive, let me suggest a related judicial approach that could help to situate direct lawmaking in the republican landscape so that both the will of the people and the need for thoughtful deliberation are respected. In some states, supporters of a ballot question can choose the form of their proposal;

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<sup>73</sup> I particularly appreciate Jane Schacter's comments on this issue.

<sup>74</sup> *Id.* at 157.

<sup>75</sup> See Frickey, 1996 *Ann Surv Am L* (cited in note 8) (explaining why "as formulated, . . . neither proposal is likely to have much impact upon public law").

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

<sup>77</sup> See, for example, *Pacific States Tel and Tel Co v Oregon*, 223 US 118 (1912).

<sup>78</sup> See generally William N. Eskridge, Jr. and Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 *VAND L REV* 593 (1992); Garrett, 45 *U Kan L Rev* at 1179-81 (cited in note 44) (discussing clear statement rules in the context of federalism).

<sup>79</sup> See Frickey, 1996 *Ann Surv Am L* (cited in note 8) (discussing his approach in the context of applying the canon to interpret legislation so as to avoid constitutional infirmity).

they can seek change through adoption of a constitutional amendment or a statutory initiative. Propositions adopted as constitutional amendments can be changed only by a subsequent vote of the people, but statutory enactments can be amended either by another popular vote or by the legislature.<sup>80</sup> Moreover, constitutional amendments are immune from state constitutional challenges. Interestingly, although constitutional amendments are therefore significantly more durable (and thus more valuable to supporters), there is little difference in the passage rates for the two types of initiatives.<sup>81</sup> Not surprisingly, then, activists prefer to work to enact constitutional amendments, thereby entrenching their proposals and insulating them from further change.

Because public deliberation on much direct legislation is not robust and informed, we may be disturbed that there will be little opportunity to change these laws even if modification seems warranted after further reflection or due to changed circumstances. Courts should respond to this concern by policing the boundary between constitutional amendments, which should only structure or limit state or local governmental powers, and legislation. One judicial strategy would be to adopt a heavy presumption that proposals that are hard to classify should be considered as legislative initiatives and therefore susceptible to subsequent modification by the legislature.<sup>82</sup> Such a presumption might be justified by the federal constitutional norm embodied in the clause that guarantees every state a republican form of government.<sup>83</sup> The approach could result in courts' recharacterizing ballot questions as statutory initiatives or, if recharacterization is not possible, in their adopting more generous methods of interpretation for such ballot propositions, thereby encouraging interest groups to consider this route, notwithstanding its lower durability.

This proposed canon is not unproblematic. First, determining whether a proposal is structural or legislative is not an easy task,<sup>84</sup> particularly because many state constitutions are quite detailed and contain provisions

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<sup>80</sup> Magleby, 66 U Colo L Rev at 13 (cited in note 2).

<sup>81</sup> DAVID B. MAGLEBY, DIRECT LEGISLATION IN THE AMERICAN STATES, IN DAVID BUTLER AND AUSTIN RANNEY, EDS, REFERENDUMS AROUND THE WORLD 218, 229 (Am Enterprise Institute 1994).

<sup>82</sup> This proposal is suggested by two articles on direct democracy. Most directly, Justice Linde makes a similar argument. See Hans A. Linde, *Who is Responsible for Republican Government?*, 65 U COLO L REV 709, 716-18 (1994). Professor Eule also distinguishes between types of plebiscites in his work on constitutional interpretation. See Eule, 99 Yale L J at 1573-78 (cited in note 46).

<sup>83</sup> US Const, Art IV, <sect> 4. I appreciate Phil Frickey's comments on this point.

<sup>84</sup> See Jesse H. Choper, *Observations on the Guarantee Clause--As Thoughtfully Addressed by Justice Linde and Professor Eule*, 65 U COLO L REV 741, 746 (1994). See also Gillette, 86 Mich L Rev at 983 (cited in note 29) (noting difficulty of determining whether a proposal is legislative, and therefore suitable for use of the initiative or referendum power, or whether it is administrative).

that seem more properly within the province of the legislature.<sup>85</sup> At the borders, courts should err on the side of characterizing proposals as legislative. Second, as Professor Eule concludes from anecdotal evidence and intuition, state judges are unlikely to be willing to apply this kind of approach aggressively.<sup>86</sup> The attitudes of these judges, who tend to be elected, are important because they are the primary interpreters of direct legislation. Third, the approach I suggest is not available in states which allow for popular votes on constitutional amendments but which do not provide for statutory initiatives or referenda.

Finally, one might argue that recharacterizing constitutional amendments as legislation does not sufficiently respect the voters' choice of form. Yet, I suspect that voters have not given much thought to the difference between constitutional amendments and statutory initiatives and that the preference for one form over another is really that of the drafters. I may have reached this conclusion too easily, however. It is possible that voters do not want their direct legislation to be susceptible to revision by the legislature and prefer extremely durable popular enactments. My proposal would then have to be justified on the ground that concerns about the flaws in public deliberation outweigh concerns about disrespecting the desires of the voters.

### III

As I noted at the outset, my purpose in this essay is to identify concerns about the entities who control the direction of direct democracy and to suggest some approaches to consider in addressing these concerns. It is clear, however, that when courts choose among methods of interpretation, they must be aware of the realities of direct lawmaking. Moreover, the norms that inform their choice should include a concern for deliberation and the due process of lawmaking,<sup>87</sup> but those principles play out differently when the laws are the product of popular vote, rather than of legislators.

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<sup>85</sup> See, for example, OK Const, Art XIII, <sect> 7 (states that the legislature shall provide for teaching of agriculture, horticulture, stock feeding, and domestic science); CA Const, Art XB, <sect> 6 (establishes fees for fishing permits during years 1991-1993); AZ Const, Art XXVI, <sect> 1 (lists the powers of real estate brokers who have licenses).

<sup>86</sup> Julian N. Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U COLO L REV 733, 736 (1994). See also Frickey, 1996 Ann Surv Am L (cited in note 8) (providing further evidence); id ("It makes it especially difficult to apply quasi-constitutional statutory interpretive techniques, for the only judges who may 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.").

<sup>87</sup> The concept of due process of lawmaking has most frequently been discussed in the context of judicial strategies to improve congressional deliberation and decisionmaking. See generally Linde, 55 Neb L Rev at 197 (cited in note 9);

Increased scholarly interest in direct democracy<sup>88</sup> provides an opportunity to deepen our understanding of the dynamics of the entire legislative framework. The legislative process includes state and local actors, political and judicial entities, interest groups and average citizens, monied interests and ideologically-motivated activists. A full and accurate description of these realities can help us construct procedures for representative government and direct democracy that enhance the opportunity for public deliberation and rational discourse, thereby improving both kinds of lawmaking. Courts can then choose among methods of interpretation with a recognition of the ways that other players will react to their decisions. As a result, courts will be more likely to reconcile the various important, but sometimes competing, constitutional norms

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Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV L REV 1212 (1978). See also Garrett, 45 U Kan L Rev at 1182-83 (cited in note 44) (applying concept to development of procedures to encourage congressional deliberation).

<sup>88</sup> See Symposium, *Ballot Initiatives and the Law: The Legitimacy of Direct Democracy*, 1996 ANN SURV AM L (forthcoming); Special Collection, *Perspectives on Direct Democracy*, 4 U CHI L SCH ROUNDTABLE (1997). A forthcoming casebook, which systematically explores the law of democratic politics, devotes an entire chapter to issues concerning direct democracy. See SAMUEL ISSACHAROFF, PAMELA S. KARLAN, AND RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL REGULATION OF THE POLITICAL PROCESS* (1998).