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Law & Politics: The Case Against Judicial Review of Direct Democracy

Corey A. Johanningmeier
Indiana University School of Law

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COREY A. JOHANNINGMEIER*

This Note argues against strong judicial review of direct democracy. Judicial review has been the dominant answer in legal scholarship for the perceived danger of majoritarian tyranny in any democratic system. But Progressive movements throughout American history, as well as a growing number of respected law professors, have questioned the assumption that courts or even legislatures are better protectors of discrete and insular minorities than the rights-respecting populace. Although the vast majority of legal scholarship still displays a crippling cynicism about popular competence, this view cannot continue to block progressives from participating in initiative campaigns. Exclusive resort to elitist procedural mechanisms begs the question of populism and drives a wedge between law and the people it seeks to protect. The only way forward for progressive agendas is to engage directly with direct democracy, fighting inevitable bad results at their source, rather than merely trying to circumvent the results with appeals to undemocratic courts.

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* Articles Editor, Indiana Law Journal, Vol. 82; J.D. Candidate, Indiana University School of Law–Bloomington, 2007; B.S. Electrical Engineering, University of Southern California, 1997. I would like to thank my fiancé Michelle McQueen for loving and supporting me through my entire law school experience, including the process of writing this Note.

> For enlightenment, anything which does not conform to the standard of calculability and utility must be viewed with suspicion. . . . No matter which myths are invoked against it, by being used as arguments they are made to acknowledge the very principle of corrosive rationality of which enlightenment stands accused. Enlightenment is totalitarian.[1]

INTRODUCTION

In a recent issue of *Yale Law Journal*, noted professor Jeremy Waldron presented an essay describing the case against judicial review of legislation.[2] Many lawyers and students steeped in the long American tradition of Supreme Court advocacy may be surprised that such an argument exists. Indeed, the entire pedagogical universe of law school often seems to have arisen under the "case or controversy" requirement of Article III. Judicial review has always been the accepted American answer to the perceived "majoritarian tyranny" of representative legislatures, at least since De Tocqueville identified the aristocratic lawyer class as the primary counterpoint to democratic majority despotism.[3] But unchallenged traditions are the enemy of progressive thought, and in recent years a number of legal scholars have revived and contributed to the growing body of populist literature challenging judicial review—and sometimes even the associated concept of a legal aristocracy.[4]

However, even legal scholars opposing judicial review often limit their argument to the distinction between unelected courts and more democratic representative legislatures.[5] Scholars' nomination of legislatures for the job of determining rights stops short of a populist revolution. Whether given to nine Justices or one hundred Senators, authority to apply state power on behalf of the many is vested in the few. The only question asked is how few and whether they are elected or appointed. This scholarship does not seriously challenge underlying Madisonian assumptions about representative democracy. Instead, writers assume representation to be a necessary feature of American society, and further excursions into direct democratization are labeled utopian.[6]

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1. MAX HORKHEIMER & THEODOR W. ADORNO, DIALECTIC OF ENLIGHTENMENT 3–4 (Gunzelin Schmid Noerr, ed., Edmund Jephcott, trans., Stanford University Press 2002) (1947).

2. Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L. J. 1346 (2006).

3. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 283 (Phillips Bradley ed., Vintage Books 1945) (1835) ("[W]e perceive that the authority they have entrusted to members of the legal profession, and the influence that these individuals exercise in the government, are the most powerful existing security against the excesses of democracy.").

4. *See e.g.*, LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

5. Waldron, *supra* note 2, at 1353 ("By privileging majority voting among a small number of *unelected* and unaccountable judges, it disenfranchises ordinary citizens and brushes aside cherished principles of *representation* and political equality . . . .") (emphasis added).

6. KRAMER, *supra* note 4, at 245 (opining that even "opponents [of judicial supremacy] are not dreaming of some pie-in-the-sky model of Athenian direct democracy" and that "[t]hey recognize the need for representation").

However, American tradition admits an alternative form of application for the distribution of state power—mass assemblage of the people. In the early twentieth century, Populist and Progressive movements proceduralized their discourse of substantive political engagement into many state constitutions, and today initiatives and referenda are becoming increasingly important sources of law.[7] Whether lawyers view direct democracy today as an anomalous regional practice[8] or a welcome resurgence of popular constitutionalism, popular lawmaking presents a deep and possibly revolutionary challenge to the standard system of legal thought and practice. As progressive dissatisfaction increases with the continuing rightward shift in judicial appointments and outcomes, many have begun to turn toward representative legislatures for legitimacy.[9] Only a small additional step is needed to reach the even greater popular legitimacy of direct democracy—but significant theoretical roadblocks prevent many lawyers from taking that step.

On one level, the task of legitimizing popularly derived legislation is complete. The practice is constitutionally established in twenty-six states,[10] the Supreme Court has consistently ruled that the existence of popular legislation is a nonjusticiable political question,[11] and a majority of the population has long supported some form of initiative or referendum.[12] However, America's legal aristocracy largely ignores or is suspicious of direct democracy, preferring instead the representational form which is more suitable to their professional interests.[13]

Progressives and a variety of legal scholars have traditionally urged caution with regard to initiatives and referenda—based on an idea that the people and the process of popular lawmaking uniquely facilitate majoritarian oppression of disfavored minority interests. This skepticism about the character of voters, warranted or not, has led legal scholars to advocate for strong judicial review of popular initiatives.[14] It has also led progressive lawyers to focus their popular campaigns defensively—and to depend on enlightened judges and representatives for positive reform.[15] Ironically, this has left the

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7. The 2006 election cycle saw 205 statewide ballot measures in thirty-seven states on subjects as diverse as the minimum wage, eminent domain, education, taxes, and denial of marriage rights to American citizens. *Election Results 2006*, BALLOTWATCH (Initiative & Referendum Inst., Los Angeles, Cal.), Feb. 5, 2007, at 1, http://www.iandrinstitute.org/BW 2006-5 (Election results-update).pdf.

8. Although direct democracy is sometimes thought of as a primarily western phenomenon, 70% of Americans live in a city or state that allows for ballot initiatives. JOHN G. MATSUSAKA, FOR THE MANY OR THE FEW: THE INITIATIVE, PUBLIC POLICY, AND AMERICAN DEMOCRACY, at ix (2004).

9. *See* Waldron, *supra* note 2, at 1350.

10. Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L. J. 1503, 1509 (1990).

11. *See* Reynolds v. Sims, 377 U.S. 533, 582 (1964) (finding "some questions raised under the Guaranty Clause nonjusticiable" when political in nature); Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912) (holding that a tax referendum is not justiciable).

12. MATSUSAKA, *supra* note 8, at 1 ("Opinion polls consistently reveal strong support for the initiative process at all levels of government—even the federal—from residents of both initiative and noninitiative states."); Eule, *supra* note 10, at 1507.

13. DE TOCQUEVILLE, *supra* note 3, at 285 ("The government of [representative] democracy is favorable to the political power of lawyers . . . .").

14. Eule, *supra* note 10, at 1558.

15. "The results underscore why we have a Bill of Rights—because it is always wrong to

initiative field open to widespread use by social conservatives, and their efforts—cynical or not—to engage voter sympathies have cyclically provided examples to support the case for progressive skepticism.

This Note argues that strong judicial review is as inappropriate for direct democracy as for the products of representational legislatures. This Note is concerned with the possibility of a progressive approach to popular lawmaking that addresses concerns with majoritarian tyrannies without merely substituting "enlightened" elitist tyrannies. A shift in lawyer attitudes and priorities is necessary before lawyers can participate constructively in truly public discussions about constitutional values.

Recently, prominent progressive scholars have expressed their dissatisfaction with the Left's sole reliance on "the professional opinion of judges."[16] What this means for direct democracy remains unexplored. This Note argues that progressive lawyers should directly engage with the diverse political processes of direct democracy—rather than undermine their effectiveness in the name of a particular brand of enlightened deliberative discourse before the law. Regardless of the results obtained, reliance on strong judicial review over direct democracy begs the question of populism and drives a wedge between law and the people it seeks to enlighten or protect.

The argument against judicial review of direct democracy depends on an understanding of how the legal system currently treats voter initiatives and referenda. Part I of this Note examines some background legal scholarship and judicial activity relative to popular lawmaking and provides some recent examples of direct democracy at work in the legal system. Part II critiques the negative conception of "the people" often employed in legal scholarship and practice—a paternalistic hostility which is the primary driver of the perceived need for judicial review. Part III provides an alternative approach for lawyers to the question of direct democracy based on the conscious choice of respect and empathy for the people—and engagement with public sphere debates. As others have noted, the way forward for progressives—including lawyers—is to rely on "a more engaged and informed citizenry rather than on a more enlightened technocratic elite."[17]

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put basic rights up to a popular vote. . . . [I]n the end, the U.S. Supreme Court will decide on marriage equality. . . ." Press Release, Common Dreams Newswire, Nat'l Gay and Lesbian Task Force, Anti-Gay Marriage Amendments Pass in 11 States (Nov. 4, 2004), *available at* http://www.commondreams.org/news2004/1103-09.htm [hereinafter Anti-Gay Marriage Amendments Pass in 11 States] (quoting Matt Foreman, executive director of the National Gay and Lesbian Task Force).

16. Robert Post & Reva Siegel, *Democratic Constitutionalism: A Reply to Professor Barron*, 1 HARV. L. & POL'Y REV. (Online) (Sept. 18, 2006), http://www.hlpronline.com/2006/08/post_siegel_01.html ("Serious substantive constitutional commitments require concomitant popular support. The left seems to have lost track of this point. A framework that invites progressives to choose between substance and democratic self-governance threatens to lock in the left's romance with the Warren Court, which celebrates courts in *opposition* to popular opinion. The focus on courts, to the derogation of politics, has distracted the left from the task of developing a political vision capable of generating broad popular support.") (emphasis in original); *see also* John Edwards, *Constitutional Values Beyond the Courts*, 1 HARV. L. & POL'Y REV. (Online) (Sept. 18, 2006), http://www.hlpronline.com/2006/07/edwards_01.html ("There is an urgent need to formulate new ideas for the future and bring them to our courts, legislatures *and communities*.") (emphasis added).

17. ROBERTO MANGABEIRA UNGER & CORNEL WEST, THE FUTURE OF AMERICAN PROGRESSIVISM 58 (1998).

A good deal of law review writing on the subject is dedicated either to the various ways that direct democracy could be reformed or to the judicial review standards that might possibly be applied to popularly enacted legislation.[18] This Note instead addresses the parallel inquiries into popular competence and the role of lawyers that inform all such questions with regard to direct democracy: Are the people really just selfish bigots that need guidance from enlightened judges? Can a legal scholarship that is structurally beholden to a hierarchical representative advocacy model give adequate deference to populist mechanisms? Do enlightened progressive ideals inevitably partner with disabling skepticism about mass human motivations and a preference for legislative or judicial fiat? This Note answers all of these questions in the negative.

I. CURRENT LEGAL APPROACHES TO POPULAR INITIATIVES

Direct democracy operates as an exception in American legal discourse. It represents an alternative answer to a question that all good citizens know was answered on day one by Madison, Hamilton, and the rest.[19] The Founders chose representation, full stop. However, the Founders also employed a rhetoric of power residing ultimately in the people. That ideal was seized upon by the Populist movement when representative corruption began to rule the day over a century ago. The harsh realities of late nineteenth century capitalism taught many that: "Corruption dominates the ballot-box, the legislatures, the Congress, and touches even the ermine of the bench. The people are demoralized."[20]

Populists implemented direct democracy in order to cure a particular mischief of faction—namely, oppressive domination by that same "enlightened" minority of representatives that Madison supposed would cure the evils of "passions," "factious tempers," "local prejudices," and "sinister designs."[21] As a result of this tension, legal scholarship on the proper function or scope of direct democracy cannot avoid some degree of taking sides on basic questions of governance. This Note proceeds down the road less taken and looks at law's response to direct democracy from a populist stance.

This Part provides a background summary of the common approaches taken by legal scholars with regard to direct democracy. Writing about direct democracy is inescapably concerned with particular outcomes of initiative voting. Those authors who

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18. An argument against judicial review of direct democracy raises many interesting questions concerning federal supremacy and minimal "rationality" review—questions that would require lengthy answers. If pressed, the author would generally endorse Ralph Nader's proposals for a national ballot initiative in response to supremacy issues, and would incorporate the concept of "weak-form judicial review" discussed by Mark Tushnet and others as a way to cover the potential for absurd ballot initiative results. Simply stating that judicial oversight of direct democracy should be decreased serves the normative argument presented here.

19. THE FEDERALIST NO. 10, at 59 (James Madison) (Easton Press, 1979) ("A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking.").

20. IGNATIUS DONNELLY, THE OMAHA PLATFORM OF THE PEOPLE'S PARTY OF AMERICA (July 4, 1892) [hereinafter THE OMAHA PLATFORM OF THE PEOPLE'S PARTY OF AMERICA], *reprinted in* HOWARD ZINN & ANTHONY ARNOVE, VOICES OF A PEOPLE'S HISTORY OF THE UNITED STATES 229 (2004).

21. THE FEDERALIST NO. 10 (James Madison).

acknowledge the empirical indeterminacy of studying political systems focus on process instead of merely counting results. But effective procedural checks and balances depend on background assumptions about how well various institutions will perform their checking function. These assumptions also face empirical proof problems. Ultimately, then, legal scholars can only rely on their preconceptions of the relative competence of "the people" to justify subjecting popular will to strong judicial oversight.[22]

A. Questions Presented

Legal writing on direct democracy can be grossly subdivided into several categories. First are those articles that accept the reality or legitimacy of popular lawmaking and focus on critiquing specific results or systematic dysfunctions of the initiative process.[23] Second are those articles addressing direct democracy on a theoretical level and critiquing its scope relative to legislative and judicial sources of law.[24] These are not rigid divisions. Articles of the first type frequently propose reforms that include legislative or judicial checks on direct democracy—but their approach is best characterized as empirical or pragmatic.[25] Articles of the second type frequently cite examples of practical results—good or bad depending on the position being advocated—but are fundamentally concerned with legitimacy via process.[26]

Three broad questions dominate direct democracy scholarship. The first, deriving from the tension between Madisonian and Populist conceptions of governance, seeks to compare representative legislatures and popular democratic mechanisms to see which is worse.[27] A second question derives from the proceduralist preference for checks and balances and concerns what level of judicial review or legislative oversight should be applied to ballot initiative results. For progressives, the answer to a third question informs both of these inquiries: how will unpopular minorities fare under a system of popular majority rule?[28] The sections below will address each of these questions in turn.

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22. KRAMER, *supra* note 4, at 246–48 (describing the question of judicial supremacy as turning on "differing sensitivities about popular government and the political trustworthiness of ordinary people").

23. *See, e.g.*, Thad Kousser & Mathew D. McCubbins, *Social Choice, Crypto-Initiatives, and Policymaking by Direct Democracy*, 78 S. CAL. L. REV. 949 (2005); Cody Hoesly, Comment, *Reforming Direct Democracy: Lessons from Oregon*, 93 CAL. L. REV. 1191 (2005).

24. The most cited example of this type is late Professor Julian Eule's article calling for increased judicial review of the legislative products of direct democracy. Eule, *supra* note 10.

25. *See, e.g.*, Kousser & McCubbins, *supra* note 23, at 984 ("Since initiatives . . . seem here to stay, we offer three proposals that we believe would improve the outcomes of the initiative process.").

26. *See* Kimberle' Crenshaw & Gary Peller, *The Contradictions of Mainstream Constitutional Theory*, 45 UCLA L. REV. 1683, 1714 (1998) (locating Eule's work within the "analytically indeterminate" proceduralist tradition of jurisprudence which appeared in response to legal realist indictments of law as mere politics).

27. *See, e.g.*, Eric Lane, *Men Are Not Angels: The Realpolitik of Direct Democracy and What We Can Do About It*, 34 WILLAMETTE L. REV. 579 (1998).

28. For the classic answer that discrete and insular minorities will fare "poorly" under direct democracy, see Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*,

1. My Democracy is Better than Your Democracy

It is not difficult to locate ideological precommitment in comparative studies of democratic systems. Authors frequently state their "commitment to representative government"[29] or include representativeness in their list of virtues that direct democracy lacks relative to representative democracy.[30] This is neither surprising, given the entrenchment of Madisonian ideals in American jurisprudence, nor avoidable. A complete empirical justification of popular or representative or judicial supremacy is just not possible; there are simply too many initiative campaigns in too many states and even more traditional legislation and judicial product to compare against.[31] In the absence of conclusive empirical studies, scholars can support almost any position with respect to direct democracy simply by citing those results which tend to support it, while their critics can always find countervailing bad results. One can see the indeterminacy of this kind of outcome-oriented scholarship by picking a single issue of current constitutional debate and cataloguing outcomes.

For instance, many progressives were saddened during 2004 by the thirteen ballot measures passed to amend state constitutions to block same-sex marriage rights.[32] However, in seven of those states the supposedly "enlightened statesmen" in state *legislatures*—not a special interest group of concerned citizens—certified the measure for the ballot.[33] The measures passed in those states by margins greater than two-thirds.[34] We can infer that the legislatures knew from polls what result to expect, and perhaps were using the referendum process merely to seek the extra legitimacy of a state constitutional amendment. The six states where citizen groups placed measures on

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54 WASH. L. REV. 1 (1978).

29. Lane, *supra* note 27, at 581; *see also* Marci A. Hamilton, *The People: The Least Accountable Branch*, 4 U. CHI. L. SCH. ROUNDTABLE 1, 3 (1997) ("As a frank apologist for representative democracy, I offer the following criticisms of direct democracy.").

30. *See* Lane, *supra* note 27, at 592.

31. The most comprehensive empirical study to date has been Professor Matsusaka's book. MATSUSAKA, *supra* note 8. Matsusaka studies fiscal effects of initiatives and concentrates on disproving the widely held belief that ballot initiatives are vulnerable to special interest capture. But he provides no conclusive empirical answers to the question of majoritarian tyranny. *See id.* at 113–27.

32. *See* Kavan Peterson, *50-State Rundown on Gay Marriage Laws*, STATELINE.ORG, Nov. 3, 2004, http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=15576.

33. *See id.* Additionally, five state *legislatures* voted to strengthen existing anti-same-sex marriage laws (New Hampshire, Ohio, Oklahoma, Utah, and Virginia), and another three *legislatures* started the process of certifying same-sex marriage bans for their state ballots (Massachusetts, Tennessee, and Wisconsin). *Id.*

34. Utah 66%, Missouri 71%, Kentucky 75%, Oklahoma 76%, Georgia 77%, Louisiana 78%, and Mississippi 86%. *2004 Election Summary*, BALLOTWATCH (Initiative & Referendum Inst., Los Angeles, Cal.), Dec. 29, 2004, *at* 3–6, http://www.iandrinstitute.org/BW 2004-10 (Election Summary).pdf; *Election 2004 Preview*, BALLOTWATCH (Initiative & Referendum Inst., Los Angeles, Cal.), Sept. 2004, at 1, http://www.iandrinstitute.org/BW 2004-1 (Preview).pdf (reporting results for Missouri and Louisiana, which voted on the same-sex marriage issue prior to November elections).

the ballot saw slightly narrower margins of victory.[35] Even if one assumes that the legislatures in Oregon and Michigan would have served an anti-majoritarian function if not bypassed by the Oregon Citizen's Alliance and the Citizens for the Protection of Marriage, it seems clear that in many other states Madison's deliberative representatives merely represented and facilitated the discriminatory biases of the majority.

Courts have also inconsistently protected same-sex marriage rights. Many residents, including myself, cheered when the Supreme Judicial Council of Massachusetts pronounced that the legal benefits of marriage must be extended without regard to sexual orientation,[36] and then advised the legislature that mere civil unions would not be enough.[37] There were even indications that after the decision, the number of people within the state that supported same-sex marriage rose.[38] But the decision has also caused a backlash of "Defense of Marriage" ballot initiatives.

Though the Massachusetts court found a state constitutional right to same-sex marriage,[39] similar challenges brought in other states have not fared well. The highest state courts in Washington and New York have upheld the constitutionality of legislative same-sex marriage bans.[40] Nevada's initiative ban on same-sex marriage was upheld by the United States Court of Appeals for the Eighth Circuit.[41]

The prior passing of a conservative backed ballot initiative also influenced the California Court of Appeals to approve same-sex marriage bans under rational basis review.[42] The California case is interesting because that state's legislature had previously become the only such body to pass a bill approving same-sex marriage.[43] That bill was then vetoed by Governor Schwarzenegger, citing contradiction with Proposition 22 and stating that the California Supreme Court would ultimately decide the issue.[44]

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35. Oregon 57%, Michigan 59%, Ohio 62%, Montana 67%, North Dakota 73%, and Arkansas 75%. *See 2004 Election Summary*, *supra* note 34.

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

37. *In re* Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004).

38. Whether this change of view was a result of debate engendered by the court case, the sight of beaming newlywed same-sex couples and their families on the steps of Old South Church, or merely resigned acquiescence to yet another coercive judicial fiat is unknown. I chose to believe it was the second, because that would be nice if true.

39. *Goodridge*, 798 N.E.2d at 941.

40. Andersen v. King County, 138 P.3d 963 (Wash. 2006); Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006) (leaving the question of whether to recognize same-sex marriages to the legislature). The New Jersey Supreme Court recently required equal rights for same-sex couples, but left the decision whether to call it marriage to "the democratic process." David W. Chen, *New Jersey Court Backs Full Rights for Gay Couples*, N.Y. TIMES, Oct. 26, 2006, at A1.

41. Citizens for Equal Prot. v. Bruning, 455 F.3d 859, 867 (8th Cir. 2006) (applying rational basis review in deference to the will of "the electorate that directly adopted § 29 by the initiative process").

42. *See In re* Marriage Cases, 49 Cal. Rptr. 3d 675, 710 (Cal. Ct. App. 2006) ("Likewise, the exclusionary intent of California voters who passed Proposition 22 could not be more clear.").

43. *See id.* at 684–85.

44. *Id.* at 697; Lynda Gledhill & Wyatt Buchanan, *Governor's Gay-Rights Moves Please No One; Marriage Bill Vetoed, Partner Benefits Preserved*, S.F. CHRON., Sept. 30, 2005, at A1.

The only consistent outcome relative to same-sex marriage has been that voters have rejected it in nearly every state where they had the opportunity.[45] Taken at face value, this would seem to be a strong political argument in favor of judicial review over popular initiatives. However, it is important to note that direct democracy has been the area on which progressives spend the least time, leaving the recent writing and championing of ballot initiatives largely to conservatives.[46] We do not know what might have happened in Oregon or California if progressive lawyers had engaged public initiative campaigns proactively with the same passion shown in the courts.

But we might guess. Voters in Oregon repeatedly saw through the discriminatory anti-gay agenda of the so-called Oregon Citizen's Alliance and defeated initiatives sponsored by the group in the 1992, 1994, and 2000 elections.[47] Although Oregon Citizen's Alliance founder Lon Mabon rewrote his initiatives with increasingly moderate language, voters continued to reject them until the 2004 backlash over the Massachusetts court decision.[48]

It is not possible to consider all of these results together and conclusively answer the question of which source of law will most effectively protect minority interests. During the 1990s, voters consistently blocked initiative attacks on gay rights in Oregon.[49] In the new century, the Massachusetts Supreme Court approved same-sex marriage, and the Vermont legislature approved civil unions.[50] Oregon voters then blocked same-sex marriage via initiative. It remains to be seen what the U.S. Supreme Court does with same-sex marriage—although some read the *Lawrence* opinion to suggest the Court will not protect it.[51] Same-sex marriage will be a reality across the United States only when it has achieved greater popular support.

The people are often simultaneously more progressive and more conservative than the average representative or judge. Progressives who defend initiatives based on their

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The California Supreme Court has granted review of the case. *In re* Marriage Cases, 53 Cal. Rptr. 3d 317 (Cal. 2006).

45. In 2006, Arizona became the first of twenty-eight states to reject a Defense of Marriage measure. However, this narrow victory was achieved partly by focusing the political discussion away from same-sex unions and citing the potential harms of the measure on cohabitating straight couples. *See* Sonya Geis, *New Tactic In Fighting Marriage Initiatives; Opponents Cite Effects On Straight Couples*, WASH. POST, Nov. 20, 2006, at A3.

46. Fortunately, the 2006 election cycle brought greater (non-defensive) participation by progressive groups in initiative politics. *See* Kathleen Hunter, *Unlike 2004, Ballot Initiatives May Benefit Both Parties*, CQPOLITICS.COM, Oct. 30, 2006, http://www.political-news.org/breaking/ 31665/unlike-2004-ballot-initiatives-may-benefit-both-parties.html.

47. *See* Elizabeth A. Tedesco, Note, *"Humanity on the Ballot": The Citizen Initiative and Oregon's War Over Gay Rights*, 22 B.C. THIRD WORLD L.J. 163, 164–65 (2002).

48. The Oregon Citizen's Alliance was the sponsor of Oregon's 2004 anti-same-sex marriage initiative, which passed in Oregon by the slimmest margin (57%) among that year's thirteen similar state measures.

49. *See* INITIATIVE & REFERENDUM INST., INITIATIVE HISTORICAL LISTING 8–10, http://www.iandrinstitute.org/Oregon.htm (follow "Initiative Historical Listing" hyperlink) (last visited Mar. 17, 2007).

50. An Act Relating To Civil Unions, VT. STAT. ANN. tit. 15, §§ 1201–1207 (2002); *In re* Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004).

51. Lawrence v. Texas, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring) (listing preservation of "the traditional institution of marriage" as a legitimate state interest). The majority also appeared to make an exception for "an institution the law protects." *Id.* at 567

ability to overcome legislative gridlock on issues like the minimum wage are immediately challenged by conservatives to similarly defend parental abortion notification results from the same electorate.[52] Because of this, result-based solutions to the question of which democratic form is superior become indeterminate. No popular electorate will duplicate any one party platform if polled issue by issue. The results of direct democracy depend on who is currently using the initiative process.[53] Legal realism rears its head, and some scholars of direct democracy turn to structural process analysis, ultimately endorsing procedural checks like judicial review.[54]

2. Is Judicial Review Appropriate?

If empirical analysis of legislative product cannot elaborate the proper scope of direct democracy, then perhaps scholars can design a process which checks bad majoritarian tyranny while still permitting popular majorities to bypass corrupt or unresponsive legislatures. This describes the project undertaken by Professor Eule and several commentators who have followed his influential work.[55] Eule called for the judiciary to check what he referred to as "unfiltered" majorities—that is, not otherwise subject to the checks and balances employed by the Founders to restrain majoritarian tyranny.[56] For him, the primary concern with direct democracy was structurally insufficient protections for minority interests.[57] The solution was also structural—a "hard judicial look."[58] This answer has dominated current scholarship about direct democracy.

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52. Initiatives increasing the minimum wage and requiring parental notification by minors seeking abortion both passed in Florida in 2004. *2004 Election Summary*, *supra* note 34, at 3. However, parental notification initiatives failed in Oregon and California in 2006. *Election Results 2006*, *supra* note 7, at 4, 7. Also, South Dakota voters protected women's right to choose, short-circuiting a court test case challenging *Roe v. Wade*, but narrowly passed a same-sex marriage ban. *Id.* at 2, 8; *see also* Dale A. Oesterle, *The South Dakota Referendum on Abortion: Lessons from a Popular Vote on a Controversial Right*, 116 YALE L.J. POCKET PART 122 (2006), http://thepocketpart.org/2006/11/1/oesterle.html.

53. *See* Jamie Court, Op-Ed., *"No" Vote Is Powerful Only if You Cast It*, S.F. CHRON., Oct. 30, 2005, at E3 (detailing the cycle of interest groups bringing initiatives and then retreating from the process for several years after significant defeats).

54. For the view that the Legal Process School of comparative institutional analysis developed in reaction to the indeterminacy claims of the Legal Realists, see Guido Calabresi, *An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts*, 55 STAN. L. REV. 2113, 2123–24 (2003).

55. *See* Eule, *supra* note 10, at 1558–60 (advocating a "hard judicial look" at initiatives enacted without legislative deliberation); Note, *Judicial Approaches to Direct Democracy*, 118 HARV. L. REV. 2748, 2750 (2005) (proposing different levels of judicial review tied to categories of direct legislation).

56. Eule, *supra* note 10, at 1584 ("Judicial review is most essential in the presence of unfiltered majoritarianism.").

57. *Id.* at 1551 ("The threat to minority . . . interests here is structural. This is how the system is *supposed* to work.") (emphasis in original).

58. *Id.* at 1558. Other scholars have proposed "ameliorating the informational and deliberative deficits" in the initiative process through judicial interpretation of statutes in instances where constitutionality is not directly challenged. Jane S. Schacter, *The Pursuit of*

That legal scholars would see judicial review as an appropriate cure for the mischief of majoritarian passions is unsurprising. However, the Populist movement pre-dated any optimism generated by the Warren Court's brief service on behalf of oppressed minorities, and Populist indictments of corruption and special-interest peddling also implicated the judiciary.[59] The history of Supreme Court jurisprudence does not settle its structural competence relative to the protection of minority interests. For every *Brown v. Board of Education*[60] there is a *Plessy v. Ferguson*[61]—for every *Lawrence v. Texas*[62] there is a *Bowers v. Hardwick*.[63] The Court's greatest coups over majoritarian oppression are just reversals of the Court's prior endorsements of majoritarian oppression, often citing to changed popular values. Recently, even the most respected of legal scholarship has increasingly endorsed the idea that the Supreme Court is a political animal.[64] A political Court is self-evidently majoritarian most of the time.

This is not meant to disparage the importance of several Supreme Court reversals of discriminatory initiative results, most notably *Romer v. Evans*.[65] However, an invocation of judicial review as the preferred structural check implies that courts have a superior competence at distinguishing bad majoritarian tyranny from good majoritarian consensus, an assertion that relies more on notions about judicial enlightenment than on empirical evidence. Dependence on the courts to provide a structural check on unfiltered majorities would work best if broad formal standards of judicial review actually instructed courts about the degree of substantive deference to give a particular minority in a particular situation—or if we knew what that judicial protection of minorities would actually accomplish relative to the coerced feeling and backlash it can generate in the hearts and minds of the majority. The populist-oriented legal scholars mentioned above have begun to seriously question the basic function of judicial review in constitutional law.[66] This scholarship counsels one to "look beyond the courts to see how judicial rulings are absorbed, transformed, and sometimes made irrelevant."[67] *Romer* did not end anti-gay bias in Colorado, and it should not end the progressive campaign there.

The disbanding of progressive campaigns after achieving victory in the courts can prolong the time it takes for the people to understand and accept the result, especially when the opposition does not disband. It took twenty-four years after *Loving v. Virginia*[68] before a majority of Americans agreed with the Supreme Court on interracial marriage.[69] The discussion above suggests that the same story could play out in the case of same-sex marriage.

"Popular Intent": Interpretive Dilemmas in Direct Democracy, 105 YALE L. J. 107, 156 (1995).

59. *See* THE OMAHA PLATFORM OF THE PEOPLE'S PARTY OF AMERICA, *supra* note 20.

60. 347 U.S. 483 (1954).

61. 163 U.S. 537 (1896).

62. 539 U.S. 558 (2003).

63. 478 U.S. 186 (1986).

64. *See, e.g.*, Richard A. Posner, *The Supreme Court, 2004 Term—Forward: A Political Court*, 119 HARV. L. REV. 31 (2005).

65. 517 U.S. 620, 632 (1996) (invalidating Colorado's Amendment 2).

66. For an excellent summary, see Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CAL. L. REV. 959 (2004).

67. *Id.* at 973.

68. 388 U.S. 1 (1967).

69. The first time the Gallup Poll reported that more Americans approved of interracial marriages (48%) than disapproved (42%) was in 1991. GLAAD, *In Focus: Public Opinion &*

Judicial review will also overturn initiatives progressives may like. In a straightforward application of the Supremacy and Commerce Clauses, the Supreme Court abandoned one recent voter initiative to invalidation by federal drug laws, mentioning the popular derivation of California's medical marijuana law only in passing.[70] Millions of California citizens who considered and approved the now ineffective initiative were left only with the irony of Justice Stevens's statement at the end of his majority opinion: "perhaps even more important than these legal avenues is the democratic process, in which the voices of voters allied with these respondents may one day be heard in the halls of *Congress*."[71] In one sentence, Justice Stevens simultaneously invokes the rhetoric of popular sovereignty and confines that sovereignty to a single building. California's voters are not worth mention because they simply did not follow correct procedures of congressional representative appeal.

In contrast, Justice Kennedy's majority opinion insulating Oregon's assisted suicide initiative from federal drug laws gives credit to the earnest debate that has swept the country on that issue.[72] These results together do not leave anyone with a clear idea of when a ballot initiative will be upheld. In *Gonzales v. Raich*,[73] the Court subjected the voter-approved use of marijuana to treat sick patients to criminalization under federal drug laws. Mere months later in *Gonzalez v. Oregon*,[74] the Court protected the voter-approved use of drugs to assist suicide of sick patients from criminalization under federal drug laws.

Whether or not judicial review is likely to consistently protect the interests of disfavored minorities is a question that is ultimately answerable only in reference to one's own optimism or pessimism about the Supreme Court.[75] In terms of preventing discrimination, actual cases only occasionally validate Madison's (and De Tocqueville's) assignment of this counter-majoritarian balancing task to lawyers and courts. A strong judicial role with regard to civil rights also brings uncertainty to ordinary popular legislation, as in *Raich* when the Court discounted clearly expressed local values in favor of uniform national laws.

Polls, *in* MEDIA REFERENCE GUIDE: 7TH EDITION (2006), http://www.glaad.org/media/guide/infocus/polls.php (attributing that result to "a trend that suggests majority opinion around such issues follows, rather than drives, legal advances in civil rights"). Clearly more energy could have been expended to convince ordinary people of the justice of the decision after it was handed down.

70. Gonzales v. Raich, 545 U.S. 1, 5 (2005).

71. *Id.* at 33 (emphasis added). The fact that one *Lopez* and *Morrison* vote defected to a Commerce Clause opinion that relied heavily on *Wickard* while another concurred in order to endorse the result without so relying is an interesting application of this Supreme Court's result-oriented jurisprudence and will no doubt be discussed elsewhere.

72. Gonzales v. Oregon, 126 S. Ct. 904, 921 (2006).

73. 545 U.S. 1 (2005).

74. 126 S. Ct 904 (2006).

75. *See, e.g.*, KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 183 (2006) ("But now I must temper passion with realism. I believe we should adopt a group-based accommodation model to protect traditional civil rights groups from covering demands. I believe with equal conviction, however, that courts are unlikely to adopt this course.").

3. Which Is the Most Counter-Majoritarian Source of Law?

The oldest and most fundamental concern informing legal scholarship on direct democracy is the worry that the "passions and interests"[76] of the people will work to the detriment of "discrete and insular minorities"[77] of the people. Majority rule is uncontroversial when majorities shift from day to day and issue to issue—but when a group consistently loses, enlightened concern for others activates a desire to take protective steps. Professor Waldron convincingly argues that the case for judicial review is only strong when his "decisional" and "topical" minority categories align to create discrete and insular minorities.[78] Any decision about rights is likely to seem tyrannical to the losing minority, but the counter-majoritarian defense of judicial review is only concerned with decisions that systematically and repeatedly affect the rights of particular minorities.[79]

As seen in the articles cited above, the first impulse many legal scholars have when discrete minority interests are threatened is to appeal on their behalf to a representative or judicial authority. Their hope is the same as Madison's—that "enlightened statesmen" will reach a different and less discriminatory outcome. One problem with exclusive pursuit of this strategy is that even when progressives successfully provoke a rare counter-majoritarian result in court, that result does not itself reduce the "passions" of the people. Political stability requires eventual acceptance of counter-majoritarian decisions by the people.[80] That acceptance in turn depends on the respect common people afford to the legal actors, which decreases the more that this compelled route to consensus is used.

Courts and legislatures are themselves majoritarian bodies, and are dependent on the consent of the governed for their legitimacy. No empirical study establishes the superior anti-majoritarian tendency of legislatures over initiative campaigns[81]—or judges over legislatures. Even the Founders understood that representatives will often sacrifice minority interests. Thomas Jefferson once wrote that: "The mass of citizens is the safest depository of their own rights; . . . the evils flowing from the duperies of the people are less injurious than those from the egoism of their agents."[82] Madison discussed the anti-majoritarian difficulty in *The Federalist*, but also repeatedly showed

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76. THE FEDERALIST NO. 10 (James Madison).

77. United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).

78. Waldron, *supra* note 2, at 1404. Under this approach, the case for judicial review over same-sex marriage initiatives would be much stronger than that for review over medical marijuana laws.

79. *Id.* at 1396.

80. *See* Post & Seigel, *supra* note 16 (stating that "recognition of judicial judgments and vindication of the principles they embody ultimately requires popular embrace").

81. *See* MATSUSAKA, *supra* note 8, at 116 (noting the inconclusiveness of empirical studies addressing the tendency of voter initiatives to undermine minority rights, and the lack of studies comparing initiative lawmaking to legislative lawmaking with respect to that alleged tendency).

82. *Id.* at 123 (quoting Letter from Thomas Jefferson to John Taylor (May 16, 1816), *available at* Thomas Jefferson Digital Archive, University of Virginia, http://etext.lib.virginia.edu/jefferson (follow the "Electronic Texts by or to Jefferson" hyperlink; then search "The Test of Republicanism")).

concern with possible legislative failures at reflecting the will of the majority[83]—calling for "fair appeal" to popular will once a "satisfactory method is . . . proposed by which the voice of the majority in this case may be determined."[84] Both Jefferson and Madison assumed the need to restrain selfish legislative will, one by direct appeal to the people, the other by resort to satisfactory process.

This Part has argued that outcomes alone cannot legitimate competing democratic processes. Procedural checks subject direct democracy to supposedly neutral, deliberative oversight, but returning to actual cases exposes the fact that judicial and legislative processes are also often contingent—shifting with political winds.[85] As conservatives increase both their numbers on the bench and their rhetoric about the evils of judicial activism, the utility of progressive appeals to the judiciary for protection of unpopular rights drops considerably.

Questions about the legitimacy of democratic systems and the need for counter-majoritarian procedural checks are answered against a background of assumptions about the behavior of various institutions. As Professor Eule asserted, "constitutional hierarchy is constructed on the Framers' relative assessments of trust" in particular decisionmakers.[86] If empirical analysis of outcomes does not give conclusive answers about the relative counter-majoritarian credentials of courts, legislatures, or groups of rights-respecting people, then we too must rely on relative assessments of credibility. Thus, ideological preference must play a large role in the choice of a system, and it is vital to critically examine the preconceptions about popular majorities that lead so many legal scholars to call for strong judicial review.

II. THE CONCEPTION OF THE PEOPLE IN LEGAL SCHOLARSHIP

> Democracy is not a deliberative process (as many academics believe), in the sense that voters examine and discuss issues and so formulate a thoughtful, knowledgeable opinion on what policies are right for the nation or for them. Voters have neither the time, the education, nor the inclination for such an activity, as intellectuals imagine. All they know is results.[87]

It is perhaps obvious to assert that whatever opinion one forms of the role and legitimacy of direct democracy depends entirely on whatever opinion one has of the competence of people to collectively self-govern. The question of popular competence is prior to inquiries into specific results or reforms of initiative processes—its answer will influence decisions about which results are emphasized and which solutions are applied. Readers of the above quote do not need to ask what Judge Posner thinks about

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83. *Id.*

84. James Madison, Memorial and Remonstrance Against Religious Assessments ¶¶ 14–15 (Jun. 20, 1785), *in* 8 THE PAPERS OF JAMES MADISON 303–04 (Robert A. Rutland, William M.E. Rachal, Barbara D. Ripel & Fredrika J. Teute eds., 1973).

85. *See, e.g.*, EDWARD LAZARUS, CLOSED CHAMBERS: THE RISE, FALL, AND FUTURE OF THE MODERN SUPREME COURT (Penguin Books 1999) (1998) (lamenting the activist Burger and Rehnquist Courts' systematic rollback of the activist Warren Court's rights decisions).

86. Eule, *supra* note 10, at 1535.

87. Posting of Judge Richard Posner to The Becker-Posner Blog, http://www.becker-posner-blog.com/archives/2006/05/the_lefts_resur.html (May 7, 2006, 21:43 CST).

judicial review of direct democracy—the answer is obvious from his view of how voters operate. If voters are indeed unable or unwilling to comprehend issues, then few would suggest that unexamined majority will should continue to go unexamined. But negative views of popular competence do not become correct simply because they are prevalent among America's legal aristocracy, especially if there is an independent incentive for lawyers to distrust popular lawmaking.[88]

This Part first looks at raw anti-populist sentiment within legal scholarship, then explores how even those articles that profess conditional approval of direct democracy tend to undervalue voter deliberation. Finally this Part points to a structural preference for representation in legal thought and practice—a preference that begs the question of populism.

A. Anti-Populist Sentiment

Since Madison, American constitutional scholarship has largely accepted the need to restrain the passions and interests of the people. It is not immediately obvious why this is so—after all, love is a passion, and most people profess an interest in fairness and peace.[89] However, Madison clearly was referring to bare self-interest, and "sinister designs," which ordinary people are presumed to be incapable of suppressing on their own. Wise and deliberative statesmen are presumed to exist and will rise to represent the public good, according to right reason, provided sufficient checks are in place.

This textual assignment of roles persists through centuries of Western jurisprudence, and predictably appears in articles about direct democracy. The people are adjectivally referred to as "unreliable," "selfish," "ignorant," and "standardless" while representatives are "accountable" and "deliberative."[90] Another article refers to the majority's "impatient, heated, or foolish will" and opines that people "left to their own devices do not know and cannot champion the public good over their own views or interests."[91] Even articles that are more sympathetic to initiative voters often paint them as "confused and overwhelmed by the issues" or vulnerable to manipulative campaigns.[92]

In a recent article on popular constitutionalism, Professor Kramer concisely delineated the dominant anti-populist sentiment of American legalism and pointed out that it is one of the few ideologies shared by the Right and the Left.[93] He recognized that "[m]ost contemporary commentators share a sensibility that takes for granted

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88. For example, if their political and economic power depended on their special competence at legislation and judicial review. *See supra* note 13.

89. Americans often hold surprisingly egalitarian ideals. Polls taken for the bicentennial found that around half of Americans thought Marx's idealistic statement "[f]rom each according to his ability, to each according to his need" was actually part of the Constitution. NOAM CHOMSKY, CLASS WARFARE 142 (Common Courage Press 1996).

90. Hamilton, *supra* note 29, at 12–14.

91. Lane, *supra* note 27, at 580.

92. Eule, *supra* note 10, at 1556.

93. Kramer, *supra* note 66, at 1002–05. "Fear and loathing of the people always threaten to become the ruling passions of this legal culture." *Id.* at 1004 (quoting ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 72–73 (1996)).

various negative stereotypes respecting the irrationality and manipulability of ordinary people and their susceptibility to committing acts of injustice."[94]

No one would seriously question that groups of people occasionally end up oppressing each other. It would be equally absurd to cast all popular votes as structurally uninformed assertions of momentary selfish preference. If that were true, the no vote on Oregon's same-sex marriage ban would simply have matched the voting percentage of marriage-seeking gays and lesbians in Oregon—it would not have been 43%.[95] Most of the supporters of same-sex marriage rights in Oregon are not gay. Whether one emphasizes people's capacity for deliberative compassion or their occasional selfishness is a rhetorical choice in scholarship about judicial review of democratic initiatives.

B. Undervaluation of Voter's Deliberative Agency

The most-cited virtue that distinguishes representative democracy from popular rule is its deliberative nature.[96] Ordinary people's capacity for public debate is unacknowledged or presumed to be inferior.[97] If one believes the people are on the whole confused, overwhelmed, selfish—and most significantly, alone—then of course the deliberative legislature would seem superior.

But the people are not alone—they deliberate in the streets, at the dinner table, and privately as they read the voter pamphlet or watch *The Daily Show*. People interrupt their co-workers with rants about politics. They make and watch films like *Brokeback Mountain* or *Crash*. If they become confused about issues, they check with a trusted friend or news source or church leader. People look things up on the Internet; many even still read books. They are accountable to the other people in their lives. Lawyers know this because they grew up as part of that shared constitutive culture.

Legal scholarship has difficulty recognizing or appreciating the power of this kind of distributed, intertextual deliberation. Rule of law tradition demands a specific type of individualized democratic deliberation directed to neutral, objective, rational norms. Neither classic liberal individualism nor its modern law and economics apology cope well with *cooperative* norm formation because these jurisprudential frameworks conceptualize humans merely as selfish interest-maximizers.[98] The communication that people employ in their daily lives is not always directed to individualized rational interest competition—and those cooperative discussions often convey normative content which escapes notice in the rational model.

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94. *Id.* at 1005.

95. 787,556 people voted against the constitutional amendment. Oregon Blue Book: Initiative, Referendum and Recall: 2000–2006, http://bluebook.state.or.us/state/elections/elections22a.htm (last visited May 5, 2007).

96. *See, e.g.*, Eule, *supra* note 10, at 1555 ("Debate and deliberation inevitably lead to better informed judgment.").

97. *See id.* at 1556 ("But it seems inconceivable that on balance the legislature does not come a whole lot closer to the ideal then the substitutive plebiscite.").

98. *See* MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 147–54 (2d ed. 1998) (1982) (describing instrumental and sentimental conceptions of community and their resistance to the strong constitutive community ideal necessary for much substantive justice work).

Behavioral law and economics fares no better at valuing deliberation among communities of rights-respecting voters. Game-theory-based explorations of information aggregation paradoxes imply interesting things about the political behavior of *A*, *B*, and *C*[99]—and can demonstrate the possibility that procedure determines a result.[100] But it is impossible to reliably apply these abstract theorems to a system of millions of real people with networks of cooperation and information that vary with mood and weather.[101] Real people often have multiple conflicting interests, or might sacrifice their interests and vote one way merely because a trusted friend—or lawyer—is doing so.[102] Real people respect the rights of others even when their own interests are not implicated.[103] Individualism and economic concepts of law have trouble seeing trust or sacrifice as rational—or modeling compassion.

Jurisprudential theories that run under the title deliberative democracy do a better job of championing popular decision making, but they also insist on a sterile, idealized form of discourse that conforms to procedural rules. As philosopher Jurgen Habermas explained, "law receives its full normative sense neither through its legal *form* per se, nor through an a priori moral *content*, but through a *procedure* of lawmaking that begets legitimacy."[104] However, this approach does not end up friendlier to the people because legal scholars inevitably find procedures of representation and judicial review to be more deliberative and legitimizing than procedures of political campaigning. Ordinary people justify informally, with moral content, and often deliberate in ways that seem irrational under a strict definition of the word. Ordinary people are therefore excluded from formal deliberative democracy as defined.[105] Enlightenment is totalizing in that it requires a particular form of rational objective reasoning in order for a popular view to qualify as legitimate.[106]

When legal scholars do take notice of ordinary, popular political deliberation they tend to see it as problematic. In the conclusion to her study of interpretive methods for

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99. *See, e.g.*, Saul Levmore, *Voting Paradoxes and Interest Groups*, 28 J. LEGAL STUD. 259, 259–60 (1999) (linking puzzles of aggregation with the outcome of certain interest group activities).

100. *See id.* at 260 n.1.

101. Law-and-economics scholarship may also increase divisiveness and spite among the people by adopting models for behavior that conceptualize every interaction as a transaction or competition of interests. These systems produce laws and procedures which leave insufficient room for cooperation, sacrifice, and love—because when recognized, these human qualities interfere with the math.

102. *See* MATSUSAKA, *supra* note 8, at 10 (noting findings that "substantively uninformed people could mimic the votes of substantively informed people on five complicated ballot propositions simply by knowing the endorsements of Ralph Nader and the insurance industry").

103. This is indeed one of the core assumptions of Waldron's argument against judicial review. Waldron, *supra* note 2, at 1364.

104. JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 135 (William Rehg trans., 1998) (emphasis in original). Although Habermas shares Eule's proceduralist approach and willingness to conceptualize judicial review as "protecting the democratic procedure," he also states, "It is not self-evident that constitutional courts should exist." *Id.* at 238–40.

105. *See* Kramer, *supra* note 66, at 1005.

106. *See generally*, HORKHEIMER & ADORNO, *supra* note 1. "Not merely are qualities dissolved in thought, but human beings are forced into real conformity." *Id.* at 9.

direct democracy, Professor Schacter acknowledges that both voters and representatives often do not read measures or bills, but instead rely on party cues or media influence.[107] She labels this reliance pathological, and says that it can "hamper" popular and representative laws.[108] Schacter sees the fact that voters receive information and understanding about both legislative and initiative law "from a sprawling and diffuse set of sources" as a problem compared to understanding derived from "bare legal language" or "formal legal sources."[109] But a populist might say that the chaotic intertextual nature of the public sphere provides the best evidence that voters are processing and responding to proposed legal norms. Popular conceptions of law are dramatically intersubjective and contingent, and so present interpretive challenges. Formalization of democratic procedure is not the inevitable response—although it is clearly the dominant answer in contemporary jurisprudence. One could instead call for increased popular contextualization of legal discourse, leading to better understanding of voter intent for lawyers and better party and media heuristic cues for voters.[110]

C. Lawyer Preference for Representation

Traditions of representative democracy and the rule of law have been dominant since the Enlightenment.[111] However, whenever legislative corruption and economic inequality grows, populist agitators appear and protest the "detestable fact that men who long for freedom begin the attempt to obtain it by entreating their masters to be kind enough to protect them by modifying the laws which these masters themselves have created!"[112] Progressive lawyers face calls for popular self-rule with an internal contradiction—popular sovereignty is one of the most cherished of democratic values, but legal training is centered on a pseudodemocratic model of zealous advocacy before a court or legislature or administrative agency.

Zealous advocacy before a high court can sometimes be the fastest way to achieve legal support for a minority position. Unfortunately, progressive lawyers' dependence on "a cadre of enlightened and benevolent notables" to achieve protection for discrete minorities can lead to "a self-reinforcing cycle of popular political disempowerment," where the original failure of popular majorities to protect minority rights becomes an

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107. Schacter, *supra* note 58, at 165.

108. *Id. But cf.* Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus,"* 50 UCLA L. REV. 1141, 1188 (2003) ("The source of voter confusion in direct democracy is not political ignorance or excessive campaign spending. It is the scarcity of familiar heuristic cues that voters customarily use to figure out how they should vote.").

109. Schacter, *supra* note 58, at 166.

110. *See infra* Part III.

111. *See* PETER KROPOTKIN, LAW AND AUTHORITY (1886), *reprinted in* KROPOTKIN'S REVOLUTIONARY PAMPHLETS, at 199 (Roger N. Baldwin ed., Dover Publications 1970) (1927) ("The middle class has ever since continued to make the most of this [rule of law] maxim, which with another principle, that of representative government, sums up the whole philosophy of the bourgeois age . . . .").

112. *Id.* at 200.

excuse to exclude them from the discourse entirely.[113] Professor Eule worried that his conclusions would "smack of paternalism and elitism,"[114] and that judicial review of initiative results would disillusion the people. However, he still chose to nominate courts to "protect the people from themselves."[115]

Decades after the original publication of Duncan Kennedy's famous criticism of hierarchical legal systems, perhaps it is uncontroversial to assert that legal education prepares lawyers for professional participation within the established hierarchy.[116] The most optimistic conclusion post-Critical Legal Studies is that vertical representation of clients is what lawyers do best—and is what even well-intentioned lawyers rationally prefer as a matter of competence and efficiency. A more pessimistic view is that a system organized around popularly inaccessible formal rules of procedure and deliberation requires professional priests to intercede for the people—not because the people are incapable of learning the dialogue, but rather because they *are* capable. Formalism is necessary in order to assert ideological control over who gets access to the forum and to property. A hierarchy was chosen on day one by the Founders, whereby the only group procedurally allowed to dominate the civil sphere was the minority of landed white men that invented it; the legal aristocracy of de Tocqueville.

Of course that view will seem hopelessly cynical towards the paternalistic, elitist, but well-intentioned project of the Founders as it was received in popular myth.[117] However, it is important to understand that the specific "factions" that most worried the Founders were in fact populist uprisings among the lower classes during and immediately after the American Revolution.[118] After Shays' Rebellion, Henry Knox wrote to George Washington to warn that "[t]his dreadful situation has alarmed every man of principle and property in New England."[119] Knox worried that the impoverished people were "determined to annihilate all debts public and private and have agrarian Laws," which would of course have significantly decreased his holdings.[120] This conflict has been received into American lore as proof that republican

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113. UNGER & WEST, *supra* note 17, at 13 (suggesting that the end result of this process is "an outright expression of *demophobia*, fear of the people") (emphasis in original).

114. Eule, *supra* note 10, at 1584.

115. *Id.* at 1585.

116. DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM 32 (N.Y. Univ. Press 2004) (1983) ("[I]t is asserted that law emerges from a rigorous analytical procedure called 'legal reasoning,' which is unintelligible to the layman, but somehow both explains and validates the great majority of the rules in force in our system.").

117. *See, e.g.*, GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 229 (Vintage 1993) ("The American people seemed incapable of the degree of virtue needed for republicanism. Too many were unwilling to respect the authority of their new elected leaders . . . .").

118. "During the Revolution, mutinies in the Continental Army, and after the war, farmers' uprisings in Massachusetts and other states, were evidence of the continued existence of class anger in the new nation." ZINN & ARNOVE, *supra* note 20, at 93.

119. Henry Knox, Letter to George Washington (Oct. 23, 1786), *in* ZINN & ARNOVE, *supra* note 20, at 106. "They feel at once their own poverty, compared with the opulent, and their own force . . . ." *Id.* at 105.

120. *Id.* at 106.

ideals needed strong leaders to safeguard them from local prejudices. It was about property.[121]

Progressive lawyers who are concerned with the plight of oppressed minorities should at least consider whether the greatest danger lies in popular prejudices expressed in direct democracy, or rather in trusting the care and well being of the impoverished to the minority of the opulent.[122] They should note Capital's long history of strategically using interest competition and racial divisiveness to drive wedges into populist labor solidarity movements.[123] Progressives should note the current conservative agenda of privatization in the economy matched with culture war in the public sphere. They should think of ways to remind the people that they have common goals, ideals, and desires.

The original proponents of initiatives and referenda understood that popular constitutionalism is compatible with representative democracy. The 1912 Progressive Party platform simultaneously stated a commitment to representative government and called for initiative and referenda as a way to secure "responsibility to the people."[124]

The primary focus at the turn of the twentieth century—as in 1789—was on economic rights. The populist concern was that representatives and judges would betray and *Lochner*-away majority will in favor of narrow, moneyed minority interests. Direct democracy could check that trend.

Today, the long-fought victories of the Civil Rights Movement have taught American legal scholars the language of counter-majoritarianism. However, substantive economic inequality is growing for racial minorities and nearly everyone else, creating a paradox. On the economic axis, the sins of the opulent minority are what progressives wish to restrain. As the people demonstrated with regard to minimum wage initiatives in 2006,[125] majority will is the chief weapon for attacking the class divide.[126]

Part I has argued that the results of populist direct democracy are an indeterminate ground for either legitimizing it or subjecting it to strong judicial review. This Part has argued that lawyers assign protection of contested rights to representatives and courts

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121. *See* MATSUSAKA, *supra* note 8, at 119 ("Although it has become a mantra in the literature to cite the *Federalist* papers on the dangers of majority tyranny, it is seldom noted that the concern there was primarily about the rights of *economic* interests . . . .") (emphasis in original).

122. *See* KROPOTKIN, LAW AND AUTHORITY, *supra* note 111, at 205–06 (identifying law's character as the "skilful commingling of customs useful to society, customs which have no need of law to insure respect, with other customs useful only to rulers, injurious to the mass of the people, and maintained only by the fear of punishment").

123. For a well-known comprehensive history of how racial and nationalist prejudices undermine shared class interests, see HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES (rev. ed. 2003).

124. Platform of the Progressive Party (Aug. 7, 1912), *available at* http://www.pbs.org/wgbh/amex/presidents/26_t_roosevelt/psources/ps_trprogress.html (last visited May 5, 2007).

125. Voters approved minimum wage increases in all six states where they had the opportunity, despite congressional deadlock on the issue. *See Election Results 2006*, *supra* note 7, at 1.

126. *See* SAUL D. ALINSKY, RULES FOR RADICALS 19 (Vintage 1989) (1971) ("The power of the Have-Nots rests only with their numbers.").

more for reasons of class loyalty than out of recognition that judicial review actually does protect unpopular rights. However, this does not mean that populists can ignore discriminatory results.

While empirical studies aimed at improving direct democratic practice are certainly desirable, the ultimate direction of reform chosen will be a matter of ideological commitment. Recourse to proceduralism and judicial review[127]—and the associated dependence on a particular idealized form of deliberation to legitimize law—derives in large part from the judgment that ordinary people are incurably mean, venal, ignorant, or misguided. That cynical or fatalist or realist judgment of the people has in turn influenced legal scholars—including the Founders—to prefer a particular model of representation and review that most closely matches their own special competence.

Proceduralism and rationality exclude direct expression of many popular moralities and emotional histories. In order to exclude fear and hate, law adopts a formality that also excludes trust, love, and compassion.[128] Distrust of ordinary people by judges and representatives—whether driven by class fear or practical cynicism—means that the actual motivations of people are unlikely to be fully understood or translated into recognized legal reasoning. This creates pessimism about the possibility of discriminatory initiatives and also keeps many lawyers from engaging with direct democracy on its own terms in order to reduce that possibility.

People respond to law's cynical critique of themselves by becoming more cynical. Ironically, law's conceptual reduction of society to a competition produces rules that reward oppressive competitiveness. To escape this cycle, progressive lawyers must turn away from sole reliance on judicial review and engage with the values and interests of the people. The powerful position that lawyers hold in the political system depends on the sufferance of the people, "because it is known that [lawyers] are interested to serve the popular cause."[129] In a climate of increased public skepticism about the allegiances of lawyers, voluntarily affected populism becomes a matter of preserving the mandate of the legal profession, as well as a way for lawyers to reconcile their aristocratic social position with their deeper humanity.

III. THE WILL TO POPULISM

> [B]efore the Law stands a doorkeeper. To this doorkeeper there comes a man from the country who begs admittance to the Law. But the doorkeeper says he cannot admit the man at the moment. . . . These are difficulties which the man from the country has not expected to meet, the Law, he thinks, should be accessible to every man and at all times . . . .[130]

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127. This trend achieved full force in the much-cited writings of Professor Eule. The Legal Process School generally has been criticized for paying insufficient attention to the possibilities of initiatives and referenda. *See* Calabresi, *supra* note 54, at 2124.

128. *See generally*, Kenji Yoshino, *The City and the Poet*, 114 YALE L.J. 1835 (2004). "Law's simultaneous need and inability to banish literature makes law and literature a distinctively fraught enterprise. Banished from law as a polluted discourse, literature keeps surfacing in the wake of its enforced departure." *Id.* at 1839.

129. DE TOCQUEVILLE, *supra* note 3, at 286.

130. FRANZ KAFKA, THE TRIAL 213 (Willa & Edwin Muir trans., Schocken Books 1995) (1925).

What seems so difficult to establish conclusively within the bounds of acceptable law review scholarship can often be captured intuitively from a short literary or political tract. This Part will step over that line in the interest of importing a more authentically populist voice—one that is infrequently heard in legal scholarship.

In his parable *Before the Law*, Kafka describes law as a series of halls, each guarded by a doorkeeper more powerful than the one before. The man from the country spends his entire life studying and bribing the first doorkeeper, waiting for permission to enter into the next hall. As the man is dying, he finally asks why no one else has come seeking admission to the Law. The doorkeeper replies that "No one but you could gain admittance through this door, since this door was intended for you. I am now going to shut it."[131] Kafka's writings are among the bleakest indictments of formal legalism in all of literature. Law is hierarchical and random. Law's keepers are secretive about its content and only allow access to its commands and summons. From these writings, many recognize emerging postmodern critique—further developed many years later by Derrida and others—applied to show that law is inescapably indeterminate and constructed.[132]

Kafka was a lawyer who worked most of his life for the government representing injured Czech workers.[133] In notebooks, he demonstrated populist ideas about working hours, minimum wages, and mandatory insurance—all "radical ideas in Kafka's day."[134] Yet his conception of law as evidenced in his writings was relentlessly despairing, perhaps indicating why he never advanced in his legal career—or why the first doorkeeper in his parable professes fear of the other doorkeepers guarding the inner halls of the Law.[135]

Franz Kafka the man provides a model for progressive lawyers seeking to operate at the interface between the earnest questioning of the people and the indiscriminate hierarchical formalism of the Law. He focused outward on questions of literature, constitutive popular culture, and the human condition,[136] even while immersed in legal culture, and understood that ordinary people believe they are entitled to admittance to the Law. His despair over the harsh secret functioning of legal structures translated into an intense sympathy for people who are subject to them.[137]

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131. *Id.* at 214–15.

132. *See* Douglas E. Litowitz, *Franz Kafka's Outsider Jurisprudence*, 27 LAW & SOC. INQUIRY 103 (2002). Others just respond to that critique by claiming that there aren't any political or economic overtones in *The Trial* at all. Richard A. Posner, *The Ethical Significance of Free Choice: A Reply to Professor West*, 99 HARV. L. REV. 1431, 1434 (1986).

133. Litowitz, *supra* note 132, at 104.

134. *Id.* at 133.

135. "And the sight of the third man is even more than I can stand." KAFKA, *supra* note 130, at 213.

136. *See* FRANZ KAFKA, DIARIES 1910–1923, at 243 (Joseph Kresh trans., Schocken Books 2000) (1913) ("The unity of mankind, now and then doubted, even if only emotionally, by everyone, even the most approachable and adaptable person, on the other hand also reveals itself to everyone, or seems to reveal itself, in the complete harmony, discernable time and again, between the development of mankind as a whole and of the individual man.").

137. He recounts having wept over trial reports concerning the effects of poverty and hunger. *Id.* at 223.

The conclusion that law is political often provokes an existential crisis in law students or practicing lawyers. As more and more results of individual cases are seen to turn on the maintenance of efficient rules rather than the application of justice to particular facts, psychological incentives appear for law students to focus on rules rather than risk engaging their sympathies in the unique human plight of either party. All people have some concept of what moral fairness means, but absent general agreement on guiding principles of natural law, the results of any cross-section of cases will seem fair only randomly at best. If one believes that the formal preconditions of representative democracy present a class bias, then the results may be experienced as systematically and relentlessly unfair. But as the life of Kafka demonstrates, knowledge of indeterminacy and unfairness does not have to lead to nihilism and opportunistic exploitation of the system for personal gain. However, it is necessary to at least search for a guiding morality in order to stave off alienation and despair.[138]

Populist tracts that were contemporaneous with the rise of direct democracy often took the political indeterminacy of law for granted. Over a century ago, Peter Kropotkin classified all systems of morality as either religious, utilitarian, or cultural,[139] noting that "[n]o society is possible without certain principles of morality generally recognized."[140] He noted the waning power of natural or religious morality, and while acknowledging the influence of utilitarianism, also concluded that it had been "judged too artificial by the great mass of human beings."[141] Nothing then is left but the intersubjective *cultural* morality developed by the people in cooperation with each other—via constitutive communities of rights-respecting voters.[142]

Asserting that cooperation between individuals has been much more important for humanity than the "so-much-spoken-of physical struggle between individuals for the means of existence,"[143] Kropotkin described a morality that derived from "a mere necessity of the individual to enjoy the joys of his brethren, to suffer when some of his brethren are suffering; a habit and a second nature, slowly elaborated and perfected by life in society."[144] His writings anticipated major arguments of the Critical Legal Studies movement by about one hundred years, and were among the many influences on those populist and socialist movements that established the practice of direct democracy. Communitarian values persist in our society, with Jefferson, Kropotkin, and Sandel providing convenient reminders of the value of community—each near the end of their respective centuries.

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138. Litowitz, *supra* note 132, at 133 ("There is some indication that Kafka attended lectures and meetings of anarchists, socialists, and Zionists, yet he never settled on a political vision, sometimes falling into a lamentable solipsism . . . .").

139. *See* PETER KROPOTKIN, ANARCHIST COMMUNISM (1887), *reprinted in* KROPOTKIN'S REVOLUTIONARY PAMPHLETS, *supra* note 111, at 74.

140. *Id.* at 73.

141. *Id.* at 74.

142. *See supra* text accompanying note 98.

143. KROPOTKIN, ANARCHIST COMMUNISM, *supra* note 139, at 74.

144. *Id.* at 75. As an aside, one should note that Kropotkin's concept of communism was significantly different from the cold war version. Those wishing to understand how the idealistic populism of early anarchistic thinkers was overthrown by totalitarian Leninist vanguard party nonsense should look to Orwell's first-person account of the Spanish Civil War. *See* GEORGE ORWELL, HOMAGE TO CATALONIA (Harcourt 2003) (1938).

Admitting the existence of a culturally derived, evolving, popular morality provides a way out for progressive lawyers caught between populist sympathies and the practical need to engage with representative hierarchies in order to accomplish anything. Lawyers and legal scholars can choose to undertake the task of bringing popular morality into law—and simultaneously bringing legal knowledge into the complex processes of cultural discourse—with the goal of making both more humane.

A. The Central Need for Popular Evangelism

Early populists declared that "this republic can only endure as a free government while built upon the love of the whole people for each other and for the nation."[145] It would be difficult to disagree with that sentiment. Lawyers—as educated, empowered actors in society—have a special obligation to take it seriously. Progressive lawyers often find themselves possessed of ideals that outpace majority acceptance—and sometimes the power to get those ideals enacted. But by cultivating respect for people and actively engaging in contextual, public-sphere deliberations about cultural norms, those lawyers can also recruit for their cause, reduce any voter confusion, improve the results of direct democracy, and decrease the paternalist effect of judicial or legislative decrees.

Elite paternalism goes down a lot easier when accomplished without cynicism—what is required is demonstrated empathy for actual people. Professor Lynne Henderson's excellent article on the need for empathic discourse in legal scholarship and practice illuminates the benefits and possibilities of such an approach to law.[146] Empathy for the human situation of the parties can expand understanding, and "aid both processes of discovery . . . and processes of justification . . . ."[147] Empathy for people pushes back against law's tendency to worship formal rationality and formal rationality's tendency to "unhing[e] . . . the law from human experience."[148]

The relation of these texts to direct democracy is in the way they promote a conscious choice among lawyers to engage with the popular culture on the issues that appear in initiatives. Rather than bemoan voter confusion or manipulative ads, legal scholars should join political campaigns and educate the public about the consequences of their vote. Lawyers should understand that shared popular morality does exist, and can change—and they should preach a larger understanding of common interests that undermine intolerance. Lawyers should stop conceptualizing people as selfish, uneducated, and mechanical interest-maximizers and attempt to relate to their lived experience of cooperation.

This model of the role of lawyers and legal scholars depends on efforts to humanize the hierarchical relationships within law school and the courtroom, but it also includes the horizontal project of bringing understanding of law to public discourse. Inclusion

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145. THE OMAHA PLATFORM OF THE PEOPLE'S PARTY OF AMERICA, *supra* note 20, at 230 ("[W]e must be in fact, as we are in name, one united brotherhood of freedmen.").

146. Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1649 (1987) ("The purpose of the foregoing discussion has been to demonstrate that empathic narrative is a part of legal discourse, and that empathic understanding can play a role in legal decisionmaking.").

147. *Id.* at 1576.

148. *Id.* at 1574.

of empathic understanding necessarily involves some meddling with the dominance of mechanical rules in legal discourse, but the choice between formal rules applied universally and flexible standards applied individually was revealed to be nothing but a choice long ago.[149]

Educating the public about legal issues or about the workings of the legal system is also simply a matter of choosing to do so—and is a project that will be greatly facilitated by the advent of the information age. The ability to communicate cheaply and instantaneously and en masse might be the catalyst that allows traditional civic republican ideals of popular participation to escape the traditionally understood requirement of small-scale cultural homogeneity. Law should embrace this opportunity to promote pluralist understanding across difference.

What then does one say to those progressive lawyers who spend thousands of hours and millions of dollars in popular activist campaigns only to lose ballot initiatives?[150] Some disillusionment is inevitable, enlightened judicial review looks like an attractive option, but the civic engagement should never stop.[151] The need for popular legal evangelism goes beyond the practical need for populists to justify legal decrees via the manufacture of informed democratic consent. Engaging with people rewards both sides, provided it is done without cynicism. It is possible to consciously—and without naiveté—choose optimism about human capacities for compassion, cooperation, and understanding, simply because it is morally and personally satisfying to do so. As expressed by poet W. H. Auden:

> Looking up at the stars, I know quite well
> That, for all they care, I can go to hell,
> But on earth indifference is the least
> We have to dread from man or beast.
>
> How should we like it were stars to burn
> With a passion for us we could not return?
> If equal affection cannot be,
> Let the more loving one be me.[152]

While some of the Founders assumed that the people were not yet possessed of virtue sufficient to avoid majoritarian tyranny,[153] their chosen cure of rule by enlightened judges and representatives did not find universal endorsement. Immanuel Kant asserted that "according to such a presupposition, freedom will never arrive, since we cannot ripen to this freedom if we are not first of all placed therein (we must be free

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149. *See generally* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

150. *See* Anti-Gay Marriage Amendments Pass in 11 States, *supra* note 15 (detailing the $2.8 million spent on voter education campaigns in opposition to Oregon's same-sex marriage ban).

151. "The results clearly show that we can move voters if we reach them and speak to them directly." *Id.*

152. "The More Loving One," copyright © 1957 by W. H. AUDEN, from COLLECTED POEMS by W.H. AUDEN. Used by permission of Random House, Inc.

153. *See supra* text accompanying notes 117–121.

in order to be able to make purposive use of our powers in freedom)."[154] While "[i]t is certainly more convenient to rule in state, household, and church if one is able to carry out such a principle"—of benevolent rule in trust for a presumably unenlightened people—Kant did not find it more just.[155]

Rejecting excesses of counter-majoritarian rhetoric and embracing popular direct democracy requires a leap of faith—a choice to trust the people in the face of the rational assumption that many will behave against their better nature. The dominant form of legal reasoning forecloses this choice as irrational, preferring procedural checks that obscure significant realization of the truth that any decision about rights is inevitably trusted to *some* collection of human frailty. Yet defenses of deference, resignation, and faith flourish in our literature and philosophy.[156] Lawyers who willfully adopt the standpoint of Kierkegaard's "knight of faith" will find it easier to resign power to the great cause of popular democracy. We must *choose* to believe in and model the proposition—absurd by most legal standards—that people are capable of respecting the rights of others en masse.

CONCLUSION

If the people are in fact persuaded into the belief that their self-interest is exclusive and can only be served via the oppression of others, then lawyers should endeavor to *convince* them of the unfairness of their view—whether or not the lawyer also applies to the courts to compel his or her enlightened concept of the public good. Whatever projects lawyers and legal scholars undertake in the realm of popular lawmaking, they will be more effective and better received if they consciously reject cynicism and attempt to relate empathically to the people.[157]

This Note concedes that conclusive justification of direct democracy within the dominant jurisprudence is not possible. The precondition that all valid arguments before the law must be stated according to the defined format of "legal reasoning"[158] excludes much of humanity, literature, poetry, and mythology from Madison's "enlightened representative" discourse. Yet these excluded mythologies operate on the will of the people. Insistence on rationality thus blocks law from an accurate

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154. IMMANUEL KANT, RELIGION WITHIN THE LIMITS OF REASON ALONE 176 (Theodore M. Greene & Hoyt H. Hudson trans., Harper Bros. 1960) (1793). "The first attempts [at freedom] will indeed be crude and usually will be attended by a more painful and more dangerous state than that in which we are still under the orders and also the care of others; yet we never ripen with respect to reason except through our own efforts (which we can make only when we are free)." *Id.*

155. *Id.*

156. *See, e.g.*, SOREN KIERKEGAARD, FEAR AND TREMBLING (C. Stephen Evans & Sylvia Walsh eds., Cambridge Univ. Press 2006) (1843).

157. *See* YOSHINO, *supra* note 75, at 194 ("[I] am troubled that Americans seem increasingly to turn toward the law to do the work of civil rights precisely when they should be turning away from it. The real solution lies in all of us as citizens, not the tiny subset of us who are lawyers."). While Yoshino asserts that "[p]eople who are not lawyers should have reason-forcing conversations outside the law," clearly his well-received book proves that lawyers can also participate in that endeavor. *Id.*

158. *See generally* KENNEDY, *supra* note 116.

assessment of collective popular competence at respecting the rights of others based on their shared understanding of these cultural sources.

But this Note also asserts that that populism is too large of a challenge to legalism to simply be proceduralized until it becomes "rational." Direct democracy rose from the understanding that judicial review is also corruptible. Populists who fought for initiatives preferred that rights be contested within the shared empathic understanding of the people as a whole, rather than solely within the exclusive, individually rationalized, and narrow understanding of the Law.

That legal scholars recognize constitutional courts as inevitably and primarily political is extraordinarily significant.[159] If the Supreme Court is only doing politics, then the people will think the Justices' voices too loud. The 2006 election cycle brought several (unsuccessful) ballot initiatives directly aimed at judicial supremacy[160]—reminiscent of century-old Progressive Party hostility to courts.[161] Prior "populist attack[s] on the Court" have often provoked calls for the Justices to reform themselves lest they lose all legitimacy.[162] Other scholars attempt to find a spoonful of jurisprudence to make a political Court go down.[163] But for populists, focusing on the political nature of courts makes the case against judicial review of direct democracy easy. In a democracy—even an exclusively republican one—it takes a non-political principle or right to justify overruling a popular majority on a contested constitutional issue. Also, if constitutional lawyers understand that what they are doing every day is already political science, then the argument for confining their discourse to rule-bound forums is weakened.

The tension between populism and "enlightened" minority rule provides a core existential conflict for American law. If the debate about the legitimacy of direct democracy proceeds without actual populist voices being heard, then the result is predetermined. Strong judicial review simply overrides those expressions of majority will that do not accord with broad consensus among lawyers, whether or not such expressions oppress a discrete or insular minority. Reliance on strong judicial review distracts from non-coercive efforts toward bringing popular consensus into accord with legal consensus.

Many will assert that current discriminatory realities for various minorities in American society demand that lawyers use any legal means necessary on their behalf. I agree. Progressive lawyers should continue to pursue practical results on behalf of

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159. *See* Mark Tushnet, *Popular Constitutionalism as Political Law*, 81 CHI.-KENT L. REV. 991 (2006); Posner, *supra* note 64. Other scholars have noted the Court's increased activity in issues of democratic political structure. *See, e.g.*, Richard H. Pildes, *Formalism and Functionalism in the Constitutional Law of Politics*, 35 CONN. L. REV. 1525 (2003).

160. Jaynie Randall, *Federal Judicial Supremacy on the Ballot*, 116 YALE L.J. POCKET PART 137 (2006), http://thepocketpart.org/2006/11/5/randall.html.

161. Platform of the Progressive Party, *supra* note 124 ("The Progressive party demands such restriction of the power of the courts as shall leave to the people the ultimate authority to determine fundamental questions of social welfare and public policy.").

162. *See, e.g.*, LAZARUS, *supra* note 85, at 11 ("[T]he Court's mending could be an inspiration for our own."). Roosevelt's court packing plan represented a less sympathetic prescription for another Court that had strayed from popular will.

163. *See* Posner, *supra* note 64, at 90 ("I do not suggest that a pragmatic court is not a political court, but present it rather as a tolerable form of political court . . . .").

minorities in court and in the legislature if they can. However, they should choose to do so with optimism, and should be willing to make moral arguments and representations of popular experience—even if doing so violates legal norms of formal deliberation. Empathy with people will improve law's ability to be convincing to the people, which will in turn improve the ability of progressive lawyers to fight discriminatory initiatives—including in the public sphere where the debate originates.

Ultimately, direct democracy presents lawyers with a choice about where to put their faith—either in the fundamental good will of most people towards each other, or in the maintenance of neutral and deliberative forums. This choice will determine where lawyers put their efforts—either towards increasing the understanding of the people and thus their capacity for good will, or towards perfecting the legal reasoning rationality filter that stands before the law.

The forces arrayed against the expression of empathy and moral choice in legal systems are formidable.[164] Also, it can be unpleasant to experience the irony that accumulates in one's psyche after internalizing both Kafka's critique of the law and an often unrequited optimism about popular competence in valuing contested rights. However, there is comfort in knowing that the ideals of constitutive cultural morality that influence public opinion and preach against discrimination are easy to understand and have been around for significantly longer than the Defense of Marriage Act:

> The main thing is to love your neighbor as yourself.... Once you do that, you will discover at once how everything can be arranged. And yet it is an old truth, a truth that has been told over and over again, but in spite of that it finds no place among men! "The consciousness of life is higher than life, the knowledge of happiness is higher than happiness"—that is what we have to fight against! And I shall, I shall fight against it! If only we all wanted it, everything could be arranged immediately.[165]

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164. *See* Henderson, *supra* note 146, at 1587–93. "Law as a closed system that is self-referential can draw the line in such a way as to *dismiss* empathic discourse or understanding as 'irrelevant' or as 'policy' argument beyond the auspices of the law." *Id.* at 1588 (emphasis in original).

165. FYODOR DOSTOEVSKY, *The Dream of a Ridiculous Man*, *in* THE BEST SHORT STORIES OF DOSTOEVSKY 348 (David Magarshack trans., Modern Library 1992) (1876).