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INTRODUCTION

The use of direct democracy is at its highest level in more than one hundred years.[1] The direct initiative, which is the primary focus of this Article, allows private citizens to bypass the traditional legislative process and make binding laws, often in highly contentious areas of public policy.[2] The 2000 elections, for example, placed directly before voters the issues of school vouchers, physician-assisted suicide, same-sex marriage and other gay and lesbian rights, gun control, campaign finance reform, bilingual education, gambling, medical use of marijuana, and sentencing for drug offenders, as well as some of the

1. A new record was set for direct-legislation activity when more than 350 initiatives and referenda appeared on state ballots during the 1990s. *See* David B. Magleby, *Direct Legislation in the American States*, *in* REFERENDUMS AROUND THE WORLD 229-31 (David Butler & Austin Ranney eds., 1994); Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum, and Recall Developed in the American West*, 2 MICH. L. & POL'Y REV. 11, 38 (1997). That record will almost certainly be broken in this decade given that more than two hundred ballot measures appeared on state ballots during the 2000 elections alone. *See* F.T. McCarthy, *Ballot Initiatives: Pot and Vouchers*, ECONOMIST, Nov. 11, 2000, *at* 2000 WL 8144316; Tom Squitieri, *Voters Are Knee Deep in Ballot Measures*, USA TODAY, Nov. 7, 2000, *at* 2000 WL 5794717.

2. Julian Eule described the direct initiative as "substitutive direct democracy" because it "offers a stripped down version of lawmaking free from the constraints—and . . . the safeguards—of the legislative framework." Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1511-12 (1990). In contrast, the referendum requires legislation that is enacted by the legislature to be referred to the electorate for subsequent ratification or rejection. *See id.* at 1512. Professor Eule characterized the referendum as "complimentary direct democracy" because it adds an additional tier to the lawmaking process. *See id.* This Article, like Eule's seminal work, is concerned primarily with substitutive direct democracy. *See id.* at 1513.

It should be noted, however, that several jurisdictions authorize the indirect initiative, which allows private citizens to refer ballot measures to the legislature for consideration. If the legislature fails to enact the proposal after a designated period of time, the measure is subsequently presented to the voters. *See id.* at 1511. Professor Eule treated the indirect initiative as substitutive direct democracy because "the voters ultimately vote on the measure." *Id.* In addition to being far less common, the indirect initiative is less problematic than the direct initiative for purposes of this Article because legislative consideration of an indirect initiative allows for some deliberation concerning the merits of a proposal and the creation of lawmaking records that can be utilized for interpretive guidance. Although this Article therefore focuses primarily on the direct initiative, the description of the initiative process and the reforms advocated below could generally be applied to the indirect initiative as well.

perennial favorites—tax reform and environmental policy.[3] The prominence of direct democracy in American government is likely to increase in the foreseeable future as a result of widespread public support for the process, as well as technological innovations, like the Internet, that promise virtually instant access to voters' preferences.[4]

Not surprisingly, as the use of direct democracy has come to play a more prominent role in the formulation of public policy, this type of lawmaking has also received closer scrutiny from legal scholars,[5] governmental commissions,[6] and the media.[7] Although direct democracy undoubtedly has its supporters among these ranks, a number of commentators have criticized initiative lawmaking on a variety of theoretical and practical grounds. Some advocate the outright abolition of initiative lawmaking on constitutional grounds;

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3. For a database of all statewide initiatives and referenda appearing on ballots since 1990, see NAT'L CONFERENCE OF STATE LEGIS., BALLOT MEASURES DATABASE: STATEWIDE INITIATIVES AND REFERENDA [hereinafter BALLOT MEASURES DATABASE], *at* http://www.ncsl.org/programs/legman/elect/dbintro.htm (last visited Feb. 17, 2003).

4. *See, e.g.*, Marci A. Hamilton, *The People: The Least Accountable Branch*, 4 U. CHI. L. SCH. ROUNDTABLE 1 (1997) (lamenting that the Internet "has become the darling of governments, politicians, and citizens around the world," which "could enable the United States to effect a system of massive self-rule. Technological capacities make a town-meeting style of democracy more attractive than ever, or so the argument goes."); Eben Moglen & Pamela S. Karlan, *The Soul of a New Political Machine: The Online, the Color Line and Electronic Democracy*, 34 LOY. L.A. L. REV. 1089, 1092 (2001) ("[T]he Internet may give added strength to the appeal of 'unmediated expression'—that is, the ability of individuals to express their preferences directly, rather than through institutional filters. This may further fuel pressures for direct, rather than representative, democracy.").

5. *See, e.g.*, Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI.-KENT L. REV. 707 (1991); Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 CORNELL L. REV. 527 (1994); Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434 (1998); Eule, *supra* note 2, at 1503; Elizabeth Garrett, *Money, Agenda Setting, and Direct Democracy*, 77 TEX. L. REV. 1845 (1999); Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930 (1988); Richard L. Hasen, *Parties Take the Initiative (and Vice Versa)*, 100 COLUM. L. REV. 731 (2000); Jane S. Schacter, *The Pursuit of "Popular Intent:" Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107 (1995); Symposium, *New Structures of Democracy*, 72 U. COLO. L. REV. No. 4 (2001); Symposium, 41 SANTA CLARA L. REV. No. 4 (2001); Symposium, *Voices of the People: Essays on Constitutional Democracy in Memory of Julian N. Eule*, 45 UCLA L. REV. No. 6 (1998); Symposium, *Redirected Democracy: An Evaluation of the Initiative Process*, 34 WILLAMETTE L. REV. Nos. 3-4 (1998); Symposium, *Perspectives on Direct Democracy*, 4 U. CHI. L. SCH. ROUNDTABLE No. 1 (1996-1997); Symposium, *The Legitimacy of Direct Democracy: Ballot Initiatives and the Law*, 1996 ANN. SURV. AM. L. 371 (1996); Symposium, *The Bill of Rights vs. the Ballot Box: Constitutional Implications of Anti-Gay Ballot Initiatives*, 55 OHIO ST. L.J. 491 (1994).

6. *See, e.g.*, CAL. COMM'N ON CAMPAIGN FIN., DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA'S FOURTH BRANCH OF GOVERNMENT (1992); PHILIP L. DUBOIS & FLOYD F. FEENEY, IMPROVING THE CALIFORNIA INITIATIVE PROCESS: OPTIONS FOR CHANGE (1992).

7. *See, e.g.*, DAVID S. BRODER, DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY (2000); PETER SCHRAG, PARADISE LOST: CALIFORNIA'S EXPERIENCE, AMERICA'S FUTURE 188-256 (1998).

some advocate increased regulation of the procedures by which proposed measures are enacted; and others advocate more stringent judicial review of successful ballot measures.[8]

The fundamental problem with direct democracy is that it allows private citizens to make laws free from the electoral accountability and other structural safeguards of representative democracy.[9] Those structural safeguards are designed to encourage careful deliberation and reasoned decisionmaking in the legislative process.[10] Moreover, assuming that direct democracy is constitutionally permissible, measures enacted directly by the electorate raise difficult issues of statutory interpretation because of the illusiveness of the underlying "voter intent."[11] A number of commentators have suggested that such concerns should compel courts to engage in a different—and ordinarily more stringent—form of judicial review for direct democratic measures than they do for ordinary legislation.[12] By and large, however, courts have not done so.[13]

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8. For examples of each of these respective approaches, see Hans A. Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19, 41-43 (1993) (articulating five proposed tests for state courts to apply to invalidate successful ballot measures under the Guarantee Clause of the United States Constitution); John Gastil et al., *There's More Than One Way to Legislate: An Integration of Representative, Direct, and Deliberative Approaches to Democratic Governance*, 72 COLO. L. REV. 1005, 1024-28 (2001) (endorsing a proposal for "Citizens Initiative Review," which would result in the establishment of "randomly-selected citizen panels to inform the judgment of the mass electorate" in ballot campaigns); Eule, *supra* note 2, at 1558 ("The purpose of this article is to suggest that courts take a harder look when constitutional challenges are mounted against laws enacted by substitute plebiscite.").

9. *See* Eule, *supra* note 2, at 1513-48.

10. *See* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 38-47 (1985).

11. *See* Schacter, *supra* note 5, at 123-47.

12. *See* Eule, *supra* note 2, at 1558 (advocating heightened judicial scrutiny of successful ballot measures); Schacter, *supra* note 5, at 153 (proposing the application of special interpretive rules for direct democracy that would "resolve statutory ambiguity based on underlying ideas about 'democratizing' the direct lawmaking process"); *see also* Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 23 (1978) (arguing for "heightened scrutiny" of ballot measures "similar to that recognized as appropriate when the normal legislative process carries potential harm to the rights of minority individuals"); Priscilla F. Gunn, *Initiatives and Referendums: Direct Democracy and Minority Interests*, 22 URB. L. REV. 135, 158 (1981) (proposing "an automatic heightened level of scrutiny when lawmaking procedures deprive minority groups of fundamental safeguards," which would subject successful ballot measures with a disparate impact on minorities to strict scrutiny); Mihui Pak, *The Counter-Majoritarian Difficulty in Focus: Judicial Review of Initiatives*, 32 COLUM. J.L. & SOC. PROBS. 237, 262-73 (1999) (arguing that in the absence of procedural reform, all successful ballot measures should be strictly scrutinized by courts); Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities' Democratic Citizenship*, 60 OHIO ST. L.J. 399, 410 (1999) (arguing that courts should apply strict scrutiny to successful

This Article accepts the premise that direct democratic measures, and initiatives in particular, raise special concerns that demand attention. Existing proposals for reform, however, are either flawed, incomplete, or impracticable, in large part because commentators have failed adequately to confront the "myth of popular sovereignty" in direct democracy. This myth assumes that initiatives appear almost magically on ballots and in statute books as a result of the "will of the people," rather than the work of the unelected, and largely unaccountable, special interest groups that draft, finance, and lobby on behalf of the measures.[14] This Article argues that the myth of popular sovereignty in direct democracy should be rejected and that ballot initiatives should no longer be romanticized as lawmaking by "the people," but rather should be viewed as lawmaking by "initiative proponents" whose general objective is either ratified or rejected by the voters.[15]

Rejecting the myth of popular sovereignty in direct democracy would resolve the primary difficulties that are currently associated with judicial review of successful ballot measures.[16] First, candid recognition that successful ballot measures constitute lawmaking by initiative proponents would eliminate the evidentiary difficulties associated with establishing an impermissible purpose by the electorate when courts assess the constitutional validity of successful ballot measures. By focusing on the statements of the initiative proponents during a ballot campaign, and utilizing the ordinary tools of discovery in civil litigation, courts would be able to assess the motivations that led to a ballot measure's enactment. This approach

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ballot measures when "the initiative has unduly burdened a minority group's civil participation").

13. *See* Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295 (1981) ("It is irrelevant that the voters rather than a legislative body enacted [the statute under consideration], because the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation."); Craig B. Holman et al., *Judicial Review of Ballot Initiatives: The Changing Role of State and Federal Courts*, 31 LOY. L.A. L. REV. 1239, 1246 (1998) ("The courts have generally operated under the presumption that both legislation and initiatives are subject to similar standards of review and constitutional scrutiny.").

14. *See infra* Part II.

15. Although this conclusion is supported by the work of leading legislation scholars, *see* Philip P. Frickey, *Interpretation on the Borderline: Constitutions, Canons, Direct Democracy*, 1996 ANN. SURV. AM. L. 477, 519 (recognizing that "[d]irect democracy consists of two separate processes: proposal by well-organized interests and ratification by the electorate"); Schacter, *supra* note 5, at 111 (explaining that "the direct lawmaking process gives powerful leverage to initiative drafters, who are situated to construct a phantom popular intent through strategic drafting"), they have not advocated the adoption of procedural reforms of the kind suggested in this Article.

16. *See infra* Parts II.C & III.C.

would also have the advantage of holding initiative proponents directly accountable for respecting constitutional values during the lawmaking process. Moreover, treating the initiative proponents as the relevant lawmakers in direct democracy would allow courts to continue utilizing an intentionalist methodology to interpret successful ballot measures without resorting to a counterproductive fiction of "voter intent."

On the other hand, an express recognition that direct democracy involves lawmaking by initiative proponents intensifies the tension between direct democracy and representative government, the problems associated with the delegation of lawmaking authority to unelected actors in a democracy, and the absence of structural safeguards to encourage careful deliberation and reasoned decisionmaking in the lawmaking process.[17] Critics of direct democracy have failed to recognize, however, that initiative proponents are not the only unelected lawmakers in our democracy. Administrative agencies have freely enacted binding rules based on broad delegations of authority from the legislative branch ever since the New Deal. Although this development has always been considered constitutionally suspect, courts have allowed it to continue unabated, largely because administrative law has adopted alternative structural safeguards to replace those provided in the traditional legislative process by representation and the requirements of Article I, Section 7. Specifically, administrative agencies must comply with the notice-and-comment procedures of the Administrative Procedure Act, and their final rules must withstand hard-look judicial review. Those safeguards ensure that agency officials engage in careful deliberation and reasoned decisionmaking during the lawmaking process and have thereby legitimized agency lawmaking.

This Article does not claim that the proponents of direct legislation are like administrators in all respects, but there are some remarkable similarities for the purposes of this project. First, direct democracy and agency lawmaking were both championed during the progressive movement to achieve instrumental goals that were allegedly frustrated by a cumbersome, unresponsive, or corrupt legislative process.[18] Second, both forms of lawmaking deviate from

17. *See infra* Part III.

18. *See, e.g.*, THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 38-59 (1989) (describing the development of direct democracy in the states); Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 392-94 (describing the progressive support for, and influence upon, the development of administrative government based on the characterization of agencies as apolitical experts).

the procedures set forth in the Constitution and are therefore inherently suspect.[19] Finally, in both cases, there is a legitimate concern that elected representatives will punt on difficult choices facing the polity and shift responsibility for the most controversial issues of public policy to less accountable actors.[20]

Notwithstanding these concerns, lawmaking by administrative agencies has been effectively constrained and legitimized by the adoption of procedural safeguards and hard-look judicial review of the reasoning underlying agency decisions.[21] This Article argues, for the first time, that a similar model is needed to constrain the proponents of ballot measures and thereby legitimize the use of direct democracy.[22] It therefore draws on the agency model to propose amending state laws that regulate direct democracy to subject the proponents of initiatives to the requirements of public deliberation and reasoned decisionmaking that presently constrain administrative agencies. The Article argues that unlike previous proposals, such reforms of initiative lawmaking would promote careful deliberation, improve the legislative product, and provide a heightened standard of judicial review that is well established and directly responsive to the serious structural shortcomings of the current method of lawmaking by "the people."

I. THE SHORTCOMINGS OF LAWMAKING BY INITIATIVE AND PROPOSALS TO MODIFY JUDICIAL REVIEW

A. The Tension Between Direct Democracy and Representative Government

It is commonly recognized that the Framers of the United States Constitution were intimately concerned with the potential for "faction" within the populace and the resulting "tyranny of the

19. *See infra* Parts I.A & III.A.

20. *See, e.g.*, Lisa Schultz Bressman, *Disciplining Delegation After* Whitman v. American Trucking Ass'ns, 87 CORNELL L. REV. 452, 485 (2002) (recognizing that those in favor of renewed enforcement of the nondelegation doctrine in administrative law argue "that delegation disserves democracy because it allows Congress to avoid responsibility for the hard choices underlying law"); Phillip Frickey, *The Communion of Strangers: Representative Government, Direct Democracy, and the Privatization of the Public Sphere*, 34 WILLAMETTE L. REV. 421, 434 (1998) (expressing a concern regarding "the timidity of California politicians on important matters because of the specter of the initiative").

21. *See infra* Parts III.B & IV.B.

22. *See infra* Parts III-IV.

majority."[23] One of the principal structural devices the Framers adopted to safeguard against these concerns was representative democracy, which was intended to ensure that lawmaking was the product of thoughtful deliberation by elected representatives, rather than the passions or narrow self-interests of the people.[24] The Framers

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23. James Madison was particularly concerned about "factions," or what we might describe today as special interests—"a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of otber citizens, or to the permanent and aggregate interests of the community." THE FEDERALIST NO. 10, at 78 (Madison) (Clinton Rossiter ed., 1961). He explained that "[a]mong the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction." *Id.* at 77.

Madison believed that "minority factions" would normally be restrained "by regular vote" and the related principle of majority rule. *Id.* at 80. The tyranny of the majority, however, was a cause for greater concern because majority factions could sacrifice "the public good and the rights of other citizens" to their "ruling passion or interest." *Id.* The rights and interests of minorities would be insecure "[i]f a majority be united by a common interest." THE FEDERALIST NO. 51, at 323 (Madison) (Clinton Rossiter ed., 1961). Madison famously warned that "there are particular moments in public affairs when the people stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn." THE FEDERALIST NO. 63, at 384 (Madison) (Clinton Rossiter ed., 1961). Because notions of civic virtue and public education were insufficient to guard against this form of tyranny, the Framers recognized that the United States Constitution needed to incorporate structural safeguards to counteract majority passions. *See* Eule, *supra* note 2, at 1522-31 (providing an influential discussion of the republican safeguards contained in the Constitution); Sunstein, *supra* note 10, at 31-49 (same); *see also* Rebecca L. Brown, *Liberty, The New Equality*, 77 N.Y.U. L. REV. 1491, 1512-20 (2002) (explaining that separated powers, federalism, and accountability check oppressive lawmaking and that tbe "communion of interests" historically reflected by representation provided an additional safeguard by ensuring that "legislators effectively burden themselves as they burden others"); Charlow, *supra* note 5, at 534-41 (explaining that in response to the perceived threat of faction, "the framers devised a scheme of government containing several safeguards against majority tyranny," which were "intended to filter bare majority preferences and to protect electoral minorities").

24. Madison distinguished representative democracy from the "pure democracies of Greece," and explained that the "total exclusion of the people in their collective capacity" from directly making policy for the national government had a number of perceived advantages. *See* THE FEDERALIST NO. 63, *supra* note 23, at 386-87. First, the pluralism encouraged by a large federal government would protect against the possibility that sufficient numbers of people would develop a common desire to oppress minorities. *See* THE FEDERALIST NO. 10, *supra* note 23, at 82-84; Sunstein, *supra* note 10, at 40. Second, the process of representation would itself "refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations." THE FEDERALIST NO. 10, *supra* note 23, at 82. Representatives in a large republic would necessarily be exposed to a host of different perspectives that would prevent them from becoming unduly attached to parochial concerns.

> Extend the sphere [of the Republic], and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a motive exists, it will be more difficult for all who feel it to discover their own strength and act in unison with each other.

also devised a system of separated powers with checks and balances, including bicameralism and presentment, which would constrain the three branches of government from operating without a certain level of consensus.[25] As Cass Sunstein has explained, the picture that emerges from the constitutional structure "has been aptly termed 'deliberative democracy.' "[26] Because the safeguards of republican democracy are absent from direct democracy, however, lawmaking by initiative is in tension with this constitutional structure.[27]

See id. at 83. Moreover, professional representatives would have the leisure to learn about the problems of the day and reflect upon appropriate solutions through a process of deliberation and debate. In short, elected representatives would be capable of engaging in a process of reasoned deliberation from which the common good would emerge. Sunstein, *supra* note 10, at 41.

25. While faith in the capacity of representatives to legislate for the common good may strike modern observers as elitist, utopian, or naive, the constitutional framework contains additional structural safeguards that were designed to encourage deliberation and consensus in the legislative process even when elected representatives are less than virtuous. *See* Sunstein, *supra* note 10, at 43 ("The structural provisions of the Constitution attempted to bring about public-spirited representation, to provide safeguards in its absence, and to ensure an important measure of popular control."). In this regard, the Framers established a system of separated powers so that "ambition [would] be made to counteract ambition." *See* THE FEDERALIST NO. 51, *supra* note 23, at 322. This was accomplished at the outset by establishing a national government of limited and enumerated powers. As the Tenth Amendment makes explicit, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. The Constitution therefore establishes a federal system of government in which the national government competes with the states for their respective spheres of authority. *See* THE FEDERALIST NO. 51, *supra* note 23, at 323 (explaining that "[t]he different governments will control each other" under a federal system).

The Constitution, of course, also divides the enumerated powers of the national government into three distinct branches. *See* U.S. CONST. arts. I-III. For a discussion of some of the virtues of separation of powers, see THE FEDERALIST NO. 51, *supra* note 23, at 321-25. Moreover, Congress's legislative authority is subject to Article I's requirements of bicameralism and presentment. *See* U.S. CONST. art. I, § 7, cl. 2. An identical bill therefore has to be enacted by both the Senate and the House of Representatives to become law. This requirement not only ensures that two separate representative bodies deliberate over the advisability of proposed legislation (thereby increasing the perceived advantages of representation), but the different composition of those chambers also broadens the constituencies served by the legislative process. *See* CRONIN, *supra* note 18, at 30-32 (describing the purposes of bicameralism and the varying composition of the two chambers of Congress). Once the requirement of bicameralism is satisfied, however, a bill does not become law until it is approved by the President, or until a two-thirds majority in both chambers votes to override an executive veto. Accordingly, a bill cannot become law unless there is either majority support for the measure in both chambers of Congress and executive approval or an unusually high level of congressional demand for the proposed legislation.

26. Sunstein, *supra* note 10, at 45 (quoting Joseph M. Bessette, *Deliberative Democracy: The Majority Principle in Republican Government*, *in* HOW DEMOCRATIC IS THE CONSTITUTION? 102 (R. Goldwin & W. Schambra eds., 1980)).

27. *See* THE FEDERALIST NO. 10, *supra* note 23, at 81-84 (rejecting the use of direct democracy at the national level by distinguishing between a "pure Democracy" and the "republic" that was being established); *see also* Charlow, *supra* note 5, at 531-48 ("The proposition that there is a constitutional problem with plebiscites stems from the idea that although our government derives its ultimate legitimacy from the will of the people, majoritarianism is not the

Despite this tension, the Supreme Court has held that the constitutionality of a state's direct democratic institutions is nonjusticiable[28] and has therefore refused to interpret the provision of the United States Constitution that "guarantee[s] to every State in this Union a Republican Form of Government."[29] Because direct democracy is nonetheless constitutionally suspect,[30] a number of

central premise on which our government is hased."); Eule, *supra* note 2, at 1525 (concluding that "most of the ways the Constitution devises to filter majority preferences are ahsent from direct democracy—at least from the substitutive version"); Frickey, *supra* note 20, at 423 (recognizing that the framers struck a balance hetween "the desire for democratic government with the need for stability, protection of individual rights, and efficiency" "by designing a representative government rather than a more direct form of democracy"); Frickey, *supra* note 15, at 478-81 (describing direct democracy's "formal and functional tension with republican values and form"); Hamilton, *supra* note 4, at 2 (explaining that the Framers chose representative democracy and rejected direct democracy); Linde, *supra* note 8, at 24 ("That a republican form of government meant representative, not direct, democracy could not be stated more emphatically."). *But see* Alan Hirsch, *Direct Democracy and Civic Maturation*, 29 HASTINGS CONST. L.Q. 185, 186-202 (2002) (arguing that "contrary to the prevailing view in the legal community, the founding fathers believed in direct democracy, and the Constitution embodies it"); Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution's Guarantee Clause*, 80 TEX. L. REV. 807, 836 (2002) (claiming that "[t]he historical record is flooded with statements in which participants implicitly assume that republics may employ direct citizen lawmaking").

28. *See* Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912), *dismissing writ of error to review* 53 Or. 162, 99 P. 427 (1909).

29. U.S. CONST. art. IV, § 4.

30. *See* Eule, *supra* note 2, at 1545 ("In the end, my claim is that direct democracy is constitutionally suspect, not impermissible."). Several commentators have argued that the Supreme Court should overrule *Pacific States* and address challenges to the constitutionality of direct democratic measures under the Guarantee Clause on the merits. *See* Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 952, 967-68 (1994); Cynthia L. Fountaine, Note, *Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative*, 61 S. CAL. L. REV. 733, 755-76 (1988); Hamilton, *supra* note 4, at 13-14. Moreover, Hans Linde, a prominent legal scholar and former Justice of the Oregon Supreme Court who has written extensively on direct democracy, has argued that state courts have an independent duty under the Supremacy Clause to enforce the provisions of the Guarantee Clause, and that certain initiative measures should be invalidated under that provision. *See generally* Hans A. Linde, *On Reconstituting "Republican Government,"* 19 OKLA. CITY U. L. REV. 193 (1994); Hans A. Linde, *Practicing Theory: The Forgotten Law of Initiative Lawmaking*, 45 UCLA L. REV. 1735 (1998); Hans A. Linde, *State Courts and Republican Government*, 41 SANTA CLARA L. REV. 951 (2001); Linde, *supra* note 9, at 19.

Although the foregoing proposals would plainly alleviate some of problems of direct democracy, a close examination of the Guarantee Clause is beyond the scope of this project. Instead, this Article accepts Julian Eule's claim that direct democracy is constitutionally suspect—not that it is impermissible. It bears noting, moreover, that courts would almost certainly be reluctant unilaterally to take a more aggressive approach to reviewing the validity of successful initiative measures under the Guarantee Clause. In contrast, because the proposals advocated in this Article would require positive enactment under state law, the heightened judicial scrutiny of successful ballot measures described below would have greater democratic legitimacy—and pose fewer concerns regarding the countermajoritarian difficulty—than efforts to review the validity of successful ballot measures more stringently under particular constitutional provisions. *See infra* Parts III.C & IV.B.

commentators have suggested that courts should review the validity of certain direct democratic measures more stringently than traditional legislation to compensate for the absence of safeguards against majority faction that are provided by representative democracy and the separation of powers.[31] For example, Julian Eule argued that the constitutionality of some direct democratic measures deserves a "harder judicial look" because the availability of judicial review is the only structural safeguard against the risk of majority tyranny in the initiative context.[32]

The clearest example Professor Eule provided of what this "harder judicial look" would entail was in the equal protection context.[33] Under current equal protection doctrine, legislation that is facially neutral but has a disparate impact on certain protected groups can only be invalidated by a plaintiff's demonstration that the measure was enacted with a discriminatory purpose.[34] Professor Eule identified the difficulties of establishing the discriminatory purpose of a law that is enacted directly by the voters rather than by a legislature.[35] Public debate about the merits of a proposed ballot measure by the electorate is minimal, and voting is conducted in private.[36] Moreover, even if it were possible to determine the subjective intentions of thousands of individual voters, a number of lower courts have barred judicial inquiry into their motivations.[37] For example, Professor Eule observed that the Fifth Circuit has held that the First Amendment "assures every citizen the right to 'cast his vote for whatever reason he pleases.' " According to the court, while racial prejudice, for example, is "neither socially admirable nor civically attuned, [it is] not constitutionally proscribed."[38]

In response to this evidentiary dilemma, Professor Eule recommended either relaxing the burden of proving discriminatory purpose and allowing the introduction of nontraditional sources, such as media accounts and exit polls, to establish impermissible bias, or abandoning the discriminatory purpose requirement altogether.[39] Professor Eule did not limit this approach, however, to equal

31. *See supra* note 12.

32. *See* Eule, *supra* note 2, at 1548-73.

33. *See id.* at 1561-68; *see also* Charlow, *supra* note 5, at 550-60 (summarizing and evaluating Eule's proposals); Frickey, *supra* note 15, at 485-90 (same).

34. *See* Washington v. Davis, 426 U.S. 229, 237 (1976).

35. Eule, *supra* note 2, at 1561-62.

36. *Id.* at 1561.

37. *Id.*

38. *Id.* (quoting Kirksey v. City of Jackson, 663 F.2d 659, 662 (5th Cir. 1981)); *see also id.* at 1561-62 & nn.259-62 (citing additional authorities for the sanctity of the secret ballot).

39. *Id.* at 1562.

protection claims raised by members of suspect classes that already receive judicial protection under strict scrutiny review, but seemed to apply his proposal to other groups as well, including "the underrepresented poor" and "non–English speaking persons."[40] Finally, Professor Eule appeared to endorse more stringent judicial review of successful ballot measures that would ordinarily be assessed under the rational basis standard of review in cases where "[t]he absence of structured factfinding . . . and the dangers of classification inherent in a process of naked aggregation" disadvantage "the powerless whose voices are stifled in the unfiltered setting of direct democracy."[41]

B. Interpretive Dilemmas in Direct Democracy

Aside from the constitutionally suspect nature of direct democracy, lawmaking by initiative also raises potentially difficult problems of statutory interpretation. These problems were well documented in a seminal article by Jane Schacter, a leading scholar of statutory interpretation.[42] Professor Schacter demonstrated that when courts interpret direct democratic measures, they routinely purport to apply the same intentionalist principles that dominate the interpretation of ordinary legislation.[43] Rather than ascertaining the intent of a legislative body, however, courts in the direct democratic context typically claim to be furthering the "popular intent" of the electorate.[44] Beyond this concession, courts seem unwilling or unable

40. *Id.* at 1560, 1567-68.

41. *Id.* at 1568-72.

42. *See* Schacter, *supra* note 5, at 107; *see also* Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575 (2002); Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1 (1998); Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593 (1995).

43. Schacter, *supra* note 5, at 117-19.

44. *Id.* For similar conclusions about the methodology used by courts to interpret successful ballot measures in particular states, see Linda A. Cistone-Albers, *Deconstructionist and Pragmatic Analyses Reveal the "Intent to Discriminate" in Proposition 227—A California Initiative*, 27 W. ST. U. L. REV. 215, 252-56 (2000) (describing a federal court's reliance on the statutory text, legal precedent, and "voter intent" to review a ballot initiative to end bilingual education in California, but noting the court's self-declared incompetence to consider empirical evidence submitted by the litigants regarding the merits of the proposal); Jack L. Landau, *Hurrah for Revolution: A Critical Assessment of State Constitutional Interpretation*, 79 OR. L. REV. 793, 873-83 (2000) (describing the approach of Oregon courts to the interpretation of constitutional amendments enacted by initiative, and claiming that while the touchstone is "voter intent," the courts have wavered between application of a strict textualist approach and the use of broader historical materials, including the measure's title, materials in the ballot pamphlet, and news articles "that may have influenced the voter thinking at the time"); Jack L.

to differentiate measures enacted directly by the electorate from those enacted through the ordinary legislative process when they are confronted with interpretive questions.[45]

Professor Schacter also demonstrated, however, that when courts ascertain the popular intent of the electorate, they rely almost exclusively on formal legal sources of meaning, including the language of the ballot measure, the language of related statutes, canons of statutory construction, legal precedent, and information from ballot pamphlets, which is sometimes used as a substitute for traditional legislative history.[46] At the same time, courts routinely ignore media accounts and advertising as sources of popular intent, even though the social science literature suggests that those sources are most likely to influence the positions of voters in ballot campaigns.[47]

Landau, *Interpreting Statutes Enacted by Initiative: An Assessment of Proposals to Apply Specialized Interpretive Rules*, 34 WILLAMETTE L. REV. 487, 489, 491-99 (1998) (recognizing that "[t]he courts seem to have taken for granted [sic] fact that the traditional model of statutory interpretation applies to initiated enactments" and that they will therefore "frequently attempt to ascertain legislative—that is, voter—intent, by applying various interpretive canons and by examining the text of the enactment and its 'legislative history,' as embodied in the voters' pamphlet and similar extrinsic materials"); Sean Pager, *Is Busing Preferential? An Interpretive Analysis of Proposition 209*, 21 WHITTIER L. REV. 3, 12-16 (1999) (describing the approach of California courts to interpreting initiatives and indicating that voter intent is always the paramount consideration); Cathy R. Silak, *The People Act, the Courts React: A Proposed Model for Interpreting Initiatives in Idaho*, 33 IDAHO L. REV. 1, 10-19 (1996) (explaining that for purposes of statutory interpretation and constitutional review, courts in Idaho "see no essential difference between measures enacted by initiative and referendum and those created through the usual legislative process") (quoting Westerberg v. Andrus, 757 P.2d 664, 670 (Idaho 1988)); Philip A. Talmadge, *The Initiative Process in Washington: Implications and Effects*, 24 SEATTLE U. L. REV. 1017, 1017 n.1 (2001) (stating that "[t]he Washington Supreme Court reviews initiative measures just as it would legislatively enacted bills"); Stephen Salvucci, Note, *Say What You Mean and Mean What You Say: The Interpretation of Initiatives in California*, 71 S. CAL. L. REV. 871, 875-83 (1998) (describing the methodology used by California courts to divine the "voter intent" of a ballot measure and identifying some its problems).

45. *See* Schacter, *supra* note 5, at 119 ("In particular, there is little indication that courts modify the interpretive sources they consult to accommodate the particular structural dynamics of the direct legislative process.").

46. *Id.* at 119-23; *see also* Pager, *supra* note 44, at 12-15 (stating that when California courts seek to identify the voter intent, they rely initially on the text of the ballot measure but will resolve ambiguities by considering arguments and summaries found in the ballot pamphlet—especially those drafted by the initiative proponents—historical context, and contemporaneous constructions by the legislature or relevant administrative agencies); Elizabeth A. McNellie, Note, *The Use of Extrinsic Aids in the Interpretation of Popularly Enacted Legislation*, 89 COLUM. L. REV. 157, 165-66 (1989) (reporting that state courts "tend to limit their inquiry" into extrinsic sources of statutory interpretation "to an examination of the official voter pamphlet or at most the pamphlet and the initiative's statement of purpose, thereby ignoring evidence of intent in the media debate that precedes an election").

47. *See* Schacter, *supra* note 5, at 119-23; *see also id.* at 131-38 (canvassing social science research regarding influences on voter behavior in ballot elections); CAL. COMM'N ON CAMPAIGN FIN., *supra* note 6, at 197-226 (concluding that "[v]oters rely heavily on election information received from the news media and campaign advertisements in deciding how to vote, especially

Judicial inquiry into the popular intent of the electorate is inherently problematic for a number of reasons. First, the characteristic problems of intentionalism in traditional statutory interpretation are magnified in the direct democratic context.[48] For example, even if one were to accept the rather dubious premise that any individual voter intent existed on a particular interpretive question, courts simply could not cumulate what might be millions of voter intentions on the issue.[49] Similarly, although it may be reasonable to assume that legislators have some detailed knowledge of the intended meaning of traditional legislation, many of the particular legal consequences of new initiative laws are systematically unforeseeable to the general electorate.[50] Voters generally lack "any detailed knowledge of the legal context surrounding a proposed initiative."[51] Moreover, voters are often unfamiliar with the technical legal jargon that is used in the text of ballot measures.[52] Indeed, a host of empirical evidence suggests that most voters do not even read, much less understand, the text of direct democratic measures.[53]

Professor Schacter argued that the sources courts rely upon to identify the voter intent underlying direct democratic measures result in a paradox, which she described as "the Inverted Informational

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for ballot propositions in which many of the traditional voting cues frequently are not available"); CRONIN, *supra* note 18, at 118 ("In many states, the most important aspect of the media in issue elections is paid television political advertisements."); DUBOIS & FEENEY, *supra* note 6, at 126 (explaining that initiative voters rely heavily on newspapers and television for information about ballot measures); DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 133-34 (1984) ("In proposition elections, voters rely almost entirely upon the mass media for information about propositions."); BETTY H. ZISK, MONEY, MEDIA, AND THE GRASS ROOTS: STATE BALLOT ISSUES AND THE ELECTORAL PROCESS 245-48 (1987) (indicating that sloganeering campaign advertisements are sometimes critical sources of information for initiative voters, especially when they do not read newspapers).

48. Schacter, *supra* note 5, at 124-26.

49. *Id.* at 124-25.

50. *Id.* at 127-28.

51. *Id.*

52. *Id.* at 123.

53. *Id.* at 139-40, nn.136-44; *see also* CAL. COMM'N ON CAMPAIGN FIN., *supra* note 6, at 261 (finding that "[v]ery few people actually read initiative texts, and their legalese constitutes an intimidating part of the [ballot] pamphlet"); CRONIN, *supra* note 18, at 74 (reporting the results of a survey conducted in four states in which between fifty-four and seventy-four percent of respondents "strongly agree[d]" or "somewbat agree[d]" with the statement that "[t]he initiative and referendum measures on the ballot are usually so complicated that one can't understand what is going on"); DUBOIS & FEENEY, *supra* note 6, at 136 (reporting the results of a voter survey indicating that less than seventeen percent of voters said that they "usually" read the legal text); MAGLEBY, *supra* note 47, at 118-19 (conducting a comprehensive "readability" study of ballot langnage in four states, and concluding that less than twenty percent of tbe adults in any of those states could have been expected to have the requisite levels of education).

Hierarchy."[54] On one hand, the formal sources at the center of judicial interpretation of direct democratic measures—statutory language, legal texts, and, to a lesser extent, official ballot materials—are widely ignored by, or incomprehensible to voters.[55] On the other hand, the sources most heavily consulted by voters—media and advertising—are routinely ignored by courts and are, in any event, unlikely to be used effectively as judicial sources of popular intent.[56] As a result, "the hierarchy of interpretive sources that courts consult in the asserted service of locating popular intent is roughly *inverse* to the hierarchy of informational sources that voters consult most regularly in ballot campaigns."[57]

This paradox is likely to endure because it is unrealistic to expect voters to become familiar with the legal landscape surrounding an initiative measure.[58] Moreover, a judicial inquiry into the media accounts and advertising that actually influenced the voters is unlikely to yield any unbiased or determinate answers to the interpretive questions facing courts.[59] Thus, the purported judicial inquiry into the popular intent of the electorate is likely to be an exercise in futility.[60]

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54. Schacter, *supra* note 5, at 130.

55. *Id.* at 130, 139-44.

56. *Id.* at 130-38.

57. *Id.* at 130.

58. *See id.* at 130, 139-44.

59. *Id.* at 130, 144-47.

60. *Id.* at 147 (concluding that "the gap between judicial and voter practices seems enduring—perhaps inevitable"). Professor Schacter briefly considered the advisability of forgoing intentionalist principles in the interpretation of direct democratic measures and relying instead on the other leading theories of statutory interpretation. *Id.* at 146-47, 149-50. She correctly concluded, however, that the other prevailing theories of statutory interpretation do not fare substantially better in this context. *See id.* First, in addition to its other characteristic problems, strict textualism and its reliance on the "plain meaning" of an enactment would seem unjustifiable when it is widely understood that most voters do not read or understand the language of initiative measures, which are often poorly drafted in the first place. *Id.* at 150. For more extensive critiques of the purported objectivity of textualism, see, e.g., William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 668-70 (1990); Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 300-06 (1990); Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1080-81, 1084-88 (1992). For discussions of the poorly drafted nature of many initiative measures, see, e.g., CRONIN, *supra* note 18, at 70-77 (describing the shortcomings in voters' understanding of ballot issues); ELISABETH R. GERBER ET AL., STEALING THE INITIATIVE: HOW STATE GOVERNMENT RESPONDS TO DIRECT DEMOCRACY 110 (2001) (explaining that "to obtain victory at the ballot box[,]" "some initiative proponents may have no choice but to write an initiative in vague or ambiguous language"); Eule, *supra* note 2, at 1516 ("Considering the complexity and obtuseness of some measures, it's a wonder that anyone knows what he or she is voting on."); Frickey, *supra* note 15, at 481 ("For a variety of reasons, direct democracy is probably more likely than legislative lawmaking to produce ambiguous statutory text."); Schacter, *supra* note 5, at 139-40

Professor Schacter ultimately concluded that what her study "most strongly suggests is that the informational dynamics of direct lawmaking impede deliberation and create opportunities for strategic abuse of the process" by initiative proponents who draft the language of ballot measures and typically have sufficient expertise to understand the existing legal landscape into which their measures will fit.[61] In order to address these concerns, she recommended constructing a distinct "interpretive approach" for direct democratic measures.[62] The goal of such an interpretive approach would be to "resolve statutory ambiguity based on underlying ideas about 'democratizing' the direct lawmaking process."[63]

Specifically, Professor Schacter would encourage deliberation in the interpretation of direct democratic measures by making the process of litigating the meaning of ambiguous ballot measures open to a broader range of perspectives.[64] Although she acknowledged that "[t]he judicial process is not a perfect substitute for a more robustly deliberative initiative process," Professor Schacter concluded that courts should maximize "procedural opportunities for participation by

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(describing the complex nature of many ballot proposals). Moreover, purposive approaches, which may seem like the most intuitively appealing solution to this problem, are fundamentally flawed in the initiative context because they are based on legal process assumptions of coherent action by rational actors in an ongoing legislative process, which cannot plausibly be applied to the one-shot process of direct decisionmaking on a single subject by the electorate. *See* Elizabeth Garrett, *Who Directs Direct Democracy?*, 4 U. CHI. L. SCH. ROUNDTABLE 17, 32-33 (1997) (explaining that legal process assumptions of coherence and reasoned decisionmaking are highly problematic in the context of direct democracy); Frickey, *supra* note 15, at 486-87, 506 (same). In any event, furthering the "purpose" of the electorate on the broad question actually considered by voters is unlikely to provide any meaningful guidance in a concrete case. *See* Schacter, *supra* note 5, at 146-47.

61. Schacter, *supra* note 5, at 154, 156-59; *see also id.* at 128 (recognizing that, unlike voters, an initiative's drafters are capable of understanding the "legal context" surrounding a proposed initiative and "the technical legal jargon that is used in the text" of ballot measures); BRODER, *supra* note 7, at 70 (quoting an initiative consultant who recognized that "[s]ince every initiative seems to be tested in the courts, [a proposal] better be legally sufficient to accomplish the purpose"); *id.* at 72 (reporting that lawyers retained by the initiative proponents "counsel their clients on the arguments between supporters and opponents about the effects of the initiative, and . . . prepare for the almost inevitable day when the initiative, if approved, is challenged in the courts"); Frickey, *supra* note 15, at 519 (explaining that "[u]nlike the electorate as a whole, many of the active participants (such as trial lawyers and insurance companies on tort-reform issues) are frequent 'players' in the repeat game of direct democracy" who can be expected to pay attention to legal decisions and respond accordingly); Garrett, *supra* note 60, at 30 (recognizing that "ballot proposals are drafted by repeat players who can learn the rules of statutory interpretation and behave accordingly").

62. Schacter, *supra* note 5, at 152-64; *see also* Frickey, *supra* note 15, at 490-94 (summarizing and evaluating Schacter's proposals).

63. *See* Schacter, *supra* note 5, at 153.

64. *Id.* at 155-56.

a range of interests."[65] These opportunities could be provided by liberally granting motions for leave to intervene or to file amicus curiae briefs by interested parties, as well as by considering "appointing pro bono representation for unrepresented, or even unorganized, interests."[66]

Professor Schacter also argued that courts should adopt rules of construction that would create disincentives for initiative proponents strategically to manipulate the process.[67] She ultimately rejected a rigid rule of narrow interpretation for all initiatives because of the strong status quo bias inherent in such a rule and the need to differentiate between particular ballot measures.[68] Nonetheless, she advocated interpreting ambiguous initiative language narrowly when it seems especially likely that the ballot measure is potentially tainted by the manipulation of "highly organized, concentrated, and well-funded interests."[69]

C. The Indirect and Selective Nature of Existing Proposals for Modified Judicial Review

Professors Eule and Schacter have persuasively described the fundamental problems with direct democracy and proposed some intriguing reforms. The willingness and ability of courts to implement their proposals is, however, open to question.[70] More important for present purposes, their proposals seek to address pervasive structural problems of initiative lawmaking indirectly by altering the nature of judicial review for some individual ballot measures, rather than by directly reforming the initiative process itself.[71] The remainder of this

65. *Id.* at 156.

66. *Id.*

67. *See id.* at 156-59.

68. *See id.* at 160-61.

69. *Id.* at 157-59.

70. *See* Frickey, *supra* note 15, at 487, 492 (concluding that the most significant problem with Eule's and Schacter's proposals may lie in their implementation).

71. Robin Charlow has persuasively criticized Eule's specific proposals, in part, on the grounds that, while he claimed that direct democracy is constitutionally problematic as an institution because of the absence of structural filters against majority faction that are inherent in the traditional legislative process, his reforms focused on the substantive constitutionality of individual measures enacted by the electorate. *See* Charlow, *supra* note 5, at 559. In other words, while Eule's attack focused on the structure of the lawmaking process, he proposed a remedy that would address the substantive results of the process, rather than the faulty process itself. *See id.* Moreover, some of Eule's suggestions seemed to assume a change in the essential nature of the meaning of certain constitutional provisions in the special case of direct democracy. *See id.* at 561-64.

To the extent that Eule's proposals could be justified on the grounds that successful ballot measures deserve less deference than traditional legislation as the product of a deliberate,

Article accepts Eule's and Schacter's concerns, but argues that a more straightforward and effective solution is available for the problems they identify. As explained below, this solution would require, first, a candid rejection of the myth of popular sovereignty in direct democracy and, second, the adoption of procedural safeguards to encourage careful deliberation during the lawmaking process and hold initiative proponents accountable for their actions.

II. REJECTING THE MYTH OF POPULAR SOVEREIGNTY IN DIRECT DEMOCRACY

A. The Myth of Popular Sovereignty in Direct Democracy

Direct democracy is commonly perceived as a mechanism to bypass an inefficient and unresponsive legislative process in order to permit lawmaking by "the people."[72] The philosophical legitimacy of

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rational, and benign lawmaking process, *see id.* at 573-74 ("If the reasons for according deference to legislative decisionmaking are not applicable in the plebiscitary context, it would be appropriate for courts to afford less deference to the public as lawmaker than to the legislature."); Frickey, *supra* note 15, at 485-87 (explaining that many important constitutional doctrines, including deferential review of the rationality of most legislation, "are based on presumptions rooted in benign judicial assumptions about the legislative process"), this conclusion would seem to apply to all direct democratic measures. *See* Frickey, *supra* note 15, at 493 (recognizing that "the informational and deliberative problems associated with direct democracy are endemic, not just limited to the unusual case"); *infra* Parts II-III. Nonetheless, Eule selectively chose certain types of initiatives for more stringent judicial review, without explaining why the categories of suspect classifications that trigger heightened scrutiny under current equal protection doctrine are inadequate or should be expanded only in the context of direct democracy. *See* Charlow, *supra* note 5, at 593-625 (discussing the purposes of heightened judicial scrutiny under equal protection doctrine and concluding that "there does not appear to be any substantial reason to confer additional judicial protection on some groups disadvantaged by plebiscitary results that do not otherwise receive special judicial solicitude when adversely affected by legislative enactments"). *But see* Frickey, *supra* note 15, at 486-87 (concurring "with Eule that courts ought to adopt less utopian assumptions about the outcomes of direct democracy than they do about legislative products"). In short, Eule's proposals seemed to be based more on a substantive disagreement with existing equal protection doctrine than on any particular feature endemic solely to direct democracy. *See* Charlow, *supra* note 5, at 629-30 ("To those for whom equal protection challenges seem inadequate, it is often not so much that plebiscites are different as it is that equal protection challenges probably appear generally inadequate to remedy discrimination, even when legislative or executive action is involved."). As Professor Schacter acknowledged, her reform proposals were similarly selective and indirect. *See supra* notes 62-69 and accompanying text.

72. *See, e.g.*, Hirsch, *supra* note 27, at 185 ("Unsurprisingly, the sense of failure of representative government has increased talk of expanding direct democracy, whereby the People themselves make laws."); Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 205 (1983) (recognizing that the adoption of direct democracy "was another indication of public dissatisfaction with state legislatures" and that "[t]he initiative allowed the people to take direct action when the legislature refused to act").

this form of lawmaking has therefore depended, in large part, upon a belief that popular sovereignty and the will of the people can be expressed in their purest form through the adoption of popularly initiated measures.[73] Indeed, the Populist and Progressive reformers that initially championed direct democracy were strongly influenced by the precedent of the Swiss Cantons and the town meetings of colonial New England.[74] The small size of those communities and existing limitations on the franchise meant that all eligible voters could attend and participate in those meetings. In a sense, then, the legislative products of those meetings could perhaps plausibly be considered the "will of the people" living in those communities.

Drawing upon this precedent, the reformers of the Populist and Progressive movements sought to return power to the people by the adoption of direct democracy.[75] Supporters of direct democracy believed that it would "break the crushing and stifling power of our great party machines, and give freer play to the political ideas, aspirations, opinions and feelings of the people. It will tend to relieve us from the dominance of partisan passions, and have an elevating and educative influence upon voters."[76] Accordingly, William S. U'Ren,

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73. *See, e.g.*, Clark, *supra* note 5, at 435-36 (explaining that the assumption that direct democracy provides the clearest expression of "the voice of the people . . . is at the heart of the populist case for direct democracy"); Richard B. Collins & Dale Oesterle, *Structuring the Ballot Initiative: Procedures That Do and Don't Work*, 66 U. COLO. L. REV. 47, 58 (1995) ("An important variant of the concept that the initiative is a perfection of democracy is the claim that the initiative allows expression of pure majoritarian will, and that this is a virtue.").

74. *See* BRODER, *supra* note 7, at 23 (describing the New England town meeting); Collins & Oesterle, *supra* note 73, at 54 (indicating that Americans who had visited Switzerland "led the movement to promote the initiative and referendum in this country"); David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 19 (1995) (recognizing that "the New England town meeting is frequently cited as a successful use of expanded voter decision-making," but claiming that this example "has worked only in small polities"); Persily, *supra* note 1, at 15 (describing "the American legacy of town meetings and the experience of the Swiss cantons" as "the idyllic, even if misplaced, paradigm for the institutional development of the tools of Progressive democracy").

75. For more thorough discussions of the historical development of direct democracy in the states, see BRODER, *supra* note 7, at 23-41; CRONIN, *supra* note 18, at 38-59; MAGLEBY, *supra* note 47, at 20-47; SCHRAG, *supra* note 7, at 188-94; Collins & Oesterle, *supra* note 73, at 53-63; Rohert Henry, *Deliberations About Democracy: Revolutions, Republicanism, and Reform*, 34 WILLAMETTE L. REV. 533, 554-62 (1998); Persily, *supra* note 1, at 15-38; David Schuman, *The Origin of State Constitutional Dircct Democracy: William Simon U'ren and "The Orcgon System,"* 67 TEMP. L. REV. 947, 949-51, 953-56 (1994). Kenneth P. Miller has recently distinguished populist and progressive conceptions of direct democracy and claimed that while modern-day populists continue to prefer unmediated lawmaking by "the people," contemporary progressives tend to favor structural reforms of the initiative process to promote good government. Kenneth P. Miller, *Constraining Populism: Thc Real Challenge of Initiative Reform*, 41 SANTA CLARA L. REV. 1037, 1039-45 (2001).

76. NATHAN CREE, DIRECT LEGISLATION AND THE PEOPLE 16 (1892), *quoted in* CRONIN, *supra* note 18, at 47-48.

the leading proponent of direct democracy in Oregon, argued that "[t]he one important thing was to restore the lawmaking power where it belonged—in the hands of the people."[77] In this spirit, the platform of the Populist Party in 1892 proclaimed that the goal of direct democracy was "to restore the government of the Republic to the hands of the 'plain people,' with which class it originated."[78]

The vision of direct democracy as lawmaking by the people was expressly incorporated into the constitutions of those states that adopted the initiative and referendum during the Progressive Movement. Those constitutions typically "reserve" the power of initiative and referendum for "the people."[79] As a result, direct democracy is constitutionally justified in the states precisely as a means by which the electorate can retain an important measure of popular sovereignty and directly pass legislation favored by a majority of voters.

Modern-day supporters of direct democracy typically justify the use of the initiative and referendum on similar grounds.[80] As one proponent of initiative measures told the *Oregonian* newspaper in

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77. CRONIN, *supra* note 18, at 49.

78. Populist Party Platform (1892), *quoted in* CRONIN, *supra* note 18, at 38.

79. *See* OHIO CONST. art. II, § 1 ("The legislative power of the state shall be vested in a General Assembly . . . but the people reserve to themselves the power to propose to the General Assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote . . . ."); OR. CONST. art. IV, § 1 ("The legislative power of the state, except for the initiative and referendum powers reserved to the people, is vested in a Legislative Assembly, consisting of a Senate and a House of Representatives."); CAL. CONST. art. 4, § 1 ("The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum."); ME. CONST. art. IV, pt. 1, § 1:

> The legislative power shall be vested in two distinct branches, a House of Representatives, and a Senate, each to have a negative on the other, and both to be styled the Legislature of Maine, but the people reserve to themselves power to propose laws and to enact or reject the same at the polls independent of the Legislature, and also reserve power at their own option to approve or reject at the polls any Act, bill, resolve or resolution passed by the joint action of both branches of the Legislature. [;]

ARIZ. CONST. art. 4, pt.1, § 1(1):

> The legislative authority of the State shall be vested in the Legislature . . . but the people reserve the power to propose laws and amendments to the Constitution and to enact or reject such laws and amendments at the polls, independently of the Legislature; and they also reserve, for use at their own option, the power to approve or reject at the polls any Act, or item, section, or part of any Act, of the Legislature. [;]

IDAHO CONST. art. III, § 1 ("The people reserve to themselves the power to approve or reject at the polls any act or measure passed by the legislature . . . [and] [t]he people reserve to themselves the power to propose laws, and enact the same at the polls independent of the legislature.").

80. *See, e.g.*, Lynn A. Baker, *Constitutional Change and Direct Democracy*, 66 U. COLO. L. REV. 143, 144 (1995) (recognizing tbat direct democracy is "[o]ften heralded as the purest and highest form of democracy"); Hirsch, *supra* note 27, at 209-17 (claiming that a more direct democracy could be an important means of promoting the civic maturation of the people).

1996, the initiative process "is the only thing we have to protect ourselves from the abuses of big government. I hate to see the people taken advantage of by [unscrupulous] lawyers, crooks, and smooth-talking, conniving politicians."[81] Indeed, the apparently widespread public support for the initiative and referendum can be explained largely as a result of the common perception that direct democracy is a vehicle for the expression of the popular will. Public opinion polls that examine the level of support for direct democracy frequently pose questions such as whether we should "trust our elected officials to make public decisions on all issues" or whether "voters [should] have a direct say on some issues."[82] Not surprisingly, those polled overwhelmingly respond that the "voters should have a direct say."[83]

Similarly, courts that review the constitutional validity of direct democratic measures frequently express the view that direct democracy is an expression of popular sovereignty and the will of the people.[84] For example, in *City of Eastlake v. Forest City Enterprises, Inc.*, the United States Supreme Court rejected a challenge to a city ordinance that required zoning variances to be approved by referendum on the grounds that this requirement unconstitutionally delegated lawmaking authority to the people.[85] The Court explained:

> A referendum cannot . . . be characterized as a delegation of power. Under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create. In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature.[86]

The Court proceeded to compare the referendum to the New England town meeting "as both a practical and symbolic part of our democratic processes," which are "means for direct political participation,

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81. BRODER, *supra* note 7, at 201 (quoting Loren Parks).

82. *See* Gallup Organization, The Gallup Study of Public Opinion Regarding Direct Democracy Devices (Princeton, N.J., Sept. 1987) (conducted for Thomas E. Cronin), *cited in* CRONIN, *supra* note 18, at 80; *see also* Mark DiCamillo & Mervin Field, *Public Divided on the Efficacy of Legislation Enaeted by Elected Representatives vs. Ballot Propositions*, FIELD POLL, Release No. 1940, at 2 (Nov. 11, 1999) (reporting that sixty-two percent of California voters still consider statewide ballot proposition elections "a good thing," but noting that a positive response to the same question had diminished from a high of eighty-three percent in 1979 when the poll was first taken).

83. *See* Gallup Organization, The Gallup Study of Puhlic Opinion Regarding Direct Democracy Devices (Princeton, N.J., Sept. 1987) (conducted for Thomas E. Cronin), *cited in* CRONIN, *supra* note 18, at 80.

84. *See* Clark, *supra* note 5, at 444-45 (claiming that judicial decisions suggest that "representative democracy has come to be seen as a second-rate form of popular sovereignty," while "[d]irect democracy . . . appears to give us the pure and unadulterated voice of the people themselves").

85. 426 U.S. 668, 672 (1976).

86. *Id.* (citation omitted).

allowing the people the final decision, amounting to a veto power, over enactments of representative bodies. The practice is designed to 'give citizens a voice on questions of public policy.' "[87] Accordingly, the Court concluded that the nondelegation doctrine, which prohibits the standardless delegation of lawmaking authority to nonlegislators, "is inapplicable where, as here, rather than dealing with a delegation of power, we deal with a power reserved by the people to themselves."[88]

In *Citizens Against Rent Control v. City of Berkeley*, the Supreme Court invalidated a local ordinance that limited financial contributions to committees formed to support or oppose ballot measures on the grounds that such limitations violate the First Amendment.[89] The city claimed that such regulations were necessary to achieve the compelling governmental interest of avoiding corruption in the lawmaking process, which the Court had earlier recognized in upholding limits on campaign contributions to election candidates and their committees in *Buckley v. Valeo*.[90] The Court distinguished *Buckley* by explaining that "[r]eferenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue."[91] The Court therefore concluded that "[w]hatever may be the state interest or degree of that interest in regulating and limiting contributions" in a candidate election, "there is no significant state or public interest in curtailing debate and discussion of a ballot measure."[92] While the risks of quid pro quo corruption may be absent in the initiative context, the Court underestimated the possibility that "the people" could be unduly influenced by the results of unlimited special interest contributions to ballot campaigns.

Members of the Supreme Court have continued to invoke the rhetoric of popular sovereignty when they confront challenges to the constitutional validity of direct democratic measures. In *Romer v. Evans*, the Court invalidated an initiated amendment to the Colorado Constitution under the Equal Protection Clause.[93] The amendment purported to prohibit state and local governments from enacting,

87. *Id.* at 672-73 (quoting James v. Valtierra, 402 U.S. 137, 141 (1971)).

88. *Id.* at 675.

89. 454 U.S. 290, 300 (1981).

90. 424 U.S. 1, 26-27 (1976).

91. *City of Berkeley*, 454 U.S. at 298 (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 790 (1978)); *see also id.* at 302 (Blackmun, J. & O'Connor, J., concurring) (claiming that "curtailment of speech and association in a ballot measure campaign, where the people themselves render the ultimate political decision, cannot be justified" as necessary to prevent quid pro quo corruption or its appearance).

92. *Id.* at 299.

93. 517 U.S. 620, 635-36 (1996).

adopting, or enforcing "any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination."[94] In his "vigorous[ ]" dissent,[95] Justice Scalia chastised the majority, in part, for setting aside the result of "this most democratic of procedures" in which "all the citizens of the State" responded negatively in a single issue election to the question of whether "homosexuality should be given special protection."[96] Justice Scalia pointedly criticized the majority not only for reaching the wrong result in the case, but for substituting its own "elite" values for those of "the people" of Colorado.[97]

The Supreme Court is hardly alone in invoking the image of popular sovereignty when engaging in judicial review of ballot measures.[98] Indeed, the previous section explained that when courts interpret ballot measures, they routinely purport to further the "popular intent" of the electorate.[99] The entire notion of "popular

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94. *Id.* at 624.

95. *Id.* at 636 (Scalia, J., dissenting).

96. *Id.* at 647 (Scalia, J., dissenting).

97. *Id.* at 652. Justice Scalia concluded his opinion with this argument:

> The people of Colorado have adopted an entirely reasonable provision which does not even disfavor homosexuals in any substantive sense, but merely denies them preferential treatment. Amendment 2 is designed to prevent piecemeal deterioration of the sexual morality favored by a majority of Coloradans, and is not only an appropriate means to that legitimate end, but a means that Americans have employed before. Striking it down is an act, not of judicial judgment, but of political will.

Id. at 653 (Scalia, J., dissenting).

98. Similar invocations of the rhetoric of popular sovereignty in direct democracy can be found in opinions of state and lower federal courts. *See, e.g.*, Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 699 (9th Cir. 1997) (cautioning that judicial invalidation of a successful ballot measure based on an erroneous legal premise "operates to thwart the will of the people in the most literal sense" and that "[a] system which permits one judge to block with the stroke of a pen what 4,736,180 state residents voted to enact as law tests the integrity of our constitutional democracy"); Amador Valley Joint Union High Sch. Dist. v. Tinney, 583 P.2d 1281, 1283 (Cal. 1978) (explaining that because the state constitution provides that "the people reserve to themselves the powers of initiative and referendum," courts must "liberally construe[ ]" the power of initiative "to promote the democratic process") (citations omitted); *see also* Holman et al., *supra* note 13, at 1250, 1253 (finding that "courts in some states, including California, express considerable deference to initiatives and have shown a reluctance to overturn them in their entirety," and explaining that while "the federal courts have not been perceived as showing a similar reluctance to review and invalidate initiatives[,] [i]t is not at all clear at this point whether this perception is valid"). *But see* Kenneth P. Miller, *Courts as Watchdogs of the Washington State Initiative Process*, 24 SEATTLE U. L. REV. 1053, 1075 (2001) (claiming that "[a]lthough they do not expressly say so, some judges seem to apply a higher level of scrutiny to initiatives").

99. *See* Schacter, *supra* note 5, at 117-19; *supra* Part I.B.

intent" is premised on direct democracy's capacity to represent the will of the people. Moreover, courts that seek to implement this popular intent often "use impassioned prose to characterize the initiative as democracy in its purest form, as the closest we can come to genuine popular sovereignty."[100]

A few commentators have questioned whether the specific provisions of successful initiative measures truly represent the will of the people.[101] Moreover, scholars have repeatedly pointed out that the

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100. *In re* Estate of Thompson, 692 P.2d 807, 808 (Wash. 1984); Schacter, *supra* note 5, at 151 (citing Yoshisato v. Superior Court, 831 P.2d 327, 333 (Cal. 1992)).

101. *See* Frickey, *supra* note 15, at 519 (recognizing that "it is much too simplistic to view direct democracy as simply a lawmaking process that replaces the legislature" and that "[d]irect democracy consists of two separate processes: proposal by well-organized interests and ratification by the electorate"); Schacter, *supra* note 5, at 128-30:

> The unfamiliarity of legal terminology to many voters creates powerful leverage for the initiative's drafters, for it enables them to have an unseemly private dialogue of sorts with the courts, who also understand these terms. Through careful use of terminology, drafters can construct a desired—but largely phantom—popular intent.

Similarly, David Magleby has explained as follows:

> In the initiative process, the voter is only partially legislator. Voters generally are not permitted to participate in the drafting of initiatives, nor may they amend the measure, as legislators can. There are no hearings, markup, floor debate, or conference between the two houses to work out technical issues or modify the bill to make it more acceptable. Sponsors of initiatives rarely circulate their proposals before the petition phase, and once this phase begins, the language of the measure cannot change. Voters instead face an initiative crafted entirely by the sponsors on which they may only cast a "yes" or "no" vote. They may in fact favor the concept behind the initiative but object to some specific parts of the proposition. The lack of prior consultation may explain why initiatives are often extreme in their approach and prone to defeat by voters, even though a majority of voters may favor the broad issue concern of the initiative.

Magleby, *supra* note 74, at 43-44.

Julian Eule also recognized the limitations of popular sovereignty in direct democracy when he described the electorate's likely understanding of one particularly complex insurance initiative:

> On one level [this proposition] represents a clear expression of citizen sentiment. It effectively conveyed to the legislature the level of voter concern and dissatisfaction on an issue marked by legislative cowardice. The particulars of the enacted reforms, however, represent little more than the speculative musings of the drafters who were then able to harness a frustrated, angry, and financially drained electorate into passage, based largely on Ralph Nader's endorsement and the promise of lower premiums. To suggest that the voters approved, let alone understood, the many facets of [the proposition] is pure mythology.

Eule, *supra* note 2, at 1570-71. Professor Eule therefore concluded that "[i]t is not immediately evident wbat warrants judicial deference to electoral policy judgments that the electorate never actually made." *Id.* at 1570. Several judges have made similar observations, typically in a futile effort to invalidate initiatives that they did not think the voters could have fully understood. *See, e.g.*, Bates v. Jones, 127 F.3d 839, 844 (9th Cir. 1997) (Reinbardt, J.) (invalidating a term limits measure under the federal Constitution because "a state initiative measure cannot impose a [lifetime ban on running for an office] when the issue of wbether to impose such a limitation of those rights is put to the voters in a measure that is ambiguous on its face and that fails to mention in its text, tbe proponents' ballot arguments, or the state's official descriptions, the severe limitation to be imposed"), *vacated and rev'd*, 131 F.3d 843 (1997) (en banc); Brosnahan v.

ideal of popular sovereignty in direct democracy is undermined by low voter turnout in general, a pronounced drop-off in voting on initiative measures in particular, and the race- and class-based disparities between those who vote and those who do not in both of these contexts.[102] Despite this recognition, many commentators have joined the general public and the courts in accepting the premise that direct democracy is a meaningful reflection of the popular will.[103] In any event, most commentators seem to agree that "the voters" are the relevant unit of analysis for purposes of judicial review.[104] This Article

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Brown, 651 P.2d 274, 292-94 (Cal. 1982) (Byrd, C.J., dissenting) (criticizing the initiative process and claiming that a ballot measure that amended numerous provisions of the state constitution was invalid under the state's single-subject rule because the voters may have "favored some of [the measure's] provisions, without realizing the effect of other, less-publicized sections").

102. Professor Eule put this prohlem succinctly when he questioned whether direct democracy accurately reflects the majority will:

> To begin with, less than half of the adult American population regularly vote—a level of electoral participation that is by far the lowest found in any Western country. . . . Citizens of higher social and economic status are far more heavily represented among voters than among those who abstain, a class skew virtually unparalleled in any other political system conducting free elections. This bias is exaggerated by the nature of who "drops-off" for ballot measure voting. Compared with voters generally, people who typically vote on propositions are disproportionately well-educated, affluent, and white. Minorities, the poor, and the uneducated are thus doubly underrepresented in the plebiscite. They are both less likely to turn out and less likely to vote on propositions if they do.

Eule, *supra* note 2, at 1514-15; *see also* CRONIN, *supra* note 18, at 66-70 (stating that "the less educated, the less well-off, the young, and minorities . . . are less likely to vote in ballot issue elections" and reporting that "a 5 to 15 percent drop-off or falloff of voter participation is common in state issue elections"); MAGLEBY, *supra* note 47, at 100-18 (discussing the representativeness of voters who decide statewide propositions and claiming that "[d]ata on the levels of voter participation in elections having statewide propositions show that on the average 15-18 percent of those who turn out do not vote on statewide propositions"); Magleby, *supra* note 74, at 33-34 ("Voting on ballot propositions only amplifies the social class bias in participation, because those with lower incomes or less education tend to skip voting on ballot questions at much higher rates"). Nonetheless, the extent of voter drop-off in ballot elections varies by election and issue and in some instances disappears altogether. *See* CRONIN, *supra* note 18, at 67 (explaining that while "voter falloff is typical, voter 'turnon' occurs when controversial and highly visible issues are placed on the ballot"); Richard Briffault, *Distrust of Democracy*, 63 TEX. L. REV. 1347, 1358-59 (1985) (book review) (claiming that drop-off rates for ballot initiatives are not unusually high when one compares the rate of voting on ballot measures with "voter participation in legislative races," rather than "the candidate contests with the highest turnouts—Presidential and gubernatorial elections").

103. *See, e.g.*, Clark, *supra* note 5, at 434-35 (recognizing that "commentators . . . have defended or described direct democratic outcomes as the voice of the 'people themselves,' " and explaining that such characterizations have gone "largely unchallenged"); Hirsch, *supra* note 27, at 185 (describing direct democracy as the process "whereby the People themselves make laws"); *see also infra* notes 265-66 (describing views of commentators that illustrate the myth of popular sovereignty in direct democracy).

104. *See* Charlow, *supra* note 5, at 574-93 (comparing the "legislature" to the "public as lawmaker" for purposes of assessing the level of judicial deference that is appropriate toward direct democracy); Eule, *supra* note 2, at 1507 ("The thesis of this Article is that arguments for judicial restraint indeed play out differently when courts review the constitutionality of direct

argues that the myth of popular sovereignty in direct democracy should be rejected and ballot initiatives should no longer be romanticized as lawmaking by "the people"; instead, they should be characterized as lawmaking by "initiative proponents" whose general objective is either ratified or rejected by the electorate.

B. The Role of Initiative Proponents

Contrary to the myth of popular sovereignty in direct democracy, initiative measures do not magically become state law as a result of the "will of the people."[105] Rather, such measures are conceived, drafted, sponsored, and promoted by identifiable individuals or groups that favor a specific policy proposal.[106] These

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expressions of the electorate."); *id.* at 1562 (arguing that "the very recognition of the fundamental way in which a voter's responsibility differs from a legislator's constitutional obligation, as well as the inevitable evidentiary obstacles to assessing electoral motivation, demands a different judicial treatment of the law produced by the electorate"); *see also* Lazos Vargas, *supra* note 12, at 404 (stating that judicial invalidation of "actions taken directly by the public" raises countermajoritarian concerns and places "a lone judge . . . in a position of having to tell possibly millions of voters that the voters' will is inconsistent with that single judge's understanding of fundamental constitutional values"); Linde, *supra* note 8, at 41-44 (arguing that initiative measures that appeal to the "collective passion" of the voters should be invalidated by state courts under the Guarantee Clause of the federal Constitution); Mark Tushnet, *Fear of Voting: Differential Standards of Judicial Review of Direct Legislation*, 1996 ANN. SURV. AM. L. 373, 379-80 (comparing the legislative and initiative processes to assess the appropriate level of deference for purposes of judicial review and stating that "the comparative question needs to be formulated precisely: given a particular policy proposal, . . . is the quality of deliberation likely to differ when that proposal is considered by a legislature or by the people directly?").

105. *See* Frickey, *supra* note 15, at 533 (claiming that the mythic nature of popular sovereignty has never been "more obvious than in the consideration of direct democracy in the states today"); Hamilton, *supra* note 4, at 10 ("The idea that [direct democracy] in any way promotes valuable democracy is a product of the self-rule myth. A worse decision-making process could not be imagined."); Linde, *Practicing Theory*, *supra* note 30, at 1741 (questioning "[t]he populist assertion that direct lawmaking by those who vote on initiative measures is the act of 'the people,' for which lawmaking by elected representatives is a regrettably necessary surrogate").

106. *See* BRODER, *supra* note 7, at 91-161 (describing an "initiative war in close-up"); Frickey, *supra* note 15, at 519 (recognizing that the electorate "does not control the drafting and circulation of proposed ballot measures"); Garrett, *supra* note 60, at 18 (stating that "special interests, not ordinary citizens, generally frame the terms of the debate concerning ballot measures" and concluding that they "have a comparative advantage in determining both what questions are placed on the ballot for popular decision and how those questions are drafted"); Schacter, *supra* note 5, at 129 (claiming that "the popular-intent approach [to statutory interpretation of ballot measures] enables small groups to appropriate the political authority of the electorate through the leverage of statutory drafting").

This Article's references to "initiative proponents" are intended to include the registered sponsors of ballot measures, their hired consultants, and those who voluntarily draft and promote measures on their behalf. When this Article advocates judicial review of statements of the initiative proponents during the ballot campaign, it contemplates that courts would also consider public statements by major financial contributors and those who make campaign

initiative proponents typically represent particular special interests and are increasingly multimillionaires who seek to influence public policy on their pet issues.[107] Not only are the proponents unelected and not sworn to uphold the Constitution, but they sometimes do not even live in the state or locality in which their measure has been proposed.[108] Nonetheless, the initiative proponents are the driving force behind drafting direct democratic measures, qualifying them for the ballot, and leading the campaigns to convince the electorate to vote in their favor[109]—often spending millions of dollars in the process.[110]

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expenditures in coordination with the initiative proponents. *See infra* Part III.C. Jurisdictions that apply the agency model to direct democracy should require all of these individuals and groups, rather than just a few designated representatives, to be identified pursuant to state law. *Cf.* CAL. ELEC. CODE § 9002 (West 1996):

> Prior to the circulation of any initiative or referendum petition for signatures, a draft of the proposed measure shall be submitted to the Attorney General with a written request that a title and summary of the chief purpose and points of the proposed measure be prepared. . . . The persons presenting the request shall be known as the "proponents." [;]

COLO. REV. STAT. ANN. § 1-40-104 (West 2002):

> At the time of any filing of a draft as provided in this article, the proponents shall designate the names and mailing addresses of two persons who shall represent the proponents in all matters affecting the petition and to whom all notices or information concerning the petition shall be mailed.

107. *See* BRODER, *supra* note 7, at 171, 191-92 (describing one wealthy initiative sponsor as "a lowly born aristocrat of talent teeing up fixes for the masses out of a sense of nerd oblige" and indicating that "[p]lenty of other millionaires have also found the initiative bandy for 'empowering' voters to endorse the initiatives' sponsors' agendas"); *see also* Peter Schrag, *The Fourth Branch of Government? You Bet*, 41 SANTA CLARA L. REV. 937, 938 (2001) (explaining that "the remarkable success that Bill Zimmerman and his colleagues have had in liberalizing state drug laws" was "financed by deep pocket funders—in his case by financier George Soros and two other multi-millionaires"); *id.* at 941 (pointing out that "one man, Bill Sizemore, who has become a sort of one-stop-shopping initiative conglomerate as developer, sponsor, and campaign organizer, qualified six measures for the ballot" in Oregon in the fall 2000 elections).

108. *See* Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 227 (1999) (Rehnquist, C.J., dissenting) ("[I]n recent years, the initiative and referendum process has come to he more and more influenced by out of state interests which employ professional firms doing a nationwide business.") (citations omitted). Richard Hasen has recently observed, however, that political parties have begun to use the initiative process to further their own political agendas. *See gencrally* Hasen, *supra* note 5, at 731. Although political parties are electorally accountable in ways that most initiative proponents are not, this development is still problematic because it allows politicians to engage in lawmaking free of the structured deliberation and other constraints inherent in the traditional legislative process.

109. Elisabeth Gerber has described the role of the initiative proponents in direct democracy as follows:

> The interest group determines the content and language of the proposition. In conjunction with state election officials, it selects the name and official description of the measure. It heads the effort to qualify the measure for the ballot and often coordinates the formation of a coalition of core supporters. It then leads the supporting coalition by coordinating fundraising and campaign efforts. Initiative proposers often provide substantial financial and nonfinancial resources to the

Even prior to beginning the formal process required to qualify an initiative for the ballot, the initiative proponents must conceptualize a policy proposal, draft the language of the measure, and begin to formulate the campaign strategy that will be used to lobby the public on its behalf.[111] Increasingly, initiative proponents hire members of an "initiative industry," composed of professional campaign consultants who often specialize in direct democracy, to aid in this process.[112] The proponents and their consultants are capable of conducting sophisticated research on the existing legal landscape in order to draft the measures to achieve their intended results with an eye toward future judicial review.[113] Moreover, it is not unusual for them to use focus groups and conduct polls to determine how most effectively to promote or "spin" their measures to the voters.[114]

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initiative campaign. They are involved in defending their measure against postelection amendments and legal challenges as well.

ELISABETH R. GERBER, THE POPULIST PARADOX: INTEREST GROUP INFLUENCE AND THE PROMISE OF DIRECT LEGISLATION 44-45 (1999).

110. *See* BRODER, *supra* note 7, at 163-64 (providing data on initiative spending and describing a record-setting initiative election in which competing gaming interests spent $92 million); GERBER, *supra* note 109, at 4-5 (providing data on "the enormous level of spending in direct legislation campaigns"); MAGLEBY, *supra* note 47, at 149 tbl.2 (providing data on campaign spending for ballot initiatives in California from 1958 until 1982).

111. *See* BRODER, *supra* note 7, at 70-71 (explaining that "[t]he first step in the initiative process is drafting the legal language as if it were a statute or a bill in the legislature," but noting that because the proposal "will be voted on by average citizens after a political campaign, it must be written with an eye to probable opposition tactics" and that "politics is so pervasive that the lawyers want the professional campaign consultants in the room right from the beginning") (internal quotations omitted).

112. For more detailed discussions of the initiative industry, see BRODER, *supra* note 7, at 43-89; MAGLEBY, *supra* note 47, at 59-76; *see also* SCHRAG, *supra* note 7, at 188-256; Garrett, *supra* note 5, at 1851 ("Providing professional signature gatherers is one of the many services offered by the growing initiative industry, which consists of political professionals who assist groups in obtaining the required number of signatures, meeting legal and procedural challenges to ballot access, and managing the campaign itself."); Garrett, *supra* note 60, at 19:

> [R]elatively small groups that can organize, amass substantial resources, and deploy their resources effectively can dominate the process of direct democracy. These small groups are involved on all levels—from drafting the direct legislation to collecting the signatures required to place a question on the ballot and from framing the debate during the campaign to influencing the eventual outcome. [;]

Magleby, *supra* note 74, at 30 (recognizing that a "highly profitable" "initiative industry which specializes in direct-legislation politics has grown in several states" and that "[p]rofessionals help draft measures, circulate petitions, manage campaigns, provide polling, and produce media"); David McCuan et al., *California's Political Warriors: Campaign Professionals and the Initiative Process in* CITIZENS AS LEGISLATORS 55-70 (Shaun Bowler et al. eds.,1998).

113. *See supra* note 61.

114. David Broder interviewed a number of participants in the initiative process and reported that the proponents and their consultants routinely draft proposals with the subsequent ballot campaign in mind. For example, one campaign consultant reported:

> "Many times the way in which we would draft an initiative would be influenced by the polling and the campaign consultant's input. You want them all at the table, because

In most states and municipalities, the official role of the initiative proponents begins at the outset of the formal direct democratic process when a proposed ballot measure is drafted and filed with the appropriate public official.[115] Once a proposed ballot

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> those who do the best job [of drafting the proposal] are ultimately going to have the best campaign. And sometimes . . . we have to tell the client, 'Don't do this. We've tested this. We've put it in the best fashion possible and you can't win this. Or if you are determined to try, it will take such-and-such an amount of resources.' "

BRODER, *supra* note 7, at 71-72.

Similarly, tbe initiative proponents and their consultants conduct substantial research to construct an effective ballot campaign. Broder quoted extensively from an interview with Ben Goddard, an initiative consultant, and described the process as follows:

> "We will bring in outside consultants with appropriate expertise to do a thorough analysis of the proposition—to see what the economic effects will be, the legal effects, the policy effects." Often, [Goddard] said, the proposition has been poorly drafted with ambiguities or overreaching language.
>
> The content analysis shapes the arguments that go into the voters' pamphlets, used by many states to inform the citizenry about issues on the ballot. . . . "Your pamphlet arguments are doubly important," Goddard said, "because when you make your ads, you can say, 'The voters' pamphlet says such-and-such.' You don't tell them that it's your argument in the voters' pamphlet." . . .
>
> Once the content analysis is finished, "you start your research process to determine which arguments will push people's buttons," Goddard said. This can be a lengthy, pain-staking process, requiring panels with different political and demographic makeups, and a constant refining of the arguments they hear. "When this qualitative research is finished, you do your broad polling to be able to quantify the results: This argument is likely to shift opinion by this percentage."
>
> The next step is to decide "who are credible messengers," Goddard said. Often the answers are surprising. "Doctors do not have credibility on health care issues," he said. "Nurses do.
>
> Expert opinion doesn't count for much. People know you can hire experts to say almost anything you want said. . . . So we get ordinary people, or actors who seem like ordinary people . . . .
>
> "We operate on the premise that most people will vote their self-interest," Goddard said, "so if you show them they can best defend themselves by voting a certain way, they will move to that position in very large numbers."

Id. at 73-77; *see also id.* at 77-83 (describing additional interviews regarding the tactics of initiative proponents and their consultants).

115. *See, e.g.*, OR. CONST. art. IV, § 1(2)(e) ("An initiative petition shall be filed not less than four months before the election at which the proposed law or amendment to the Constitution is to be voted upon."); CAL. SEC'Y OF STATE, INITIATIVE GUIDE (explaining that "[t]he first step in the process of qualifying an initiative is to write the text of the proposed law" and that "[o]nce the text of the initiative measure has been written, the proponent(s) must submit a draft of the proposed initiative measure to the Attorney General" for a title and summary of the proposed measure), *at* http://www.ss.ca.gov/elections/init_guide.htm (last visited Feb. 18, 2003). A number of states provide assistance in the drafting of initiative proposals, but they do not require the proponents to accept this assistance or allow governmental officials to amend proposed ballot measures without the consent of the initiative proponents. *See, e.g.*, CAL. SEC'Y OF STATE, *supra* (stating that "[t]he initiative measure's proponent(s) may obtain assistance from the Legislative Counsel in drafting the language of the measure" if they meet certain requirements, but the proponents "also may seek the assistance of their own private counsel to help draft the text of the proposed law, or they may choose to write the text themselves"); COLO. REV. STAT. ANN. § 1-40-105 (West 2002) (requiring the initiative proponents to submit a proposed measure to "the

measure is filed, the proponents are required to circulate initiative petitions and acquire a certain number of signatures from registered voters, who purport to express their support for placing the measure on an upcoming ballot.[116] This signature requirement, which is sometimes higher for proposed constitutional amendments than for statutory provisions, is typically based on a percentage of the voters who participated in a previous election.[117]

The signature requirement is, of course, intended to weed out frivolous proposals and ensure the existence of an appropriate level of public support for a proposed measure.[118] This public support was originally evidenced by the participation of a significant number of volunteer petition circulators who felt intensely enough about a proposal to devote their time and effort to the cause.[119] Moreover, the signatures themselves were thought to reflect deliberate consideration of the underlying policy proposal by registered voters who signified their support for placing the measure on the ballot.[120]

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directors of the legislative council and the office of legislative legal services for review and comment" prior to circulation of the initiative petitions); *see also* CAL. COMM'N ON CAMPAIGN FIN., *supra* note 6, at 91-92, 99-103 (describing the drafting assistance that is available for initiative proponents in some states).

116. *See, e.g.*, ARK. CONST. amend. 7 ("Eight per cent of the legal voters may propose any law and ten per cent may propose a Constitutional Amendment by initiative petition, and every such petition shall include the full text of the measure so proposed."); CAL. CONST. art. II § 8(b) (2001) ("An initiative measure may be proposed by presenting to the Secretary of State a petition that sets forth the text of the proposed statute or amendment to the Constitution and is certified to have been signed by electors equal in number to 5 percent in the case of a statute, and 8 percent in the case of an amendment to the Constitution, of the votes for all candidates for Governor at the last gubernatorial election."); OR. CONST. art. IV, § 1(2)(b) ("An initiative law may be proposed only by a petition signed by a number of qualified voters equal to six percent of the total number of votes cast for all candidates for Governor at the election at which a Governor was elected for a term of four years next preceding the filing of the petition."); *see also* MAGLEBY, *supra* note 47, at 36-44 (surveying state signature requirements).

117. *See id.*; Magleby, *supra* note 74, at 22 tbl.1 (indicating that the average number of signatures required is 7.5% of registered voters, with requirements ranging from 2% in North Dakota to 15% in Wyoming for statutory questions). A number of states also impose geographic distribution requirements to force proponents to demonstrate support in multiple parts of the state. *See id.* at 21.

118. *See, e.g.*, MAGLEBY, *supra* note 47, at 41 ("Signature thresholds are intended to keep the ballot free of frivolous or unreasonably narrow propositions."); Garrett, *supra* note 5, at 1850 (describing the twofold purpose of signature requirements as demonstrating public support for a vote on the question and educating the electorate).

119. *See* Garrett, *supra* note 5, at 1853-54 ("The ability of a group to command large numbers of volunteers is itself a convincing demonstration of public support").

120. Elizabeth Garrett has pointed out that some historians claim that signature drives were occasions for public deliberation in the early days of direct democracy. "Supporters would bring [initiative] petitions to meetings of civic groups and churches, and people would [allegedly] debate the merits of the proposal as they considered whether to sign." *Id.* at 1850. *But cf.* BRODER, *supra* note 7, at 52 (claiming that the practice of paying for the collection of signatures to place an initiative on the ballot "sprang up within the first decade of the Progressive era—the

The dominant role played by the initiative industry in modern petition drives has substantially undermined the ability of the signature requirement to serve its intended purposes.[121] Signature-gathering firms are typically paid on commission and sometimes charge as much as $2.50 per name.[122] Moreover, the registered voters who are asked to sign initiative petitions generally do not reflect upon the wisdom of the proposed policy, but are persuaded instead by the argument that they should support placing the measure on the ballot to "let the people decide."[123] Indeed, petition circulators appear actively to discourage potential signatories from engaging in the relatively time-consuming activities of reading the language of the measure and asking substantive questions, much less thoughtfully debating the policy's merits.[124] In light of these increasingly common practices, it is not surprising that commentators have concluded that sufficiently well-financed initiative proponents can utilize the initiative industry to obtain enough signatures to qualify virtually any

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first decade!—as if to mock the pretensions of those public-spirited reformers who brought the idea to America").

121. *See* BRODER, *supra* note 7, at 52-69, 172-74, 187-88 (describing the tactics of paid petition circulators); Garrett, *supra* note 5, at 1850-51 (claiming that the growth of the initiative industry and the use of paid petition circulators prevents signature threshold requirements from serving their purpose in most cases).

122. BRODER, *supra* note 7, at 63; *cf.* Garrett, *supra* note 5, at 1851 (describing fees of up to $1.50 per name). The practice of using signature gathering firms to qualify an initiative for the ballot is certain to continue in light of the Supreme Court's holding that a state's prohibition of paid petition circulators violates the First Amendment. *See* Meyer v. Grant, 486 U.S. 414, 428 (1988); *see also* Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182 (1999) (holding that a Colorado law that regulated initiative petition circulators violated the First Amendment in several respects).

123. *See* BRODER, *supra* note 7, at 54 (describing the basic technique of the "table method" of gathering signatures and indicating that hesitant voters will usually sign a petition after being reminded that "[t]his is just to get it on the ballot"); CRONIN, *supra* note 18, at 62-64 ("Some people who either cannot resist the pressure to sign or are persuaded by the argument that this group deserves the right to present the issue to the voters sign the petition even though they are opposed to the measure."); Garrett, *supra* note 5, at 1851 (indicating that "most studies reveal that people are willing to sign without reading the question, without thinking about it much, and certainly without deciding to support the proposition on its merits"); Magleby, *supra* note 74, at 15 ("Petition circulators frequently use the argument, 'the voters should decide,' to persuade people to sign petitions that place initiatives on the ballot.").

124. *See* BRODER, *supra* note 7, at 54 (stating that professional signature-gatherers find "arguing" to be "a waste of time" and explaining that "[i]f they encounter any significant resistance, they simply move on to the next prospect, hoping to find someone more pliable"); CRONIN, *supra* note 18, at 63 ("Even when a group plays by the rules, an incentive exists to get as many people to sign as fast as possible."); Garrett, *supra* note 5, at 1851 ("The primary hurdle blocking supporters is finding enough circulators who can approach a sufficient number of citizens within the short time frame allowed to gather signatures."); Garrett, *supra* note 60, at 20 ("Those who gather signatures through the more traditional 'booth-in-the-shopping-mall' method structure their interactions with the public to discourage extended discussion and to avoid even revealing what issue the petition proposes to place on the ballot.").

initiative measure for the ballot.[125] Commentators have also recognized that "money increasingly appears to be a necessary condition" for waging a successful ballot campaign.[126]

Every state that authorizes the initiative process prohibits the proponents from making substantive amendments to the language of a ballot measure's text once an initiative petition is circulated to the voters for their signatures.[127] The justification for this rule, which is apparently based on a desire to honor the policy preferences of the registered voters who signed the initiative petitions, is often accepted without critical examination.[128] Nonetheless, these prohibitions on amendments effectively preclude initiative proponents from

125. *See* Garrett, *supra* note 5, at 1852-53 ("There is no disagreement in the literature that using paid circulators overseen by a professional firm virtually guarantees ballot access.").

126. *Id.* at 1847; *see also* GERBER, *supra* note 109, at 61-62 (finding that "monetary resources are necessary to run an effective media-intensive statewide direct legislation campaign," but that "they may not be sufficient" to ensure electoral success). One initiative consultant bluntly explained to David Broder: "When somebody walks in [with an initiative proposal], I always ask the million-dollar question, which is, 'Where's your million dollars?' It's very difficult to qualify something for less than a million dollars." BRODER, *supra* note 7, at 84 (quoting Tom Hiltachk); *accord* Todd Donovan et al., *Contending Players and Strategies: Opposition Advantages in Initiative Campaigns*, *in* CITIZENS AS LEGISLATORS, *supra* note 112, at 94 (reporting that "the average *qualification* costs in California were about $1 million" by the mid-1990s).

127. *See* MAGLEBY, *supra* note 47, at 184 (explaining that because the initiative process forecloses amendments, voters must affirm or reject ballot propositions in toto); Eule, *supra* note 2, at 1556 (indicating tbat "[m]ajoritarian preferences cannot be softened or diluted by political compromise" in the initiative process); Frickey, *supra* note 20, at 437 (stating that "[o]nce the petitions are floated to the public for signature," a ballot proposition is "an unamendable matter"); Frickey, *supra* note 15, at 523-24 (describing a highly problematic initiative proposal and lamenting that "once this ballot proposition was drafted and circulation for signatures had begun, there was no method of providing public consideration and refinement"); Garrett, *supra* note 60, at 31 (recognizing that initiative opponents "cannot seek compromise to accommodate their concerns . . . because the text of a proposal cannot be changed once it has been placed on the ballot"); Magleby, *supra* note 74, at 18 (recognizing that "[t]here are . . . no provisions for amendment or modification of the initiative once it begins petition circulation"); Miller, *supra* note 75, at 1052 (recognizing that after the ballot petition is circulated for signatures, "the measure cannot be amended again, even by the proponents, even if it becomes apparent that the measure contains a flaw that should be corrected"). In those states that authorize the indirect initiative, the proposed ballot measure must typically be enacted in an unamended form by the legislature to preclude a subsequent vote by the electorate. *See* MAGLEBY, *supra* note 47, at 35-36:

> If, after a specified time, the statute has not been approved by the legislature or if the legislature has amended the original initiative in a way unacceptable to the original proponents, the proponents may then gather the remaining required signatures and submit the original initiative to the voters for approval or rejection.

128. Given the minimal attention that voters who sign initiative petitions devote to the substance of proposed ballot measures, *see supra* notes 123-24 and accompanying text, it would appear that the prohibition against amending ballot measures after initiative petitions are circulated is based on a fiction, much like that of the "myth of popular sovereignty" in direct democracy generally.

correcting, improving, or compromising on the language of a proposed measure that qualifies for the ballot.[129]

After an initiative proposal qualifies for the ballot, the proponents and their consultants lead the campaign to convince the electorate to vote in favor of the measure.[130] Although initiative campaigns are increasingly financed by wealthy sponsors, other measures receive financial support from consortia of existing interest groups and campaign committees formed specifically to promote an initiative proposal.[131] Moreover, the costs of conducting a controversial or contested initiative campaign have soared in recent years.[132] For example, the ballot campaigns in California during the 1996 election cycle cost $141,274,345—only slightly less than the national presidential election conducted in the same year.[133]

The proponents engage in a variety of activities to promote their measure during a typical initiative campaign. These activities include the behind-the-scenes work of negotiating with state officials over the initiative's title and official summary, as well as lobbying interested individuals and groups for financial and electoral support.[134] Indeed, endorsements of an initiative measure from interest groups, elected officials, celebrities, and the media can provide useful information to the electorate in a context where other common voter cues, including a candidate's name recognition and

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129. *See supra* note 127; *infra* note 215.

130. *See supra* note 114 (describing the formulation of a ballot campaign).

131. *See* BRODER, *supra* note 7, at 163-97 (describing the financing behind a number of direct democratic measures); GERBER, *supra* note 109, at 59-100 (describing group characteristics, resources, and spending in ballot campaigns).

132. *See supra* note 110.

133. BRODER, *supra* note 7, at 164.

134. *See id.* at 111 (discussing "the now-traditional fight over the ballot language that describes each initiative"); *id.* at 163 (explaining that "[j]ust as in presidential campaigns, the first test for any contender is the ability to raise the needed money"); *see also* Collins & Oesterle, *supra* note 73, at 93-99 (describing the procedure for titling an initiative in Colorado and claiming that "an officious citizen can use the process" to his or her advantage); William A. Lund, Note, *What's in a Name? The Battle over Ballot Titles in Oregon*, 34 WILLAMETTE L. REV.143, 144-45 (1998) (discussing the procedures for providing ballot titles in Oregon and other direct democracy states); McCuan et al., *supra* note 112, at 70 (stating that the attorney general's provision of a title and summary is a "critical juncture" that "often involves group members in a long negotiating process with the state's attorneys"). Indeed, the fight over the attorney general's characterization of the initiative measure can itself lead to contentious litigation. *See* BRODER, *supra* note 7, at 178 (describing initiative proponents who were emboldened by a victory in the courts over the official ballot description of an initiative); SCHRAG, *supra* note 7, at 214 (claiming that the language of the title and summary "is so crucial it often becomes the subject of a separate court battle before it reaches the ballot itself"); Collins & Oesterle, *supra* note 73, at 95 ("Many ballot title controversies end up in the Supreme Court of Colorado, most brought by aggrieved initiative proponents, and a select few brought by petition opponents, with the court upholding the title board in all but a few cases.").

political party, are absent.[135] As those who live in initiative states well know, the proponents and their financial backers typically lobby the electorate directly by engaging in extensive print, radio, and television advertising on behalf of their measures.[136] The proponents sometimes appear on talk radio programs and in other public forums to gain support for their policy proposals.[137] Unfortunately, much of this discourse with the electorate is conducted in a simplistic, partisan, and sometimes misleading fashion.[138]

Not surprisingly, if organized opponents of an initiative measure exist, they will typically engage in similar tactics to convince

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135. *See* BRODER, *supra* note 7, at 78 (describing "the careful selection of endorsers" as one of the "principles of initiative campaigns" identified by an attorney who specializes in them); Jeffrey A. Karp, *The Influence of Elite Endorsements in Initiative Campaigns*, *in* CITIZENS AS LEGISLATORS, *supra* note 112, at 149-65 (conducting a case study on the effects of Tom Foley's endorsement in a ballot campaign and concluding that "mass opinion is shaped in part by elites when their positions are known"); Schacter, *supra* note 5, at 135-36 (indicating that "endorsements" of ballot measures are prominent "information shortcuts" that are available to voters in ballot campaigns); *cf.* MAGLEBY, *supra* note 47, at 151-59, 165 (recognizing that "much disagreement exists [in campaign literature] over how large a role media and elite endorsements play in determining the outcome of proposition elections" and claiming that "[t]he role of elites in the process of direct legislation is limited").

136. *See supra* note 110 (describing the high levels of spending in ballot campaigns). A number of direct democracy states provide information regarding ballot campaign spending on their Web sites. *See, e.g.*, CAL. SEC'Y OF STATE, CAL-ACCESS: CAMPAIGN FINANCE ACTIVITY (providing information regarding all of the campaign committees that bave organized to support or oppose propositions and ballot measures on California's statewide ballot), *at* http://cal-access.ss.ca.gov/Campaign/Measures (last visited Feb. 17, 2003); OR. SEC'Y OF STATE, POLITICAL COMMITTEES (providing a database to search for campaign spending by political committees in Oregon, including those that support or oppose ballot measures), *at* http://sos-venus.sos.state.or.us:8080/elec_srch/elfi$.startup (last visited Feb. 17, 2003).

137. *See* BRODER, *supra* note 7, at 177 (describing initiative proponents who "represented the affirmative side" of a ballot question "in public debates and on innumerable talk-sbow interviews").

138. *See id.* (describing the initiative industry as "a huge industry devoted to the manipulation of public opinion"); CAL. COMM'N ON CAMPAIGN FIN., *supra* note 6, at 199 (explaining tbat campaign advertising in ballot contests has developed "a reputation for innuendo, deception and exaggeration"); ZISK, *supra* note 47, at 264 (finding that ballot campaign advertisements are "simplistic" at best and "deceptive" at worst); Eule, *supra* note 2, at 1517 (claiming that "[i]llustrations of deceptive advertising and sloganeering abound" in ballot campaigns); Frickey, *supra* note 20, at 441 (claiming that "[a] largely unmotivated and unaccountable electorate is much more prone to influence by campaigns based on fear and misunderstanding, if not outright misrepresentation"); Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. REV. 505, 570 (1982) (indicating that ballot campaigns are "marked by gross exaggeration, distortion, and outright deception"); Becky Kruse, Comment, *The Truth in Masquerade: Regulating False Ballot Proposition Ads Through State Anti-False Speech Statutes*, 89 CAL. L. REV. 129, 147-51 (2001) (criticizing the use of "increasingly sophisticated, often misleading ads" in ballot campaigns and providing several notable examples); Schacter, *supra* note 5, at 131 (recognizing that advertising in initiative campaigns is "avowedly partisan and intended to persuade rather than inform").

the public to vote against a proposed measure.[139] It is also increasingly common for initiative opponents to qualify their own "counter-initiative" for the ballot in an effort either to move the status quo in a more favorable direction or to encourage confused voters simply to vote against all of the measures on a particular subject.[140] The opponents commonly focus their campaigns on describing the "parade of horribles" that would result if an initiative measure were enacted.[141] Indeed, the opponents can "ambush" the proponents with negative advertising against a measure at the tail end of a campaign, hoping to capitalize on the electorate's conservative tendency to vote against any doubtful measure.[142]

Because of the amount of time required to produce media advertisements and the tendency of the proponents and opponents to engage in heavy advertising shortly before an election, the advertising from both sides tends to draw upon carefully orchestrated strategies that were conceived in advance of the time that the opposing groups' advertisements reached the airwaves.[143] As a result, the advertisements tend to focus on peripheral issues and "talk past one another," instead of reflecting much true deliberation or dialogue about the substantive merits of the measure.[144] The groups producing the advertisements are limited in their ability directly to respond to charges made by the opposing parties in the days before an election.

Ballot pamphlets, which are distributed to the voters prior to the election in a number of states, provide one tool for a modicum of

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139. *See* Lowenstein, *supra* note 138, at 580.

140. *See* Eule, *supra* note 2, at 1517-18 ("A recent innovation in obfuscation has been the placement of competing propositions on the ballot, leaving voters completely baffled about which one does what."); Magleby, *supra* note 74, at 24 (describing the oppositions' use of counter-initiatives); Elizabeth M. Stein, Note, *The California Constitution and the Counter-Initiative Quagmire*, 21 HASTINGS CONST. L.Q. 143, 155-57 (1993) (describing the development of the counter-initiative as a strategy utilized by the initiative opponents in ballot campaigns).

141. *See* BRODER, *supra* note 7, at 91-161 (describing the tactics of initiative opponents in one ballot campaign); *id.* at 156 (claiming that "[n]ever once in all their ads and all their mailings did the opponents of [the measure] engage the basic question" raised by the proposal, but "basically they threw up a lot of dust, creating bogus scares about the people behind [the measure] and the consequences of its passage").

142. *See id.* at 114 (quoting an initiative campaign consultant who explained, "When you're on the negative side, you basically just try to create doubts."); GERBER, *supra* note 109, at 56 ("One consequence of voter risk aversion is that if campaigners expect voters to behave this way, opponents of direct legislation propositions may design their campaigns to emphasize and cultivate uncertainty about a proposition, even further biasing voters' tendencies to favor the status quo."); Donovan et al., *supra* note 126, at 99 (recognizing that initiative proponents "must overcome voter tendencies to 'just vote no' when in doubt").

143. *See* BRODER, *supra* note 7, at 91-161 (describing an "initiative war in close-up").

144. *See id.*; Adam Winkler, *Beyond* Belotti, 32 LOY. L.A. L. REV. 133, 184-85 (1998) (claiming that "[m]ass media advertisements" in ballot campaigns "tend to encapsulate issues into often deceptive slogans and catch-phrases, eschewing substantive examination").

deliberation and debate prior to an initiative election.[145] The proponents routinely submit statements on behalf of their measure for inclusion in such ballot pamphlets.[146] The ballot pamphlets also contain "objective" descriptions of the general purpose and effect of an initiative, which are typically drafted by public officials or committees composed of proponents and opponents of the measure.[147] Finally, the ballot pamphlets typically contain statements in opposition to the measure, which are drafted by individuals and groups seeking to defeat the measure at the polls.[148]

If an initiative measure receives the requisite amount of electoral support—typically an affirmative vote from a majority of the participating voters—the measure is enacted.[149] Successfully enacting a measure, however, is not necessarily the end of the road for the initiative proponents. Often, the validity of successful initiative measures is challenged on statutory and constitutional grounds in the courts.[150] Although the attorney general in most states is charged with the task of defending legislation in the courts, the initiative

145. For a detailed discussion of ballot pamphlets in initiative and campaign elections, see generally Peter Brien, *Voter Pamphlets: The Next Best Step in Election Reform*, 28 J. LEGIS. 87 (2002); *see also* CAL. COMM'N ON CAMPAIGN FIN., *supra* note 6, at 227-63 (describing California's ballot pamphlet and other state-sponsored sources of information available to voters in ballot campaigns); CRONIN, *supra* note 18, at 80-83 (discussing ballot pamphlets and estimating that between thirty and sixty percent of those who go to the polls read them and rely upon them as important sources of information); MAGLEBY, *supra* note 47, at 136-39 (describing the advantages and shortcomings of ballot pamphlets); Frickey, *supra* note 20, at 437 (claiming that "the voter pamphlet might be so gargantuan (Oregon's ran 247 pages in 1996) as to be worthless to all but the most dedicated or fixated voters"); Schacter, *supra* note 5, at 141-44 (describing the use of ballot pamphlets in some jurisdictions and claiming that "they pose many of the same problems—albeit ones not as severe—as statutory language").

146. A report on the initiative process, which was prepared by the City Club of Portland, pointed out that anyone can buy an advertisement in the Oregon ballot pamphlet for $500, and warned that "[t]here are no procedures for screening purchased arguments for accuracy. A totally false statement of fact . . . can be published with no opportunity for rebuttal in the pages of the pamphlet." CITY CLUB OF PORTLAND, THE INITIATIVE AND REFERENDUM IN OREGON 26 (1996) (on file with author).

147. *See* CAL. COMM'N ON CAMPAIGN FIN., *supra* note 6, at 236-37.

148. *See supra* notes 145-46.

149. *See* MAGLEBY, *supra* note 47, at 38-39, tbl. 3.1 (summarizing state procedures for direct legislation and providing information regarding the vote necessary for successful enactment of ballot measures).

150. BRODER, *supra* note 7, at 72 (recognizing that legal challenges to successful ballot measures are "almost inevitable"); MAGLEBY, *supra* note 47, at 52-53 (claiming that because courts "have not hesitated to declare a particular initiative in conflict with the state or federal constitution, . . . successful initiatives are almost always challenged in the courts"); Gerber et al., *supra* note 60, at 4 (explaining that "[m]any initiatives that win at the ballot box are challenged in the courts"); Holman & Stern, *supra* note 13, at 1240 (explaining that "public policies formulated through the initiative process often become embroiled in controversy and [are] scrutinized by the courts").

proponents sometimes assist public officials in defending their measures.[151] Alternatively, the proponents are routinely granted permission to intervene in lawsuits to support the validity of their measure and obtain a favorable judicial construction.[152] Even when successful ballot measures are upheld by the courts, the initiative proponents are sometimes forced to engage in additional litigation, lobbying, or oversight activities to ensure that responsible public officials take appropriate action to implement the measure after it is enacted.[153]

In contrast to the dominant role played by the initiative proponents in direct democracy, the role of "the people" is quite limited. The voters do not write the language of ballot measures; nor do they typically engage in meaningful public debate about the advisability of a proposed policy.[154] With the possible exception of unusually high-profile initiative elections, some voters may not know anything about a measure prior to entering the voting booth.[155] In most jurisdictions, the actual text of an initiative measure is not even

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151. *See* GERBER ET AL., *supra* note 60, at 34-108 (reporting the results of case studies of the implementation of successful ballot measures); GERBER, *supra* note 109, at 44-45 (recognizing that initiative proponents "are involved in defending their measure against postelection amendments and legal challenges as well").

152. *See id.*; Bates v. Jones, 904 F. Supp. 1080, 1086 (N.D. Cal. 1995) ("The individualized interest of official proponents of ballot initiatives in defending the validity of the enactment they sponsored is sufficient to support intervention as of right.") (citing Yniguez v. Arizona, 939 F.2d 727 (9th Cir.1991), *vacated as moot*, Arizonans for Official English v. Arizona, 520 U.S. 43 (1997); Wash. State Bldg. & Constr. Trades Council v. Spellman, 684 F.2d 627, 629-30 (9th Cir. 1982)).

153. *See* GERBER ET AL., *supra* note 60, at 20-21, 109-10 (explaining that "[a]ll initiatives require government actors to implement and enforce them" and describing the methods available to initiative proponents for sanctioning government actors who "thwart initiative proponents' intentions").

154. *See* Frickey, *supra* note 20, at 437 ("It would be fanciful to suggest that the electorate collectively has the same basis of information and opportunity for fruitful deliberation about a ballot measure as the legislature does for important pending bills."); Frickey, *supra* note 15, at 506 (recognizing that "the electorate never formally convenes at all, to deliberate or otherwise"); Hamilton, *supra* note 4, at 15 ("Direct democracy, or the public initiative, lends itself to misguided yes/no votes, not to the scrutiny, deliberation, compromise, and horse-trading necessary to solve hard social problems with some hope of finality."); Schacter, *supra* note 5, at 155-56 (claiming that several "factors leave citizen-lawmakers poorly situated to deliberate about proposed initiatives").

155. *See* CRONIN, *supra* note 18, at 71 (reporting the results of a survey in which twenty-two percent of likely voters reported being "not too informed, or not at all informed about the specific issues" in an upcoming ballot election); MAGLEBY, *supra* note 47, at 135 (reporting the results of a survey in which twenty-three percent of California voters reported having no sources of information about a ballot measure); Susan A. Banducci, *Searching for Ideological Consistency in Direct Legislation Voting*, *in* CITIZENS AS LEGISLATORS, *supra* note 112, at 132 (explaining that "a voter is not likely to be exposed to any information about the measure before entering the voting booth" if "a proposed ballot measure is noncontroversial," and that "[e]ven if the measure is controversial and information is available, the complexity of the measure may make it difficult for voters to translate preferences into electoral choice.").

presented to the voters at the time they cast their ballots.[156] Even when the language of a ballot measure is presented to the electorate, many voters are unable to understand the meaning of the legalese that is often used in the text.[157] Nor are they aware of the existing legal landscape or the likely application of a measure to some later, unforeseen interpretive controversy.[158] Indeed, the most that can realistically be expected of voters is that they will grasp the broad purpose of an initiative measure and vote either to approve or reject a general policy based on their understanding of information gleaned from media accounts, advertising, and ballot pamphlets.[159]

In sum, direct democratic measures are not self-enacting; nor do they become codified simply as a result of the will of the people. Instead, those measures are conceived, drafted, qualified for the ballot, and promoted by increasingly sophisticated initiative proponents and their hired consultants.[160] As explained below, recognition of the dominant role played by the initiative proponents has important implications both for judicial review of successful ballot measures and for the broader project of improving and legitimizing lawmaking by direct democracy.

C. The Privileged Status of Initiative Proponents in Judicial Review

Although courts and commentators often accept the myth of popular sovereignty, the initiative proponents are, in fact, the real driving force behind successful ballot measures. Unlike the voters, the

156. *See, e.g.*, COLO. REV. STAT. ANN. § 1-40-115(1) (West 2002) ("Measures shall appear upon the official ballot by ballot title only."); OR. REV. STAT. ANN. § 254.145(4) (2001) (providing that the proposition number and ballot title, rather than the full text of the initiative measure, are presented to voters when casting their ballots).

157. *See* Schacter, *supra* note 5, at 139-40.

158. *See id.* at 140-41.

159. *See id.* at 127, 131-44, 146 (describing the sources of voter information in ballot contests and explaining that "[a] vote in favor of a ballot question will often signify, at best, an electoral judgment on the salient and general policies in question, not on the rarified points that often generate interpretive litigation"); *see also* Frickey, *supra* note 15, at 529 ("The electorate cannot plausibly be expected to understand much of the details of what is on the ballot.").

160. Even if truly grass-roots initiative proposals could still succeed, *but see supra* notes 125-26 and accompanying text, the proposals set forth in this Article would still be beneficial. As explained below, the application of the agency model to direct democracy would provide procedural safeguards to encourage meaningful deliberation and reasoned decisionmaking by the initiative proponents. The ability of initiative proponents to utilize direct democracy solely for their own unexamined, political purposes would therefore be limited. At the same time, the procedural safeguards would ensure that initiative proponents performed their lawmaking responsibilities with a sufficient degree of competence. *Cf.* Gail Diane Cox, *Lawmaking By Amateurs: Initiatives Drafted by Kitchen-Table Legislators Can Have Perverse Results*, NAT'L L.J., Oct. 23, 1995, at A1. The utility of these goals does not depend upon whether the initiative proponents are "sophisticated" or "amateur" lawmakers.

initiative proponents draft the language of proposed ballot measures and typically have sufficient expertise to understand the legal landscape into which their measures will fit—including such things as the canons of construction and existing legal precedent.[161] Moreover, statements from the proponents are routinely included in the ballot pamphlets that are sent to voters and sometimes relied upon by courts in lieu of legislative history.[162] As a result, when courts rely upon these formal legal sources to interpret the meaning of direct democratic measures, they are effectively privileging the intentions of the proponents of such measures in the name of "voter intent."[163]

This insight has important implications for judicial review of initiative measures. First, because courts routinely privilege the proponents' intentions when they interpret popular initiatives, the motivations of those "lawmakers" should also be carefully scrutinized when evaluating the constitutional validity of ballot measures.[164] The apparent unwillingness or inability of courts to perform this latter task with any regularity means that initiative proponents receive the primary benefits—but not the most significant responsibility—of lawmaking. Perhaps ironically, then, the current state of judicial review of direct democracy privileges the status of unelected and largely unaccountable initiative proponents over that of elected representatives in the legislative process.

Second, a candid recognition of the dominant role played by initiative proponents in the lawmaking process could provide a relatively straightforward solution to the "interpretive dilemmas" that seem to exist in direct democracy. The judicial tendency to privilege the intentions of the proponents of direct democratic measures lends a false air of legitimacy to direct democracy when courts claim to be implementing the will of the people.[165] The prevailing theories of statutory interpretation are problematic in this context precisely

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161. *See supra* note 61.

162. *See, e.g.*, Pac. Legal Found. v. Cal. Coastal Comm'n, 655 P.2d 306, 308 n.1 (Cal. 1982) ("Statements in ballot arguments in support of a successful initiative measure are properly considered as evidence of the intent behind the measure."); Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 583 P.2d 1281, 1300 (Cal. 1978) ("[w]hen, as here, the enactment follows voter approval, the ballot summary and arguments and analysis presented to the electorate in connection with a particular measure may be helpful in determining the probable meaning of uncertain language."); *see also supra* notes 145-46.

163. *See* Schacter, *supra* note 5, at 128-30.

164. As explained below, focusing on the statements of initiative proponents during the lawmaking process would eliminate the evidentiary difficulties associated with establishing that a successful ballot measure was motivated by a discriminatory purpose, which were described by Professor Eule. *See infra* note 229 and accompanying text.

165. *Cf.* Schacter, *supra* note 5, at 150-52 (claiming that the rhetoric of popular intent allows courts to attribute their own policy choices to the voters).

because voters do not read or understand the language of initiative measures and their surrounding legal context.[166] If, however, courts were expressly to acknowledge that their use of formal legal sources of interpretive guidance was designed to convey the meaning intended by the initiative proponents, rather than the meaning intended by the voters, these interpretive dilemmas would largely disappear. The initiative proponents would stand on the same footing as the sponsors of traditional legislation who take primary responsibility for drafting their proposals, who guide their bills through the legislative process, and whose views are often given substantial weight by courts that are later charged with interpreting successful legislation.[167] In other words, by rejecting the myth of popular sovereignty in direct democracy, the inevitable judicial reliance on formal legal sources to interpret the meaning of ballot measures could be squared with traditional, intentionalist theories of statutory interpretation.[168]

That said, a candid acknowledgment that courts are privileging the intentions of initiative proponents when they interpret direct democratic measures brings other, potentially more difficult, problems to the fore. First, the tension between direct democracy and the republican form of government endorsed by the Guarantee Clause is only intensified.[169] Second, the argument that the initiative process unconstitutionally delegates lawmaking authority to private citizens, which was so cavalierly dismissed in *City of Eastlake* based on the Court's willingness to accept the myth of popular sovereignty in direct democracy, regains much of its vitality when the courts' interpretation of direct democratic measures is viewed in this more realistic light.[170] Third, the judicial tendency to privilege the intentions of the proponents of direct democratic measures intensifies concerns about

166. *See id.* at 139-44.

167. The leading casebook on the legislative process and statutory interpretation points out that "the qualms courts and commentators may have about relying on" legislative history "often disappear when the speaker is the sponsor of the bill or amendment that includes the statutory provision being interpreted." WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 997 (3d ed. 2001). The authors also point out that "[a]s the availability of legislative history for state statutes has dramatically increased, state courts, too, are relying on statements of sponsors to interpret statutes." *Id.*

168. A textualist approach to the interpretation of ballot measures would even more clearly result in lawmaking by the unelected and unaccountable initiative proponents who draft such measures, and would therefore also demonstrate a need for the types of procedural reforms described below. *Cf.* Schacter, *supra* note 5, at 149-50 (rejecting a textualist response to the interpretive dilemmas in direct democracy, in part, "because the legal terms of art commonly used in ballot measures are often meaningful only to a small, elite community of lawyers, judges, and knowledgeahle observers").

169. *See infra* Part III.A.

170. *See id.*

the simplistic, partisan, and sometimes misleading nature of initiative advertising, particularly when the proponents' message to the electorate is at odds with the meaning suggested by the formal legal sources that are relied upon by the courts.[171] These concerns suggest a need for mechanisms to encourage more honest deliberation in the process and to hold initiative proponents accountable for their decisions during ballot campaigns if lawmaking by direct democracy is to be improved and legitimized. The next part argues that well-established and judicially manageable mechanisms for accomplishing these tasks are readily available.

III. THE NEED FOR REASONED DECISIONMAKING IN DIRECT DEMOCRACY

A. The Constitutionally Suspect Nature of "Alternative" Lawmaking

Article I of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."[172] Moreover, the Constitution provides that "[e]very Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States."[173] The president may either sign the bill into law or refuse to do so, in which case the two chambers of Congress may override a presidential veto by a subsequent vote of a two-thirds majority of their members.[174]

These constitutional provisions suggest that federal legislation must satisfy two fundamental requirements. First, such legislation must overcome the structural hurdles of bicameralism and presentment, which ordinarily requires a sufficient level of deliberation, compromise, and consensus.[175] Perhaps more fundamentally, the Constitution at least implicitly provides that federal laws must be enacted by elected representatives of the people.[176] The absence of these characteristics renders administrative

171. *See supra* note 138 and accompanying text.

172. U.S. CONST. art. I, § 1.

173. U.S. CONST. art. I, § 7, cl. 2.

174. *See id.*

175. Sunstein, *supra* note 10, at 44 ("The system of checks and balances within the federal structure was intended to operate as a check against self-interested representation and factional tyranny in the event that national officials failed to fulfill their responsibilities.").

176. *Id.* at 41-47 (describing the opportunities for collective deliberation and debate provided by representation).

lawmaking constitutionally suspect and provides the underlying basis for the nondelegation doctrine, with which the Supreme Court and public law scholars have been struggling for more than a century.[177]

Lawmaking by initiative also lacks the structural safeguards of Article I and is controlled by unelected actors in the political process. In contrast to the near obsession with this problem in the administrative context, however, the Supreme Court easily disposed of a challenge to the constitutional validity of direct legislation on these grounds in *City of Eastlake v. Forest City Enterprises, Inc.*[178] As discussed above,[179] the Court invoked the rhetoric of popular sovereignty in describing the ballot measure at issue and simply concluded that the nondelegation doctrine "is inapplicable where, as

177. *See, e.g.*, David Schoenbrod, *Separation of Powers and the Powers That Be: The Constitutional Purposes of the Delegation Doctrine*, 36 AM. U. L. REV. 355, 371-81 (1981) (explaining that "agencies lack all of the structural features upon which Madison relied to protect against faction when enlightened statesmen fail"); Sunstein, *supra* note 10, at 66 ("The constitutional status of administrative agencies has been uncertain precisely because they evade the ordinary constitutional safeguards against domination by powerful private groups."); *see also* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 334 (2002) (describing the "widespread modern obsession with the nondelegation doctrine" in administrative law). *See generally* Symposium, *The Phoenix Rises Again: The Nondelegation Doctrine from Constitutional and Policy Perspectives*, 20 CARDOZO L. REV. 731 (1999).

178. 426 U.S. 668, 672 (1976). As this Article was going to press, the Supreme Court issued a decision in *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 2003 WL 1477301 (Mar. 25, 2003), which held that city officials did not violate the Equal Protection or Due Process Clauses by placing a referendum involving the city counsel's approval of a low-income housing project on an election ballot pursuant to the city charter or by delaying the issuance of building permits pending the certification of the election's outcome. Although the Court did not address the merits of this successful referendum, which was invalidated by the Ohio Supreme Court on the grounds that a referendum was not authorized by state law for "administrative acts" of this nature, *see id.* at *3, the Court's decision is relevant to this project in at least two respects. First, although the Court found no evidence of a discriminatory intent by city officials in implementing the referendum procedure at issue, it recognized that "statements made by decisionmakers or referendum sponsors during deliberation over a referendum may constitute relevant evidence of discriminatory intent in a challenge to an ultimately enacted initiative." *Id.* at *5-6; *accord supra* note 164 and accompanying text (arguing that courts should closely scrutinize the statements of initiative proponents when assessing the constitutional validity of ballot measures under the Equal Protection Clause); *infra* note 229 and accompanying text (same); text accompanying *infra* note 231 (same). Second, the Court reaffirmed its decision in *City of Eastlake*, which held that a referendum "cannot . . . be characterized as a delegation of power" because "all power stems from the people," and therefore concluded that the city's implementation of a referendum procedure does not "constitute per se arbitrary government conduct in violation of due process." *City of Cuyahoga Falls*, 2003 WL 1477301, at *8 (quoting *City of Eastlake*, 426 U.S. at 672, 675). *But see infra* notes 179-88 and accompanying text (criticizing the Court's seemingly broad approval of direct democracy in *City of Eastlake*). Although the Court acknowledged that "the 'substantive result' of a referendum" may violate due process "if it is 'arbitrary and capricious,' " the Court apparently continues to accept the myth of popular sovereignty in direct democracy. *City of Cuyahoga Falls*, 2003 WL 1477301, at *8; *see also id.* at *6 (describing the "devotion to democracy" evidenced by the referendum) (quoting James v. Valtierra, 402 U.S. 137, 141 (1971)).

179. *See supra* notes 85-88 and accompanying text.

here, rather than dealing with a delegation of power, we deal with a power reserved by the people to themselves."[180]

The Court's broad approval of direct democracy in *City of Eastlake* is questionable on a number of grounds. First, the myth of popular sovereignty in direct democracy was so ingrained in their thinking that the litigants and the Court naturally viewed "the people" as the unelected actors to whom lawmaking authority was allegedly delegated.[181] The Court therefore failed to distinguish between a referendum, which refers legislation to the voters after it is enacted by elected representatives, and an initiative—which bypasses the traditional legislative process altogether. Because the case involved a challenge to a referendum that rejected the city council's approval of a zoning variance, it was perhaps accurate to characterize the procedure as "allowing the people the final decision, amounting to a veto power, over enactments of representative bodies."[182] Indeed, the electorate's decision to reject the city council's departure from the status quo did not result in the creation of a newly enacted law that was written, financed, and promoted entirely by private parties. It is therefore not surprising that the Court was unsympathetic to nondelegation concerns in this particular context.

Because the proponents of ballot measures are the driving force behind initiatives, however, they are the private persons to whom lawmaking authority is truly being delegated.[183] Although rejection or ratification of a proposed measure by the electorate provides a potential safeguard, the real question for nondelegation purposes should be whether consideration by the electorate is adequate to deter arbitrary decisionmaking in the process of initiative lawmaking. Given the limitations on voter knowledge and understanding that are described above, as well as the absence of other structural safeguards designed to promote deliberation and reasoned decisionmaking in the lawmaking process, this prospect seems highly unlikely.[184] While the

180. *City of Eastlake*, 426 U.S. at 675.

181. *See id.* at 671 (stating that the respondent sought a declaratory judgment that the city charter provision requiring any change in land use to be approved by a fifty-five percent vote of the electorate in a referendum was "invalid as an unconstitutional delegation of legislative power to the people"); *id.* at 671-72 (explaining that the Ohio Supreme Court "held that a popular referendum requirement, lacking standards to guide the decision of the voters, permitted the police power to be exercised in a standardless, hence arbitrary and capricious manner"); *id.* at 672 (concluding that "[a] referendum cannot . . . be characterized as a delegation of power" because "the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature") (citing Hunter v. Erickson, 393 U.S. 385, 392 (1969)).

182. *Id.* at 675.

183. *See supra* Part II.B.

184. *See infra* Part IV.A (describing the inadequacies of the safeguard provided by the electorate's consideration of proposed initiative measures).

absence of adequate structural safeguards in the initiative process does not necessarily render such lawmaking unconstitutional under the nondelegation doctrine, the initiative lawmaking process raises the same concerns as broad delegations of lawmaking authority to administrative agencies.[185]

The Court's broad approval of direct democracy in *City of Eastlake* is also questionable on other grounds. First, the particular lawmaking procedure at issue, which required zoning variances granted by the city council to be approved by a referendum of the people, was more akin to an adjudication of an individual's property rights than to a generally applicable regulation. As the dissenting opinions of Justices Powell and Stevens recognized, adjudications of this nature are inappropriate for resolution by direct democracy because of the absence of adequate procedural protections for the individual whose property rights are at stake.[186] Moreover, the Court

185. Although the federal nondelegation doctrine does not apply directly to the states (except perhaps through the Guarantee Clause), state courts have uniformly adopted their own versions of the nondelegation doctrine. *See* Gary J. Greco, *Standards or Safeguards: A Survey of the Delegation Doctrine in the States*, 8 ADMIN. L.J. AM. U. 567, 568 (1994); Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1187-91 (1999). Indeed, some state courts have enforced their nondelegation doctrines in the agency context more aggressively than federal courts under a variety of rationales. *See* Greco, *supra*, at 578-600; Rossi, *supra*, at 1191-1216. A number of state courts, including California, Oregon, and Washington, specifically consider whether the lawmaking process contains adequate procedural safeguards when assessing the validity of delegations of authority to administrative agencies. *See* Greco, *supra* at 576, 599-600 tbl. III; *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1477 (1982). Accordingly, the argument that initiative lawmaking is in tension with the nondelegation doctrine would appear even stronger under principles of state law than under federal doctrine.

186. 426 U.S. at 680 (Powell, J., dissenting) (explaining that using the referendum to address the status of a single small parcel of land owned by a single person affords "no realistic opportunity for the affected person to be heard, even by the electorate," and is accordingly "fundamentally unfair"); *id.* at 688-89 (Stevens, J., dissenting) (arguing that due process "requires that a municipality protect individuals against the arbitrary exercise of municipal power, by assuring that fundamental policy choices . . . are articulated by some responsible organ of municipal government" and that the city charter provision "ignored these concepts and blatantly delegated legislative authority, with no assurance that the result reached would be reasonable or rational"); *see also* Lawrence Gene Sager, *Insular Minorities Unabated*: Warth v. Seldin *and* City of Eastlake v. Forest City Enterprises, Inc., 91 HARV. L. REV. 1373 (1978) (arguing that by giving broad approval to the use of direct democracy in the zoning context, the Court in *City of Eastlake* ignored principles of "due process of lawmaking," which dictate that certain decisions be made by a reflective legislative body rather than by the electorate at large). *But see* Daniel P. Selmi, *Reconsidering the Use of Direct Democracy in Making Land Use Decisions*, 19 UCLA J. ENVTL. L. & POL'Y 293, 297-98 (2001) (examining municipal land use decisions made by direct democracy and concluding that "while the normal regulatory process is certainly superior to the initiative and referendum, direct democracy can serve valuable purposes and is not necessarily incompatible with sound land use practices"). The remainder of this Article explains how the principles of due process of lawmaking discussed by Professor Sager can—and should—be incorporated into the initiative process. *See infra* Parts III.C & IV.B.

failed to address the constitutional provision which provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government . . . ."[187] Although referenda, which are referred to the voters after legislative consideration of the proposal at issue, present fewer problems in these regards than direct initiatives, which bypass the legislative process entirely, the Court was apparently oblivious to the fact that the Guarantee Clause seems to place some limitations on the procedures by which state and local governments enact laws.[188]

As indicated above, the Supreme Court had previously held that federal court challenges to the products of direct democracy under the Guarantee Clause are nonjusticiable political questions.[189] Nonetheless, if the fundamental lawmaking characteristics set forth in the federal Constitution (i.e., structural filters and representative democracy) are viewed as the baseline requirements of republican lawmaking, it becomes apparent that lawmaking by initiative is in serious tension with those principles and therefore potentially conflicts with the attributes of a "Republican Form of Government."[190] Viewed against this baseline, the idea that "the people" could "reserve" unfiltered lawmaking powers to themselves runs counter to the fundamental tenets of republican democracy. This conclusion is particularly compelling when one rejects the "myth of popular sovereignty" in direct democracy and recognizes how courts that

187. U.S. CONST. art. IV.

188. *See supra* notes 27, 30 & 169.

189. *See* Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912), *dismissing writ of error to review*, 53 Or. 162, 99 P. 427 (1909).

190. Robert G. Natelson has recently argued that an original understanding of the Guarantee Clause would not prohibit direct democracy on federal constitutional grounds. *See* Natelson, *supra* note 27, at 814; *see also* Hirsch, *supra* note 27, at 186 (arguing that "the founding fathers believed in direct democracy, and the Constitution embodies it"). Although Natelson's critique of scholarship to the contrary is provocative, this Article does not argue that direct democracy is absolutely prohibited by the Guarantee Clause. Nor does the Article claim that direct democracy is constitutionally suspect merely because of the original intentions of the Framers. Rather, this Article claims that direct democracy is in serious tension with the structure of government established by the Constitution. Even if the Guarantee Clause does not require states to adopt the same constitutional structure as the federal government, as Natelson claims, *see* Natelson, *supra* note 27, at 856, this conclusion would mean only that additional structural safeguards for direct democracy are not constitutionally required. This Article does not attempt to argue otherwise, but merely contends that jurisdictions which authorize direct democracy should enact statutory reforms that apply the agency model to direct democracy in order to encourage deliberation and reasoned decisionmaking in the initiative process. While some of the Framers, including James Madison, would surely favor reforms that are intended to provide direct democracy with alternatives to the procedural safeguards provided by the republican government established by the federal Constitution, contemporary advocates of deliberative democracy should favor these reforms on pragmatic grounds as well—even if they are not required by the Constitution.

review and interpret such measures consistently privilege the intentions of the proponents of ballot measures.[191] This latter insight, in particular, reinforces the notion that direct democracy in reality "delegates" lawmaking authority to the initiative proponents who actually control the process.

While it is unlikely that courts would consider invalidating direct democracy in the states under the Guarantee Clause or the nondelegation doctrine, it seems apparent that lawmaking by initiative is constitutionally suspect for the same fundamental reasons as agency lawmaking.[192] Moreover, even aside from the foregoing constitutional principles, it seems clear that authorizing lawmaking by unelected actors who are not subject to adequate safeguards designed to encourage reasoned deliberation, compromise, and consensus is simply a bad idea from the perspective of those who are concerned about good government. While such safeguards are currently lacking in the context of direct democracy, the next section explains that alternative safeguards that further republican lawmaking principles have been implemented with considerable success in administrative law.

B. Deliberation and Accountability in the Administrative State

The Supreme Court has consistently understood the Constitution to limit the extent to which, or the conditions under which, Congress may delegate its lawmaking powers to executive or administrative officials. The Court's early cases upheld congressional delegations of authority to agencies to "fill in the details" of a statutory scheme as long as Congress retained for itself the

191. *See supra* Part II.

192. It is therefore not surprising that both the administrative state and direct democracy have repeatedly been labeled the "fourth branch of government." *See, e.g.*, Selmi, *supra* note 186, at 294 & n.2; Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941, 950 & n.30 (2000) ("[A]dministrative bodies . . . have become a veritable fourth branch of Government"). The separation of powers concerns raised by the nondelegation problem are closely related to the tension between unconstrained "alternative lawmaking" and principles of due process. *See* William Funk, *Rationality Review of State Administrative Rulemaking*, 43 ADMIN. L. REV. 147, 155 (1991) ("At some level, the due process and equal protection clauses of the Fourteenth Amendment require rationality review" of state administrative action); *infra* note 197 and accompanying text (recognizing the procedural due process gloss on the nondelegation doctrine); *see also* Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1514-16 (1991) (recognizing that "the structure of the government is a vital part of a constitutional organism whose final cause is the protection of individual rights" and arguing that "[w]hen government action is challenged on separation of powers grounds, the Court should consider the potential effect of the arrangement on individual due-process interests.").

responsibility for setting basic policy.[193] During the late 1920s, the Court began to acknowledge the emerging reality that agencies were necessarily engaging in substantive policymaking and ruled that it would sustain delegations of legislative power whenever Congress dictates an "intelligible principle" to which an agency must conform.[194] Although the Supreme Court invalidated two pieces of New Deal legislation under this standard during the 1930s,[195] those decisions proved to be the Supreme Court's last and only applications of the nondelegation doctrine to overturn congressional acts on the ground that they lacked sufficient standards—even though the Court has continued to repeat the message that "sweeping delegation[s] of legislative power" to administrative agencies are unconstitutional.[196]

There is little consensus in the scholarly literature regarding the reasons for, and the advisability of, the Supreme Court's reluctance to invalidate acts of Congress under the nondelegation doctrine. Nonetheless, Congress's enactment of the Administrative Procedure Act in 1946 and the subsequent acknowledgment by courts that procedural protections and judicial review can operate like substantive legislative standards to check potentially excessive uses of administrative authority have undoubtedly played an important role.[197] Indeed, Kenneth Culp Davis argued in an influential article

193. *See* United States v. Grimaud, 220 U.S. 506, 522-23 (1911) (upholding a delegation of authority to the Secretary of Agriculture to promulgate regulations protecting public forests and to establish criminal penalties for violations); Buttfield v. Stranahan, 192 U.S. 470, 494 (1904) (upholding a delegation to an administrator to " 'establish uniform standards' " for importing tea).

194. *See* J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928) (recognizing that the Tariff Act of 1922 authorized the President to make discretionary economic judgments, but upholding the delegation of authority because Congress set forth "an intelligible principle" to guide the President's discretion); Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 7-17 (1982) (providing an historical overview of tbe development of the nondelegation doctrine); Lisa Schultz Bressman, Schecter Poultry *at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1404 (2000) (describing the initial appearance of "[t]he most familiar judicial formulation of the nondelegation doctrine").

195. *See* Panama Refining Co. v. Ryan, 293 U.S. 388, 433 (1935) (invalidating a provision of the National Industrial Recovery Act which authorized the President to restrict interstate transportation of oil produced in violation of state law); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 535, 551 (1935) (invalidating another provision of the National Industrial Recovery Act which authorized the President to approve "codes of fair competition" recommended by private industry groups).

196. Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 646 (1980); *see also* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (maintaining that Congress must articulate "an intelligible principle" to guide an agency's discretion when it confers rulemaking authority on an administrative agency).

197. *See* Michael Asimow, *On Pressing McNollgast to the Limits: The Problem of Regulatory Costs*, 57 LAW & CONTEMP. PROBS. No. 1, at 127, 127-29 (1994) (claiming that "[s]everal generations of commentators have agreed that the APA's notice-and-comment procedure strikes a pretty good balance" in promoting accuracy, efficiency, and acceptability in the rulemaking

published in 1969 that "[t]he courts should recognize that administrative legislation through the superb rule-making procedure marked out by the [APA] often provides better protection to private interests than congressional enactment of detail."[198] Davis argued, however, that "courts need to do much more than they have been doing through the non-delegation doctrine to provide protection against arbitrariness."[199]

A number of years later, in the landmark case of *Motor Vehicle Manufacturers Association v. State Farm*, the Supreme Court seemed to follow Davis's suggestion when it held that an agency rule would be deemed arbitrary and capricious under the APA "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[200] *State Farm* is

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process); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 660 (1996) ("The procedural safeguards for rulemaking required by the APA are important constraints on an agency's lawmaking authority."); Shapiro & Levy, *supra* note 18, at 388 (explaining that hard-look judicial review "is best understood as a form of heightened scrutiny of the rationale of agency decisions and that the doctrine of separation of powers requires such scrutiny because of the unique position of administrative agencies in terms of the constitutional structure of government"); Sunstein, *supra* note 10, at 60-61 ("Much of modern administrative law is a means of serving the original purposes of the nondelegation doctrine, and of promoting Madisonian goals, without invalidating regulatory statutes"); Zellmer, *supra* note 192, at 953-54, 963-64 (explaining that "[p]rior to the enactment of the Administrative Procedure Act in 1946, unelected agency officials made important decisions largely free from public scrutiny and judicial review, giving rise to separation of powers and due process concerns," and that "in the post–New Deal, post–Administrative Procedure Act era, courts have been far more interested in ensuring that procedural safeguards cabin the exercise of delegated power so that those affected by agency action are protected from arbitrary and abusive decisions"); *see also* Clinton v. City of New York, 524 U.S. 417, 489 (1998) (Breyer, J., dissenting) (recognizing that the dangers of broad delegations of authority can be alleviated by "subsidiary rules," including the procedural requirements of the APA and judicial review, which diminish "the risk that the agency will use the breadth of a grant of authority as a cloak for unreasonable or unfair implementation"); Amalgamated Meat Cutters & Butcher Workmen of N. Am., AFL-CIO v. Connally, 337 F. Supp. 737, 760-62 (D.D.C. 1971) (Leventhal, J.) (approving a broad delegation of authority only after finding that procedural safeguards and judicial review were adequate to control the actions of the executive branch); Aranson et al., *supra* note 194, at 14 (recognizing that although *Amalgamated Meat Cutters* was not a Supreme Court decision, the opinion "has been widely accepted as an authoritative modern statement of the procedural due process gloss on the delegation doctrine" and explaining that "[i]n some of the delegation cases, the [Supreme] Court has . . . indicated that broad delegations of authority without either corresponding procedural protections or an opportunity for judicial review may violate the Constitution"); *supra* note 185.

198. Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 726 (1969).

199. *Id.*

200. Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) ("*State Farm*"). Professor Davis's procedural approach to the nondelegation

widely understood to have imposed a requirement on administrative agencies to engage in "reasoned decisionmaking" during the lawmaking process.[201]

The net result of APA procedures and "hard-look" judicial review under *State Farm* is to encourage and enforce republican ideals of deliberation and reasoned decisionmaking in the administrative lawmaking process.[202] Those ideals are generally assumed to be

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doctrine was influential in the state courts and consistent with the Supreme Court's endorsement of hard-look judicial review of administrative action. *See* Aranson et al., *supra* note 194, at 14 (describing the judiciary's acceptance of the "procedural due process gloss on the nondelegation doctrine"); *Developments in the Law—The Interpretation of State Constitutional Rights*, *supra* note 185, at 1477 (describing Professor Davis's approach to the nondelegation doctrine and explaining that it "had a great deal of influence on the nondelegation doctrine as applied by state courts"); Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 344 (1999) (explaining that *Amalgamated Meat Cutters* "can be understood as part of a range of surrogate safeguards, operating in Davis's spirit and promoting nondelegation goals without invoking the nondelegation doctrine" and that "much of the work of the doctrine, and of Davis's proposal, ultimately came from judicial review of agency action for arbitrariness" under the " 'hard-look doctrine' "); Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 274-76 & n.86 (1978) (describing the highly influential *Final Report of the Attorney General's Committee on Administrative Procedure* and explaining that the "talented staff" that produced the report "included the budding administrative law scholar, Kenneth C. Davis"); Zellmer, *supra* note 192, at 964 & n.118 (describing Professor Davis's approach to the nondelegation doctrine and explaining that it "gained support in state courts" and "likely influenced the three-judge panel in *Amalgamated Meat Cutters*"); *cf.* Shapiro & Levy, *supra* note 18, at 396-413 (describing the evolution of administrative law doctrine and concluding that after *State Farm*, "[r]ationalism has become the primary method of constraining administrative action").

201. *See* ERNEST GELLHORN & RONALD M. LEVIN, ADMINISTRATIVE LAW AND PROCESS IN A NUTSHELL 108-09 (1997) (summarizing the development of hard-look judicial review and attributing tbe term "reasoned decisionmaking" to Judge Leventhal of the D.C. Circuit). Despite the influence of Professor Davis's approach to the nondelegation doctrine, a number of states have not adopted hard-look judicial review of informal agency rulemaking. *See* Funk, *supra* note 192, at 147. Alternative approaches to state administrative law are problematic because they omit an important structural safeguard that helps to legitimize agency rulemaking in the first place. *See id.* (concluding that "nothing in the federal experience or the nature of state government justifies the denial of judicial review of the rationality of state administrative rulemaking, which is nothing less than granting discretion to state agencies to make irrational rules"); Shapiro & Levy, *supra* note 18 (describing the constitutional underpinnings of hard-look judicial review).

In any event, this Article's references to "the agency model" refer to the federal agency model and the model adopted by those states that have authorized hard-look judicial review of agency action. There is little reason to think that state courts could not adequately conduct hard-look judicial review in the administrative law or initiative contexts if the legislature explicitly adopted this version of the "arbitrary and capricious" standard of review. *See* Funk, *supra* note 192, at 170-72, 174-75 (refuting objections to hard-look judicial review of agency action by state courts and concluding that "there is no reason to suppose that state judges are incompetent with respect to administrative law issues"). *But cf. infra* note 227 (describing the problems posed by the election of state court judges for heightened judicial scrutiny of successful ballot measures and identifying potential solutions).

202. *See* Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1512 (1992) (arguing that "the political theory of civic republicanism, with

satisfied in the traditional legislative process by virtue of representation and the structural safeguards of bicameralism, presentment, and separation of powers that are enshrined in the Constitution.[203] Indeed, courts routinely state that laws enacted by the legislature are entitled to a presumption of validity.[204] Thus, when courts review the constitutionality of traditional legislation, they normally uphold the validity of a measure as long as they can conceive of a rational basis for the legislation, even if the purpose attributed to the measure did not motivate the enacting body.[205] Courts do not ordinarily examine the legislative record to assess the validity of traditional legislation, except when the ordinary presumption of validity is unwarranted because the legislation at issue implicates certain fundamental rights, suspect classifications, or perhaps, more recently, federalism concerns.[206] In the latter situations, courts

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its emphasis on citizen participation in government and deliberative decision-making, provides the best justification for the American bureaucracy"); Sunstein, *supra* note 10, at 56-68 (describing administrative law doctrine as "classically republican" because of its requirements of "deliberation" and "reasoned analysis"); Note, *Civic Republican Administrative Theory: Bureaucrats as Deliberative Democrats*, 107 HARV. L. REV. 1401, 1416 (1994) (explaining that the "interest-group model" of administrative lawmaking articulated by civic republican scholars identified "the problem with delegation" as shifting "policymaking from the inclusive and accountable forum of Congress to the exclusive and unaccountable site of the agency" and "posed as a corrective a series of reforms intended to help the bureaucracy approach the kind of inclusivity that the legislative process affords").

203. *See, e.g.*, Frickey, *supra* note 20, at 444 (explaining that "[f]ederal constitutional law conclusively presumes that, when general legislation affects many people, the legislative process" meets the criteria of due process of lawmaking because it "develop[s] the relevant facts and legal standards so that people are not deprived of important rights or interests based on erroneous assumptions" and promotes "participation and dialogue by affected individuals in tbe decisionmaking process") (internal quotations omitted); Sunstein, *supra* note 10, at 65 (recognizing that "conventional understandings of the separation of powers" suggest that "in reviewing legislative action . . . courts ought to give legislators the benefit of every doubt ").

204. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 322 (1980) (recognizing the "presumption of constitutional validity" that is ordinarily attributed to acts of Congress); Parham v. Hughes, 441 U.S. 347, 351 (1979) (plurality opinion) ("State laws are generally entitled to a presumption of validity against attack under the Equal Protection Clause.").

205. *See* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-3, at 1443 (2d ed. 1988).

206. *See, e.g.*, Attorney Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 906 n.6 (1986) ("It is well established that where a law classifies by race, alienage, or national origin, and where a law classifies in such a way as to infringe constitutionally protected fundamental rights, heightened scrutiny under the Equal Protection Clause is required.") (citations omitted). The Court's recent federalism cases have proven controversial, in part, because the Court has closely scrutinized the legislative records underlying the enactments while purporting to apply the deferential rational basis standard of review. *See* Melissa Hart, *Conflating Scope of Right with Standard of Review: The Supreme Court's 'Strict Scrutiny' of Congressional Efforts to Enforce the Fourteenth Amendment*, 46 VILL. L. REV. 1091, 1092-93 (2001) ("In effect, the Court has declared that it will apply a kind of 'strict scrutiny' to federal legislation that would receive only minimal scrutiny were a state to pass an identical law."); *infra* Part IV.B (describing the Court's recent federalism cases).

ordinarily subject the legislation to some version of heightened scrutiny.

In contrast, because the structural constitutional safeguards provided by representation and the procedural requirements of Article I are absent from administrative rulemaking, there is no reason to assume that this method of lawmaking will satisfy the republican ideals of deliberation and reasoned decisionmaking.[207] The procedural requirements of the APA and hard-look judicial review are therefore necessary to enforce those ideals. First, the requirements that agencies publish proposed rules, solicit comments from interested citizens, and issue general statements of the basis and purpose for a final rule are designed to encourage reasoned deliberation in the rulemaking process.[208] Second, when courts examine the validity of an agency rule under the arbitrary and capricious standard, they do not simply defer to any rationale proffered by the government to justify the policy, but will instead examine the administrative record for the reasoning actually provided by the agency.[209] A rule will be invalidated or remanded to the agency for reconsideration under *State Farm* if the agency has relied on factors prohibited by Congress,

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207. *See State Farm*, 463 U.S. 29, 43 n.9 (1983) (rejecting the Department of Transportation's argument that "the arbitrary and capricious standard requires no more than the minimum rationality a statute must bear in order to withstand analysis" under the Constitution, and explaining that "[w]e do not view as equivalent the presumption of constitutionality afforded legislation drafted by Congress and the presumption of regularity afforded an agency in fulfilling its statutory mandate"); Shapiro & Levy, *supra* note 18, at 429 (stating that "administrative agencies, unlike legislatures, are not entitled to the same presumption of correctness because they are neither politically accountable nor directly subject to checks and balances"); Sunstein, *supra* note 10, at 59-68 (recognizing that hard-look judicial review "may be understood as a form of means-ends scrutiny akin to what we have seen in constitutional law," but explaining that "[t]he rationale for deference applies with much less force to actions of administrative agencies, whose constitutional pedigree is far less clear").

208. *See* 5 U.S.C. § 553 (2000); *see also* Seidenfeld, *supra* note 202, at 1560 (stating that "the paradigmatic process for agency formulation of policy—informal rulemaking—is specifically geared to advance the requirements of civic republican theory"); Sunstein, *supra* note 10, at 61-64 (explaining that courts have helped to transform informal agency rulemaking into a process that "favor[s] . . . a more deliberative role for administrators").

209. *See* § 706 (in reviewing agency action under the arbitrary and capricious standard, "the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error"); *State Farm*, 463 U.S. at 43 (explaining that a court may not "supply a reasoned basis for the agency's action that the agency itself has not given") (quoting SEC v. Chenery Corp., 332 U.S. 194, 196 (1947)); *id.* at 50 (noting that "an agency's action must be upheld, if at all, on the bases articulated by the agency itself," not those articulated after the fact by its lawyers); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 419-20 (1971), *abrogated on other grounds*, Califano v. Sanders, 430 U.S. 99, 105 (1977) (explaining that judicial review of agency action is to be based on tbe full administrative record that was before the Secretary at the time a decision was made and that "post hoc rationalizations . . . have traditionally been found to be an inadequate basis for review") (internal quotations and citation omitted).

entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence in the administrative record, or provided an implausible explanation for its decision.[210] This form of heightened judicial scrutiny enforces the republican ideal of reasoned decisionmaking for every legislative rule adopted through the administrative lawmaking process.[211]

Regardless of whether APA procedures and hard-look judicial review have completely resolved the nondelegation problem,[212] these administrative law safeguards have undoubtedly made agency

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210. *State Farm*, 463 U.S. at 43.

211. *See* Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 WIS. L. REV. 763, 768, 811 (arguing that the hard-look doctrine is a "protector of increased citizen participation and deliberative government" that "contributes to legitimacy and thus is a fully warranted exercise of judicial authority"); Seidenfeld, *supra* note 202, at 1548 ("In essence, by delegating policymaking authority to a subordinate agency, Congress allows the courts to review agency decisionmaking to ensure that it comports with civic republican criteria without forfeiting the primacy that the Constitution grants to Congress as the body of duly elected representatives of the people."); Shapiro & Levy, *supra* note 18, at 440 ("Rationalist review acknowledges the unique constitutional position of agencies outside of the tripartite system of government envisioned by the Framers, and compensates through heightened scrutiny of agency decisions in the form of the requirement that agencies give adequate reasons."); Sunstein, *supra* note 10, at 63 ("Reviewing courts are attempting to ensure that the agency has not merely responded to political pressure but that it is instead deliberating in order to identify and implement the public values that should control the controversy.").

212. During the 1970s, a consensus emerged that informal rulemaking under the APA "offered an ideal vehicle for making regulatory policy." Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1385 (1992). Professor Davis expressed the prevailing sentiment when he entbusiastically characterized informal rulemaking as "one of the greatest inventions of modern government." KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 6.15, at 283 (1st ed. Supp. 1970). Although informal rulemaking continues to be viewed as "an exceedingly effective tool for eliciting public participation in administrative policymaking," the rulemaking process has received a great deal of critical scrutiny in subsequent years. McGarity, *supra*, at 1385-86. Some contemporary critics of administrative rulemaking have argued that existing safeguards are insufficient to constrain the discretion of agency officials. *See, e.g.*, Schoenbrod, *supra* note 177, at 381-87. Conversely, numerous contemporary critics have complained that the existing structural safeguards are too stringent and have the unfortunate result of ossifying the rulemaking process. *See, e.g.*, McGarity, *supra*, at 1385-86 (claiming that " 'ossification' of the rulemaking process . . . is one of the most serious problems currently facing regulatory agencies"); *infra* note 300 (discussing the ossification hypothesis in administrative law scholarship). Despite these criticisms, hard-look judicial review has remained a central feature of administrative lawmaking. Nor has a better approach been developed to take its place. *See, e.g.*, William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 445 (2000) ("Judicial review under the hard look doctrine is the price we pay for delegating highly complex important public policy decisions to unelected administrative agencies."); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 471 (1987) (acknowledging that many of the criticisms of hard-look judicial review "have some basis," but arguing that they "are insufficient to justify abandonment" of the doctrine because its "requirement of detailed explanation has been a powerful impediment to arbitrary or improperly motivated agency decisions").

lawmaking more consistent with republican principles of government and have therefore substantially improved the democratic legitimacy of the rulemaking process. Because there is no reason to assume that the product of direct democracy as it currently exists is consistent with republican ideals of deliberation and reasoned decisionmaking, a comparable model is necessary to encourage deliberation in the initiative process, hold the proponents of ballot measures accountable for their actions during the lawmaking process, and thereby improve the democratic legitimacy of lawmaking "by the people." The following section explains how the administrative law model could be implemented in the context of direct democracy.

C. Application of the Agency Model to Direct Democracy

In contrast to the requirements for lawmaking by administrative agencies, the existing procedures for conducting initiatives in jurisdictions that authorize direct democracy do not provide adequate alternative mechanisms for promoting republican values or holding initiative proponents accountable for their decisions during the lawmaking process.[213] Indeed, there are currently no

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213. Kenneth P. Miller, a Ph.D. candidate in political science at the University of California, Berkeley, has succinctly described the procedural shortcomings of initiative lawmaking as follows:

> At the "front end" of the policy process, the initiative system has two primary features that undermine democratic values: 1) proponents have absolute control of the framing and drafting of the measure; and 2) measures are fixed and unamendable at an early stage of the process. Initiative proponents are accountable to no one, and routinely exclude the measure's opponents and other interested parties from their decisions on how to draft the measure's language. There are no open meeting laws, public notice requirements, hearings to solicit public input, or other guarantees to give the press and public access to the drafting and editing stages of the initiative policy-making process. Instead, measures simply "appear" in final form at the titling and circulation stage. After they have finished drafting, proponents file the measure with the attorney general's office, which prepares a title and summary, but again no one involved in that process has the power to amend the proposal. Proponents then circulate the measure to gather sufficient signatures to place it on the ballot. At that point, the measure cannot be amended again, even by the proponents, even if it becomes apparent that the measure contains a flaw that should be corrected.

Miller, *supra* note 75, at 1051-52 (internal citations omitted).

A number of jurisdictions that authorize direct democracy have adopted procedures that are intended to improve deliberation in ballot campaigns. For example, the indirect initiative, which requires legislative consideration of an initiative proposal prior to placing the measure on the ballot, furthers this objective. *See* MAGLEBY, *supra* note 47, at 35-36, 38-39 tbl.3.1 (describing the indirect initiative and identifying those states in which it is authorized). Moreover, Colorado has adopted a procedure that requires initiative proponents to submit a proposed ballot measure to the state for comments and proposed amendments, which can be incorporated into the ballot measure before signature petitions are circulated to the electorate. *See* COLO. REV. STAT. § 1-40-105 (2002). Similarly, the State of Nebraska requires public hearings on all proposed initiatives prior to the ballot election. *See* NEB. SEC'Y OF STATE, HOW TO USE THE INITIATIVE AND

formal mechanisms for requiring the initiative proponents to communicate with interested parties to exchange ideas and make compromises during ballot campaigns. As a result, the initiative proponents and opponents spend virtually all of their time and money lobbying to win the electorate's vote rather than attempting to improve the policy at issue.[214]

Moreover, there are currently few mechanisms in place to encourage initiative proponents to make well-reasoned arguments and decisions during ballot campaigns. Indeed, even if the initiative

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REFERENDUM PROCESS IN NEBRASKA, Part II.B.3(b) (explaining that "the Secretary of State conducts public hearings on the measures . . . in each congressional district . . . no more than 8 weeks prior to the general election" and that "[p]roponents and opponents are encouraged to attend to provide their views on the measure"), *at* http://www.vote-smart.org/ce/states/ne/elections/phtml (last visited Feb. 17, 2003). Single-subject rules, which have been adopted in a number of states, are intended to alleviate voter confusion and thereby improve public deliberation regarding the merits of initiative proposals. *See* Collins & Oesterle, *supra* note 73, at 87-91, 111 (stating that "[a]t least fifteen states, including Colorado," limit the scope of an initiative to a single subject and arguing that those rules should be enforced to improve voter understanding); Philip P. Frickey & Steven S. Smith, *Judicial Review, The Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1712 (2002) (claiming that "in recent years the state supreme courts are becoming more aggressive in enforcing the single-subject requirement, especially in the context of ballot measures"). Ballot pamphlets, which are made available to the electorate in a number of states, also attempt to perform this function. *See supra* notes 145-48 and accompanying text. Finally, a number of states that authorize the initiative impose disclosure requirements pertaining to campaign spending on initiative proponents and require them to comply with anti–false speech statutes. *See, e.g.*, *Buckley*, 525 U.S. at 205 (recognizing that the State of Colorado "legitimately requires sponsors of ballot initiatives to disclose who pays petition circulators, and how much," in order "[t]o inform the public where the money comes from") (internal quotations and citation omitted); Kruse, *supra* note 138, at 129 (explaining that some states prohibit false proposition advertisements through anti–false speech statutes).

Commentators have also proposed further reforms of the initiative process that would encourage increased deliberation. For example, the State of Washington is apparently considering the adoption of a Citizens Initiative Review Commission, which would implement "the use of randomly-selected citizen panels to inform the judgment of the mass electorate" in ballot elections. *See* Gastil et al., *supra* note 8, at 1021-28 (explaining and endorsing Ned Crosby's proposal for Citizens Initiative Review). A governmental commission in California proposed a number of amendments to the initiative process, which would improve deliberation and allow opportunities for amendment and compromise that do not currently exist. *See* CAL. COMM'N ON CAMPAIGN FIN., *supra* note 6, at 20-29 (summarizing the Commission's proposals for reform); *see also* Miller, *supra* note 75, at 1061-81 (describing proposals to reform the initiative process that have been suggested in California). Similar proposals have been recommended in Oregon by the City Club of Portland. *See* CITY CLUB OF PORTLAND, *supra* note 146, at ii-iii (recommending the use of the indirect initiative and suggesting that constitutional amendments be subjected to an affirmative vote of sixty percent of the electorate prior to taking effect); *see also* Frickey, *supra* note 20, at 446 (claiming that "[t]he thoughtfulness of these ideas provides fodder for further useful conversation in Oregon and elsewhere"). Despite the foregoing procedural requirements and reform proposals, however, no jurisdiction has adopted or, as far as the author has been able to determine, even considered the application of the agency model to direct democracy, as described below.

214. *See supra* Part II.B.

proponents were presented with a universally acceptable suggestion to improve or refine the policy at issue, the proponents are typically prohibited by state and local laws from substantively amending the language of initiative measures after they have been qualified for the ballot.[215] Not only are the initiative proponents therefore given little incentive to consider the views of third parties or monitor their own conduct during a ballot campaign, but the courts that subsequently review the meaning and validity of a successful initiative measure currently have no authority to assess whether the proponents engaged in reasoned decisionmaking during the lawmaking process.

These shortcomings in the initiative process could be remedied by amending state and local laws that govern the initiative process to incorporate procedural safeguards similar to those that are currently required by the APA. In this regard, the initiative proponents should be required to conduct a formal proceeding that would provide an opportunity for opponents, elected officials, and other interested members of the general public to comment on the advisability of, and to offer amendments to, the text of a proposed ballot measure.[216] Further, the proponents should be required to respond to those

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215. *See supra* note 127 and accompanying text. Examples of initiatives that were approved by the voters, despite clear drafting errors, are not uncommon. *See* Cox, *supra* note 160, at A1. One constitutional amendment that was enacted by initiative in Nebraska adopted term limits for elected officials. Although the proponents claimed that they intended to exempt incumhent politicians, an erroneous citation to the state constitution resulted in the amendment saying nothing about grandfathering. When the Secretary of State was asked to make a "clerical" correction to the initiative's text, he declined to intervene because the office "didn't want the responsibility of saying what was clerical and what wasn't, and if this really isn't what voters want, then there is the mechanism—another initiative—to correct it." *Id.* Similarly, a "victim's bill of rights" that was approved by voters in Alaska provided that "the accused," rather than "convicted offenders," were liable for restitution to the victims of certain offenses. *See id.* At the time of its passage, Proposition 13, the well-known tax-revolt measure that was enacted in California in 1978, contained "at least 40 ambiguities in [its] language" according to an analysis conducted by the governor's office. *See* CAL. COMM'N ON CAMPAIGN FIN., *supra* note 6, at 81. As of 1995, there were "16 follow-up ballot measures—some launched by the Proposition 13 authors themselves—to clarify an initiative whose goal was governmental efficiency." Cox, *supra* note 160, at A1.

A striking example of the failure of initiative proponents to engage in reasoned decisionmaking when drafting a ballot measure is provided by the "Landowners Bill of Rights" that was approved by voters in a Northern California County in 1982. While the measure's goal was to limit local land-use planning, its text included a clause which provided that the measure preempted any conflicting state or federal law. Several years of litigation followed regarding whether the blatant illegality of that clause should invalidate the entire measure. Five years after the measure was enacted, however, a split appellate panel upheld several more innocuous parts of the initiative by reasoning that, despite the literal language of the measure, the electorate did not really intend to restrain the United States Congress. *See* Patterson v. County of Tehama, 235 Cal. Rptr. 867, 883-96 (1987), *review denied and ordered not to be officially published*; Cox, *supra* note 160, at A1.

216. *Cf.* 5 U.S.C. § 553(b)-(c) (2000).

comments with a written statement of the basis and purpose for their final initiative proposal.[217] This document should explain the initiative proponents' reasoning for rejecting various objections and proposed amendments. The proponents should also be allowed to amend their proposed measures in response to comments and suggestions that would improve or refine their proposals. Finally, courts should be authorized to review the validity of a successful initiative measure under an "arbitrary and capricious" standard of review, which would authorize the judiciary to ascertain whether the initiative proponents engaged in reasoned decisionmaking during the lawmaking process.[218] Courts would therefore be authorized to invalidate successful ballot measures when the initiative proponents ignored important aspects of the problem, offered explanations that ran counter to the evidence in the official lawmaking record, or failed to respond in a cogent fashion to public comments.

Under this proposal, the proponents of an initiative that qualified for the ballot would be required to conduct a notice-and-comment proceeding similar to those conducted by administrative agencies engaged in legislative rulemaking.[219] After a measure qualified for the ballot, the initiative proponents would be required to publish the text of their proposed measure in a document that was readily available to the public. The notice would need to explain that interested parties have a designated period of time to comment on, and propose amendments to, the measure. The notice would also need to explain that commenters are entitled to submit evidence in support of their positions. Finally, the notice would have to describe the manner in which comments should be submitted for consideration.

After the period for submitting comments expired, the initiative proponents would have a designated period of time to

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217. *Id.* § 553(c). Alternatively, the initiative proponents could simply withdraw their proposal and decline to place it on an upcoming election ballot if they concluded from the notice-and-comment proceeding that the measure was legally invalid or fatally flawed in some other respect.

218. *Cf.* § 706; *State Farm*, 463 U.S. 29, 42-44, 48-49 (1983).

219. For a different proposal to reform direct democracy based on principles drawn from administrative law, see Troy M. Yoshino, *Still Keeping the Faith? Asian Pacific Americans, Ballot Initiatives, and the Lessons of Negotiated Rulemaking*, 6 ASIAN L.J. 1, 52-62 (1999) (proposing reforms of the initiative process based on the administrative law model of negotiated rulemaking). The primary problems with the application of a negotiated rulemaking model to direct democracy include limitations on the number of citizens who could participate in the deliberative process, the unduly complicated voting procedure described by Yoshino, and the unaddressed difficulties of judicial review that would inevitably remain. In contrast, the agency model described below would allow unlimited participation in a notice-and-comment proceeding by interested parties, while maintaining a streamlined lawmaking process and providing a well-established standard of heightened judicial review of successful ballot measures.

consider and respond to the comments. This response would be in the form of a statement of the basis and purpose for their final initiative proposal. Thus, at the end of the period for considering comments, the proponents would once again be required to publish the entire text of the measure in its amended form in a document that is readily available to the public. The proponents would also be required to issue a statement explaining the reasoning underlying any amendments that were made to the original text of the initiative. Moreover, the proponents would be required to explain their reasoning for rejecting proposed amendments and otherwise respond in a cogent fashion to the comments that were submitted. The proponents would also be authorized to support their explanations by referring to any evidence in their possession that supported their positions or contradicted the positions taken by commenters during the notice-and-comment proceeding.

A notice-and-comment proceeding of this nature would provide opportunities for meaningful deliberation and debate that are currently absent from direct democracy.[220] Such a proceeding would

220. In addition to the benefits described below, application of the agency model to direct democracy would likely improve voter understanding of proposed ballot measures. For starters, the official lawmaking record—including the comments submitted by interested parties and the response provided in the proponents' statement of basis and purpose—could be made available to the voters over the Internet. Moreover, a portion of this lawmaking record could be included in the ballot pamphlets that are already submitted to voters in many jurisdictions. The information contained in the statement of basis and purpose, along with a reply from the initiative opponents and an "objective" evaluation of the ballot measure prepared by the state attorney general, would provide voters with more meaningful information than is currently available.

In this regard, the ballot pamphlets currently provided by most states include statements by the initiative proponents, its opponents, and the attorney general. *See supra* notes 145-46. The statements of the proponents and opponents, however, typically contain simplistic campaign advertising, rather than a balanced discussion of the substantive merits. *See* Schacter, *supra* note 5, at 142 (explaining that because "[t]hese authors will have every incentive to characterize the measure in partisan, politically driven ways, rather than to attempt any detached, impartial summary," their statements "can mislead—and are sometimes designed to mislead—voters about the effects and potential consequences of the vote"). Replacing the existing advertisements with a statement of basis and purpose from the proponents and a reply from the opponents would therefore increase the quality of the information provided to the voters.

Moreover, even if voters ignore the official lawmaking record and the ballot pamphlets provided to them, the information that is generated by a notice-and-comment proceeding would almost certainly be presented to the electorate in other ways. As indicated below, the arguments for and against a measure that are contained in the official lawmaking record would inform the debate during the subsequent ballot campaign. For example, the initiative proponents and opponents would be able to challenge the positions of their adversaries in their campaign advertising. Perhaps more important, the media would become better informed about the merits of ballot measures and would be able to pass this information along to the voters in the form of news stories and editorials. In any event, the notice-and-comment proceedings would create an important new avenue for deliberation and debate, which would contribute to the marketplace of ideas regarding the merits of proposed ballot measures.

encourage initiative proponents and opponents to communicate with each other early in the process when opportunities to compromise and improve the proposed measure are still available. Further, by authorizing initiative proponents to amend their measure before placing it on the election ballot, the agency model would expressly allow any acceptable compromises and substantive improvements to be incorporated into the measure. Finally, a notice-and-comment proceeding of this nature would result in the creation of a formal "lawmaking record" that could improve the debate during the election campaign and provide a valuable resource for courts that are responsible for interpreting and reviewing the validity of successful ballot measures.

The agency model would not interfere with the right of the proponents and opponents of a ballot measure to campaign on behalf of their respective positions to the electorate after the notice-and-comment proceeding ended. Instead, the existence of a notice-and-comment proceeding would structure the debate during the campaign in a more positive fashion. As things currently stand, the proponents and opponents typically develop their strategies and begin producing their advertising before the parties have complete knowledge of the positions that their adversaries will take during the ballot campaign.[221] By requiring the advocates to state their positions "on the record" before the election campaign begins, a more meaningful debate of the merits of a proposed measure would be possible. Instead of simply talking past one another with simplistic and misleading rhetoric, the parties would be able to address their opponents' substantive arguments directly. Moreover, a party whose position was misstated by the opposition would have better "ammunition" to correct any misrepresentations that persisted during the election campaign.

The agency model would authorize courts to scrutinize successful ballot measures under the "arbitrary and capricious" standard of review that currently governs the validity of agency lawmaking under the APA. In the agency context, courts examine the "administrative record" initially to determine whether lawmakers complied with the applicable procedural requirements.[222] Thus, courts are obligated to ensure that the agency provided the public with notice of a proposed rule and an opportunity to respond, as well as to ensure that the agency issued a statement of the basis and purpose of its final rule. Courts are thereby authorized under the APA to verify that the legislative rulemaking process contained adequate opportunities for

221. *See supra* Part II.B.

222. *See* 5 U.S.C. §§ 553, 706 (2000).

deliberation by lawmakers and third parties who might be affected by the policy under consideration. If an agency fails to comply with those procedural requirements, courts are obligated to invalidate a final rule and remand the matter to the agency potentially to cure the procedural defects.[223]

Courts are also authorized by the APA to examine the administrative record to determine whether an agency engaged in reasoned decisionmaking during the lawmaking process. Pursuant to the Supreme Court's decision in *State Farm*, courts are obligated to engage in hard-look judicial review by ensuring that lawmakers considered the important aspects of the problem, responded to the comments of interested parties in a cogent fashion, and reached a final policy decision that is justified by the evidence contained in the administrative record.[224] When an agency fails to engage in reasoned decisionmaking during the lawmaking process, courts must invalidate the final rule and remand the matter to the agency for further consideration.[225]

Courts would be authorized under the agency model to engage in a similar form of "heightened" judicial scrutiny of successful ballot measures. First, courts would be obligated to examine the "lawmaking record" that would be created to determine whether the initiative proponents complied with the procedural requirements of conducting a public notice-and-comment proceeding and issuing a statement of the basis and purpose of the final initiative proposal that was presented to the voters. This requirement would allow courts to ensure that adequate opportunities were provided for deliberation during the lawmaking process. Second, courts would be obligated to examine the lawmaking record to ascertain whether the initiative proponents considered the important aspects of the problem, responded to the comments submitted by interested parties in a cogent fashion, and formulated a final policy proposal that was justified based on the evidence that was available to the initiative proponents. Finally, courts would be compelled to invalidate a successful initiative

223. *See, e.g.*, Indep. U.S. Tanker Owners Comm. v. Lewis, 690 F.2d 908, 918-20 (D.C. Cir. 1982) (invalidating and remanding an interim final rule based on an agency's failure to provide an adequate statement of basis and purpose); PPG Indus., Inc. v. Costle, 659 F.2d 1239, 1249 (D.C. Cir. 1981) (invalidating and remanding an EPA rule because the agency "did not fully meet the APA's notice requirement").

224. 463 U.S. 29, 42-44, 48-49 (1983).

225. *See, e.g., id.* at 46-57 (concluding that the National Highway Traffic Safety Administration's rescission of a passive restraint requirement was arbitrary and capricious and that further consideration of the issue by the agency was therefore required); Farmers Union Cent. Exch. v. FERC, 734 F.2d 1486, 1510-28 (D.C. Cir. 1984) (applying hard-look judicial review to invalidate a base rate formula adopted by the agency).

measure when the initiative proponents failed either to comply with the applicable procedural requirements or to engage in reasoned decisionmaking during the lawmaking process.

The application of an agency model to direct democracy would have several advantages over existing proposals for heightened judicial scrutiny of successful ballot measures. First, the agency model is directly responsive to the structural shortcomings of direct democracy. In particular, the proposals described above would alleviate the tension between direct democracy and republican government by creating new opportunities for deliberation and incentives for reasoned decisionmaking. Moreover, the agency model would not selectively choose certain types of disfavored ballot measures for more stringent judicial review. Because the structural shortcomings of direct democracy are pervasive in the current initiative process, the suggested reforms would apply in a neutral fashion to every initiative measure that qualifies for the ballot.

In addition to providing a consistent response to the structural problems inherent in direct democracy, application of the agency model to direct democracy would provide a manageable form of heightened judicial scrutiny of successful initiative measures. Indeed, many courts have already been engaging in hard-look judicial review of agency lawmaking for two decades.[226] There is little reason to think that it would be substantially more difficult to apply the arbitrary and capricious standard in the context of direct democracy.[227] Moreover,

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226. For a description of the primary critiques of current administrative law doctrine, see *supra* note 212.

227. *See infra* Part IV (responding to some anticipated objections to the agency model's application to direct democracy). In addition to having less experience with hard-look judicial review, *see supra* note 201, some state courts could have greater difficulty applying heightened judicial scrutiny of any kind to direct democratic measures than federal courts because state judges are often elected, rather than appointed to the bench with life tenure. *See* Holman & Stern, *supra* note 13, at 1259. Several commentators have recognized that elected judges may be hesitant to invalidate direct democratic measures on constitutional grounds because of the perception that they would be interfering with the "will of the people." *See id.* at 1259-60; Gerald F. Uelmen, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Politicization*, 72 NOTRE DAME L. REV. 1133, 1133-35, 1147-49 (1997). As a result, elected judges could fear a potential backlash from voters in response to a decision to invalidate a successful initiative measure. *See* Julian N. Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. COLO. L. REV. 733, 739 (1994) (recognizing that elected judges are aware of the political consequences of highly visible decisions); Gerald F. Uelmen, *Handling Hot Potatoes: Judicial Review of California Initiatives After* Senate v. Jones, 41 SANTA CLARA L. REV. 999, 1000 (2001) (stating that "as a practical matter, elected judges considering a popular initiative must face the same voters who enacted it to keep their judicial seats"). Indeed, one judge who faced a retention election in California candidly admitted that reviewing controversial cases is like having a crocodile in the bathtub while shaving—although one attempts to ignore the threat of voter reprisal for such decisions, one always knows that it is

the agency model would provide courts with statutory authority to engage in hard-look judicial review of successful ballot measures, while simultaneously leaving the substantive meaning of potentially applicable constitutional provisions unaffected. Accordingly, courts that review the validity of successful ballot measures under this model would not be engaging in a controversial form of constitutional interpretation by assigning a meaning to the Equal Protection Clause, for example, in the context of direct democracy different from the meaning they would assign to the same provision in a challenge to a statute enacted through the traditional legislative process.[228]

At the same time, however, the agency model would not foreclose potential challenges to the constitutionality of successful ballot measures. On the contrary, injured parties would continue to be able to challenge the constitutionality of successful ballot measures on the same grounds that are currently available. Indeed, the agency model would only enable more meaningful constitutional review by rejecting the myth of popular sovereignty in direct democracy and expressly recognizing the dominant role played by the initiative proponents in the process. For example, rather than conducting a fictional search for a discriminatory purpose by the electorate in an equal protection challenge to the validity of a successful ballot measure, the agency model would encourage courts to examine the

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there. *See* Uelmen, *Crocodiles in the Bathtub*, *supra*, at 1133 (quoting the late Justice Otto Klaus, who served on the California Supreme Court from 1980 through 1985).

Potential solutions to this problem include appointing state court judges, rather than having them elected. *See, e.g.*, Republican Party of Minnesota v. White, 122 S. Ct. 2528, 2542-44 (2002) (O'Connor, J., concurring) (criticizing the practice of popularly electing judges). Alternatively, challenges to the validity of direct democratic measures could be litigated in federal courts where judges have life tenure under Article III of the Constitution. *See* U.S. CONST. art. III, § 1. In order for the latter solution to he accomplished, plaintiffs would need to challenge the validity of an initiative measure under a federal constitutional provision, such as the Equal Protection Clause. Moreover, the federal court would need to be willing to exercise supplemental jurisdiction over related state law claims, including those based on a state or local statute that authorized judicial review under the "arbitrary and capricious" standard. While potential constitutional claims would remain unaffected by the proposals suggested above, federal courts would need to apply principles of supplemental jurisdiction relatively liberally (by concluding that state law claims do not predominate) to engage in the type of heightened judicial scrutiny under state law that is recommended above. *See* 28 U.S.C. § 1367(a) (2000) (providing statutory authority for the exercise of supplemental jurisdiction in federal court); *cf.* City of Chi. v. Int'l Coll. of Surgeons, 522 U.S. 156, 172 (1997) (holding that the federal supplemental jurisdiction statute authorizes federal jurisdiction over pendent "state law claims for on-the-record review of administrative decisions," but recognizing that such jurisdiction need not he exercised in every case).

228. *Cf.* Charlow, *supra* note 5, at 561-73 (criticizing proposals for heightened judicial scrutiny of successful ballot measures on the ground that they "seem to assume a change in the essential nature of what constitutes a constitutional violation in the special case of direct democracy").

actual purposes for the measure that are identified by the initiative proponents. The creation of a formal lawmaking record during the notice-and-comment proceeding described above would provide courts with the concrete evidence that they need to conduct this inquiry. As a result, adoption of the agency model would help to resolve some of the evidentiary problems associated with the search for a discriminatory purpose by the electorate that courts seem to require under current equal protection doctrine.[229]

Similarly, adoption of the agency model would help to resolve some of the difficult problems of statutory interpretation that courts face in the context of direct democracy. The creation of a formal lawmaking record would provide courts with a meaningful "legislative history" of the enactment that could be utilized to help resolve the meaning of an initiative measure in subsequent interpretive disputes. Although concerns about strategic manipulation of the meaning of a measure by the initiative proponents would not be entirely absent from this material, the fact that proponents' statements would be subject to attack by the initiative opponents during the ballot campaign would likely provide an incentive against blatant misrepresentations. Moreover, the prospect that the lawmaking record would be subject to subsequent judicial review for "reasoned decisionmaking" under the arbitrary and capricious standard would provide strong incentives for proponents to provide rational explanations for their actions during the lawmaking process.

Despite the advantages of applying the agency model to direct democracy, one could still argue that the model does not go far enough to hold initiative proponents accountable for their actions during ballot campaigns. Judicial review of agency action under the APA is typically limited to an examination of the formal rulemaking record

229. In response to Professor Eule's claims regarding the difficulties of establishing a discriminatory intent of the electorate, *see supra* notes 34-38 and accompanying text, Lynn Baker has argued that "[t]o the extent that evidence of a 'bigoted decision-maker' is central to finding legislation unconstitutionally discriminatory under modern equal protection law, the courts have had little difficulty obtaining such proof in the case of plebiscitary enactments." Baker, *supra* note 5, at 759. Professor Baker pointed out that the Supreme Court has invalidated successful initiative measures on constitutional grounds under an intent standard based on the "objective intent" reflected by the plain language of an initiative, the discriminatory impact of the measure, and the historical background or aberrational procedures leading to its enactment. *See id.* at 759-66. Accordingly, Professor Baker concluded that "the fact that a plaintiff (or a court) neither knows, nor can inquire into, the often complex motivations of each plebiscite voter should not pose an additional or unique barrier to a successful claim under existing equal protection doctrine." *Id.* at 765. Even if Professor Baker is correct that the objective intent of a ballot measure is the relevant inquiry under equal protection doctrine, the creation of a formal lawmaking record pursuant to the agency model would assist the courts in conducting this analysis by providing additional information about the circumstances leading to a ballot measure's enactment.

that is submitted to the court.[230] If judicial review of successful initiative measures were similarly limited to the formal lawmaking record that would be produced by the notice-and-comment proceeding described above, sophisticated initiative proponents might be able to undermine the purposes of the agency model. For example, the initiative proponents could circumvent the purposes underlying the agency model if they provided well-reasoned, instrumental statements on behalf of their positions in the official lawmaking record, but then proceeded to give false, misleading, or constitutionally suspect justifications for their proposal to the electorate during the ballot campaign.

In order to counteract this concern, courts that review the constitutional validity of an initiative measure should freely examine the public statements of the initiative proponents during the ballot campaign—as well as the justifications they provide for their decisions in the official lawmaking record—for a constitutionally impermissible purpose. Moreover, the normal tools of civil discovery, including depositions, document production requests, interrogatories, and requests for admission, could also be utilized for this purpose. These litigation devices, in combination with the official lawmaking record that would be created under the proposals described above, would not only eliminate the evidentiary problems currently associated with establishing that an initiative was enacted with a discriminatory purpose, but they could also make this task substantially easier than establishing that a law was enacted with a discriminatory purpose through the traditional legislative process.[231]

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230. *See* 5 U.S.C. § 706 (2000) (in reviewing agency action under the arbitrary and capricious standard, "the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error"); Fla. Power & Light Co. v. United States Nuclear Regulatory Comm'n, 470 U.S. 729, 743-44 (1985) ("The task of the reviewing court is to apply the appropriate APA standard of review to the agency decision based on the record the agency presents to the reviewing court.") (internal citation omitted); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 419-20 (1971) (explaining that judicial review of agency action "is to be based on the full administrative record that was before the Secretary at the time" a decision was made).

231. Indeed, the constitutions of the federal government and most states immunize legislators from being called into court to defend their lawmaking activities. *See* U.S. CONST. art. I, § 6, cl. 2 (providing that members of the Senate and House "shall not be questioned in any other Place" "for any Speech or Debate in either House"); Tribe, *supra* note 205, § 5-18, at 370-74 (describing the scope of the legislative immunity conferred by the Speech or Debate Clause of the United States Constitution); Steven N. Sherr, Note, *Freedom and Federalism: The First Amendment's Protection of Legislative Voting*, 101 YALE L.J. 233, 236 (1991) (reporting that "the constitutions of every state except Florida and North Carolina provide some form" of legislative immunity); *see also supra* notes 34-38, 229 and accompanying text (discussing the current evidentiary difficulties associated with establishing the discriminatory purpose of a law enacted by initiative).

For the same reason, jurisdictions that apply the agency model to direct democracy should also consider authorizing courts to look beyond the official lawmaking record in evaluating the validity of a ballot measure under the arbitrary and capricious standard of review. Courts would, of course, be authorized by the agency model to examine the official lawmaking record to determine whether the initiative proponents engaged in reasoned decisionmaking. Nonetheless, because the ballot campaign is a vital part of the lawmaking process in the initiative context, courts could also be authorized to consider whether public statements made by the initiative proponents outside of the official lawmaking record were compatible with their officially stated rationale for proceeding in the chosen manner. Accordingly, if the initiative proponents provided internally inconsistent explanations of their proposal or otherwise provided voters with misleading information during the ballot campaign that could not be squared with the proponents' officially stated rationale in the lawmaking record, a court could be authorized to invalidate a successful ballot measure under the arbitrary and capricious standard of review based on the proponents' failure to engage in reasoned decisionmaking during the entire lawmaking process.[232]

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232. *See State Farm*, 463 U.S. at 48-49 (reaffirming the principle that "an agency must cogently explain why it has exercised its discretion in a given manner" under the arbitrary and capricious standard); *cf.* Natural Res. Def. Council, Inc. v. SEC, 606 F.2d 1031, 1050 n.23 (D.C. Cir. 1979) (recognizing that "more exacting scrutiny" under the arbitrary and capricious standard is appropriate when "the agency has had a history of 'ad hoc and inconsistent judgments' on a particular question"); Local 777 v. NLRB, 603 F.2d 862, 869-71 (D.C. Cir. 1978) (same).

In one of the only comprehensive treatments of judicial review of direct democracy to date, Philip Frickey recognized the shortcomings of initiative lawmaking and argued that courts should consider applying certain canons of construction when they examine the constitutionality of successful ballot measures and interpret their meaning. *See* Frickey, *supra* note 15, at 477; *see also* John Copeland Nagle, *Direct Democracy and Hastily Enacted Statutes*, 1996 ANN. SURV. AM. L. 535, 551-53 (advocating special interpretive rules for "hastily enacted statutes" that could be applied to both initiative lawmaking and traditional legislation). First, Professor Frickey suggested that "[t]he application of the canon counseling that, if plausible, statutes should be interpreted to avoid constitutional invalidation potentially plays an important procedural role in the process of review of the products of direct democracy." Frickey, *supra* note 15, at 512. The application of this avoidance canon would encourage courts to interpret ballot measures narrowly on "subsidiary issues" that raise constitutional concerns when the issues were not addressed in the text of the initiative or expressly considered by the voters that approved a proposal. Second, Professor Frickey argued that "a preference for republican lawmaking should suggest that statutes in derogation of republican processes—both because they were adopted as ballot propositions and because they might displace existing laws adopted through representative channels—should not be broadly construed." *Id.* at 517. In other words, the traditional canon against repealing existing laws by implication suggests that "because ballot propositions are in derogation of republican government, there should be a general working presumption in favor of narrow construction when directly adopted laws are in tension with pre-existing laws." *Id.* at 522. Finally, Professor Frickey suggested that "to the extent a ballot

In sum, the foregoing reforms would encourage meaningful deliberation and reasoned decisionmaking in direct democracy. Moreover, application of the agency model to direct democracy would hold initiative proponents accountable for their actions during the lawmaking process. Finally, these reforms would provide courts with a well-established legal framework, as well as crucial evidentiary materials, for engaging in heightened judicial scrutiny of successful ballot measures in a manner that would simultaneously further republican principles of lawmaking and safeguard other important constitutional values. Indeed, by directly addressing the structural problems associated with using direct democracy in a representative democracy, the foregoing proposals could substantially bolster the legitimacy of the initiative process—and perhaps improve the quality of the legislation that it produces as well.

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proposition runs up against specialized substantive canons, such as the rule of lenity, those canons should have somewhat more force than they would in the context of a legislatively adopted law." *Id.* at 522-23.

Professor Frickey's canonical approach to judicial review of ballot measures would be a useful supplement to the application of the agency model to direct democracy. Under the agency model, courts would assess the constitutionality of a successful ballot measure by examining the initiative language, the official lawmaking record, statements made by the initiative proponents, the anticipated effects of a ballot measure, and the circumstances leading to its enactment. Moreover, courts would be authorized by statute to examine the same sources to determine whether the initiative proponents engaged in reasoned decisionmaking during the lawmaking process. If the validity of a challenged measure was upheld under these inquiries, courts would proceed to examine the initiative language and the official lawmaking record to resolve any interpretive disputes presented by the litigation. Courts would then be obligated to implement the unambiguous legislative intent reflected by the initiative language and the official lawmaking record. When those sources do not unambiguously resolve the interpretive issue, however, courts would be free to apply the canons identified by Professor Frickey, which suggest that courts should narrowly interpret the meaning of ballot measures that would otherwise conflict with constitutional principles of fairness and equality, displace existing law that was enacted through the traditional legislative process, or undermine other well-recognized legal process values—such as the principle that criminal statutes should be interpreted narrowly in favor of the accused.

While examination of evidence outside the lawmaking record is justified for purposes of judicial review of the validity of successful ballot measures under the agency model, such information should be viewed skeptically by courts for the purpose of statutory interpretation. For reasons explained above, the official lawmaking record would provide a sufficiently reliable source of legislative history for courts to use in ascertaining the meaning of ambiguous ballot measures. The same conclusion, however, would not necessarily apply to statements made by initiative proponents outside of the official lawmaking record. First, such statements are less likely to be challenged by the initiative's opponents during the ballot campaign. Moreover, as long as those statements do not flatly contradict the rationale provided by the initiative proponents in the lawmaking record, courts may be reluctant to give such statements the critical scrutiny they deserve. In short, statements made by the initiative proponents outside of the lawmaking record about the meaning of the measure are "cheap" legislative history that courts should not ordinarily deem authoritative.

IV. A CRITICAL EXAMINATION OF THE APPLICATION OF AN AGENCY MODEL TO DIRECT DEMOCRACY

Advocates of the initiative process as it currently exists could, of course, criticize the proposed application of an agency model to direct democracy on a number of grounds. Those critiques would likely fall into two general categories: those based on claims that direct democracy already contains adequate safeguards against abuse by initiative proponents or those which contend that application of the agency model to direct democracy is flawed in some other significant respect. The latter form of criticism might include arguments that (1) principles of "due process of lawmaking" should not be enforced by courts in the context of direct democracy, (2) invalidation of a successful ballot measure based on statements made by initiative proponents conflicts with the First Amendment, and (3) application of the agency model to direct democracy unduly favors initiative opponents who already have a number of advantages in ballot campaigns. Moreover, critics of the current initiative process might be concerned that application of the agency model to direct democracy could have the perverse effect of legitimizing what is, at bottom, an illegitimate enterprise. The shortcomings of direct democracy could be compounded if the agency model provided a veneer of deliberation and accountability, but did not effectively accomplish those objectives. Indeed, courts that upheld the validity of successful ballot measures under the highly deferential arbitrary and capricious standard of review might be more reluctant to invalidate those measures under the Constitution. This part addresses these potential criticisms and concludes that the need for additional republican safeguards in the initiative process outweighs any arguably negative consequences of applying the agency model to direct democracy.

A. The Safeguard of Consideration by the Electorate

This Article has argued that the "myth of popular sovereignty" in direct democracy should be rejected and that further responsibilities should be imposed on the initiative proponents who actually control the content of successful ballot measures.[233] The Article has also argued that the structural safeguards imposed by the APA and hard-look judicial review of agency action would provide a useful model for promoting republican principles of lawmaking in the

233. *See supra* Part II.

context of direct democracy.[234] Direct democracy does, however, contain one significant safeguard that is absent from the agency model—the electorate's opportunity to ratify or reject an initiative proposal.[235] There is no question, moreover, that voters reject a significant number of the initiatives that are placed on election ballots.[236] Indeed, political science research suggests that, if anything, a bias exists in favor of the status quo in ballot contests because the electorate tends to vote against initiative measures about which they have reasonable doubts.[237] One might therefore be tempted to conclude that the additional safeguards imposed by the agency model

234. *See supra* Part III.

235. One could argue that the signature requirement for placing an initiative on the ballot is another meaningful safeguard that is absent from the agency model. Given the frequent use of paid petition circulators and evidence that any sufficiently financed initiative proposal can be qualified for the ballot, the signature requirement no longer appears consistently to satisfy its purpose of keeping frivolous initiatives off the ballot. *See supra* notes 118-29 and accompanying text. Instead, the signature requirement appears only to pose a bar to frivolous proposals (and probably some meritorious ones as well) that are *also* poorly financed. In any event, the signature requirement does not appear to promote any meaningful deliberation and reasoned decisionmaking about the *content* of a measure, even if the requirement accurately filters out initiatives that are not supported *in principle* by the electorate. Accordingly, additional safeguards are necessary to promote deliberation and reasoned decisionmaking about the specific content of an initiative's text even if the signature requirement demonstrates a minimal level of public support for its broad underlying purpose.

236. David Magleby has reported that only thirty-six percent of statewide initiatives were approved by voters between 1898 and 1979. *See* MAGLEBY, *supra* note 47, at 70-76 & tbl.4.3. Although the reported numbers vary, there appears to be a general consensus that ballot measures have passed at higher rates in recent years, especially for particular types of measures. *See* GERBER, *supra* note 109, at 79, 116-19 (reporting passage rates of between thirty-three percent and one hundred percent by subject area for all statewide initiatives and referenda that qualified for the ballots in eight states between 1988 and 1992); Lazos Vargas, *supra* note 12, at 424-25, app. A-H (reporting that "[i]n the eighty-two initiatives and referendums surveyed . . . , majorities voted to repeal, limit, or prevent any minority gains in their civil rights over eighty percent of the time"); Donovan et al., *supra* note 126, at 89-90, tbl.4.1 (reporting a passage rate of 41.5% for initiatives between 1986 and 1996); Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245, 261 (1997) (reporting that anti–civil rights ballot measures enjoyed a seventy-five percent success rate between 1959 and 1993); Elisabeth R. Gerber, *Pressuring Legislators Through the Use of Initiatives: Two Forms of Indirect Influence*, *in* CITIZENS AS LEGISATORS, *supra* note 112, at 191 (reporting that "only 42% of the 271 statewide initiatives considered by voters between 1981 and 1990 passed" and that "the initiative passage rate in many states was considerably lower" in prior decades); Maglehy, *supra* note 1, at 230-31 tbl.7-2 (reporting passage rates of 39.6% and 36.0% for statutory initiatives and constitutional amendments, respectively, between 1898 and 1992). For a critique of Gamble's study on the grounds that her sample was "heavily weighted by a nonrandom draw of local cases" that had attracted the attention of journalists and academics, see Todd Donovan & Shaun Bowler, *Responsive or Responsible Government*, *in* CITIZENS AS LEGISLATORS, *supra* note 112, at 264-70; *see also id.* at 272 (arguing that "one of the most enduring critiques of state direct democracy—that it is somehow more abusive of minorities than representative processes—rings a bit hollow").

237. *See supra* note 142 and accompanying text.

are unnecessary because the initiative proponents already face sufficient obstacles during the lawmaking process.

This conclusion misses the mark, however, because the filtering of initiatives that results from ballot elections is not calibrated to further republican principles of lawmaking.[238] Instead, direct democracy allows precisely the type of "majority faction" that the structural filters of the Constitution were designed to prevent.[239] Those structural filters protect determined minorities in the traditional legislative process by providing a variety of opportunities to defeat proposed legislation.[240] Moreover, the existence of numerous "vetogates" in the legislative process creates incentives for amendments and compromise that can minimize objections to proposed legislation and "tone-down" its adverse impact on minorities.[241] Finally, the ongoing nature of the traditional legislative process allows participants to engage in vote-trading and other strategic behavior, which reflects the intensity of their preferences and provides minorities with an opportunity to prevail on issues about which they care more than the majority.[242] In contrast, the one-shot,

238. Indeed, there are good reasons to question whether consideration of an initiative by the electorate represents an accurate reflection of the "will of the people" at all. *See supra* note 102 and accompanying text (describing low voter turnout, a drop-off in voting on initiatives, and race- and class-based disparities in voting). Moreover, the empirical evidence is mixed regarding whether those who do vote in hallot elections are ahle to cast "intelligent" votes that are consistent with their preferences. *See* CRONIN, *supra* note 18, at 61-62, 89 (recognizing that "many analysts who study populist democracy practices develop considerable reservations about them after finding that citizens and voters often do *not* fully understand the process, frequently vote with limited information, and sometimes vote contrary to their own preferences," but arguing that "[t]he charge that voters are not competent enough to decide on occasional issues put before them is usually exaggerated"); MAGLEBY, *supra* note 47, at 142 (reporting that "studies of voting on statewide propositions have generally found that 10 percent or more of the voters cast incorrect or confused ballots"); Banducci, *supra* note 155, at 132-48 (analyzing the consistency of the actual voted ballots from the 1990 general election in Marion County, Oregon, which contained eight initiative measures, and reporting that "when voters make choices on a large number of initiatives, it is reasonable to expect that outcomes 'make sense' after all the votes are counted"). Of course, the ability of majority voting schemes accurately to reflect the preferences of legislators has been questioned in representative democracy as well. *See, e.g.*, KENNETH ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963); WILLIAM RIKER, LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF PUBLIC CHOICE 137 (1982).

239. *See supra* Part I.A; GERBER, *supra* note 109, at 3 (describing direct democracy as an attempt "to counteract excessive minority control" of the legislative process).

240. *See* ESKRIDGE ET AL., *supra* note 167, at 66 (recognizing that "any legislative proposal has to surmount a series of hurdles before it becomes a law").

241. *See id.* (explaining that "scholars have coined the term *vetogates* to apply to the choke points in the process, some with the durability of constitutional requirements, others matters of congressional rule or norm," and recognizing that their existence "means that determined minorities can often kill legislation or, in the alternative, maim legislation they cannot kill").

242. *See* Clark, *supra* note 5, at 462 ("Logrolling simply offers a chance for minorities to prevail on issues that they care about more intensely than do those in the majority."); Robert

single-issue, winner-take-all nature of initiative elections practically eviscerates the protections that are available to minorities in the traditional legislative process.[243]

In addition, one of the primary purposes of republican safeguards is to encourage lawmakers to refine and improve the substantive content of proposed legislation. The traditional legislative process therefore provides opportunities for careful consideration of the details of the laws that are enacted. An all-or-nothing public vote on whether to approve a proposed initiative cannot compensate for the absence of similar opportunities in direct democracy.[244] Even if

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Collins, *How Democratic Are Initiatives?*, 72 U. COLO. L. REV. 983, 991 (2001) ("The most important way that representative legislatures modify majority rule is by reflecting the intensity of minority preferences."); Eule, *supra* note 2, at 1556 ("Legislative logrolling over a broad agenda brings minorities into the process and allows resulting compromises to accommodate their interests.").

243. *See* Clark, *supra* note 5, at 434 (claiming that direct democracy distorts popular input by precluding the expression of priorities among issues); Eule, *supra* note 2, at 1553-58 (describing the need for safeguards designed to filter majority preferences in direct democracy); Hamilton, *supra* note 4, at 13 (arguing that the flawed procedures of direct democracy "invite[] majoritarian tyranny"); Moglen & Karlan, *supra* note 4, at 1092 (explaining that the possibility of increased use of direct democracy "poses new threats to minority rights, which are often better protected through a less purely majoritarian, less populist process").

244. *See, e.g.*, Frickey, *supra* note 20, at 435-37 (recognizing that "[t]he legislative process provides many opportunities for gathering relevant information and deliberating about it," which are absent from direct democracy); Frickey, *supra* note 15, at 523-26 (explaining how the procedural safeguards of the legislative process would likely have killed or refined several vaguely drafted ballot measures with potentially wide-ranging effects). *See generally* Nourse & Schacter, *supra* note 42, at 575 (describing discrepancies between the judiciary's characterization of legislative drafting and the practices of the Senate Judiciary Committee and recognizing the importance of achieving compromise and consensus to participants in the traditional legislative process). A number of commentators have criticized differential treatment of successful ballot measures on the grounds that the legislative process does not always operate in an ideal fashion. *See* Briffault, *supra* note 102, at 1350 (arguing that "the legislature is afflicted by flaws similar in kind to those . . . [of] direct democracy" and that the initiative process "serves as a fitting complement to the legislative process"); Clayton P. Gillette, *Is Direct Democracy Anti-Democratic?*, 34 WILLAMETTE L. REV. 609, 636-37 (1998) (assessing claims that the initiative process favors special interests, harms minorities, and lacks sufficient deliberation and arguing that "it is unclear that the initiative, as we currently employ it, is sufficiently inferior to the legislature to warrant the attacks visited on it"); Landau, *supra* note 44, at 533 (arguing that traditional legislation has many of the same flaws attributed to initiative lawmaking and that different judicial treatment of successful ballot measures is therefore unwarranted); Tushnet, *supra* note 104, at 392 (arguing that "[t]he case for differential judicial review ultimately rests on a fear of voting" premised on a belief that "[t]he people . . . are not as good as they ought to be"). While it is undoubtedly true that "deliberation in the legislative process rarely resembles anything like an academic symposium," the foregoing commentators underestimate the pervasive structural flaws of the initiative process. Frickey, *supra* note 20, at 435-37; *see also* Eric Lane, *Men Are Not Angels: The Realpolitik of Direct Democracy and What We Can Do About It*, 34 WILLAMETTE L. REV. 579, 581 (1998) (claiming that "with imperfect legislative processes as the point of comparison, direct democracy still does not provide procedures as accessible or deliberative as representative democracy"). The concern is not only that "the people" are unable to engage in reasoned deliberation about the specific content of proposed ballot measures, but

consideration of a ballot measure by the electorate reflected an accurate appraisal of the "will of the people" regarding the desirability of the general policy reflected by an initiative proposal, it would be impossible for the electorate to express any meaningful intentions regarding the more specific legal implications of an initiative measure when it is applied and subsequently interpreted by courts.[245] The electorate simply lacks sufficient knowledge of the existing legal landscape and the meaning of the technical legal jargon contained in the text of most initiatives to approve or reject the specific legal implications of a successful ballot measure.[246] In short, consideration of a ballot measure by the electorate does not reflect any meaningful approval of the *precise content* of an initiative measure, even if this requirement accurately filters out initiatives that are not supported *in principle* by the electorate. Accordingly, additional safeguards are necessary to promote deliberation and reasoned decisionmaking by initiative proponents about the details of a ballot measure's text and its legal implications, even if an affirmative vote by the electorate demonstrates a minimal level of public support for an initiative's broad underlying purpose.[247]

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that the unelected initiative proponents who actually control the process are not currently required (or even encouraged) to do so.

245. *See* Frickey, *supra* note 15, at 529; Schacter, *supra* note 5, at 127-28.

246. *See* Frickey, *supra* note 15, at 529 ("The electorate cannot plausibly be expected to understand much of the details of what is on the ballot."); Schacter, *supra* note 5, at 127-28 (recognizing that "many of the legal consequences of new initiative laws are systematically unforeseeable to citizen-legislators.").

247. While this section argues that consideration of an initiative proposal by the electorate is not an adequate substitute for the application of the agency model to direct democracy, it bears noting that there are additional mechanisms to encourage accountability in the administrative rulemaking process that are not present in direct democracy. *See, e.g.*, Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1290-1301 (1999) (describing the nonjudicial checks on agency action provided by the President and Congress); Lauren A. Smith, *Judicialization: The Twilight of Administrative Law*, 1985 DUKE L.J. 427, 449 (stating that "there is an abundance of both formal and actual controls and influences upon the administrative process deriving from the two branches of government that have a popular mandate"). First, administrative agencies are often under the control of a chief executive who is, of course, an elected official. Second, administrative agencies are subject to legislative oversight and control, particularly through annual budget appropriations that can be limited or eliminated when an agency deviates from congressional preferences. In short, while administrative agencies and the proponents of initiative measures are both subject to forms of control independent from notice-and-comment procedures and hard-look judicial review, application of the agency model remains necessary in both contexts to encourage deliberation and reasoned decisionmaking about the specific content of the laws promulgated by unelected actors outside of the traditional legislative process.

B. Due Process of Lawmaking in Direct Democracy

The proposals advocated in this Article would impose additional procedural requirements on initiative proponents and authorize judicial review of the lawmaking process for reasoned decisionmaking. This version of heightened judicial scrutiny would therefore focus on the adequacy of the lawmaking process and the quality of the initiative proponents' deliberations, in addition to requiring courts to continue assessing the substantive constitutionality of successful ballot measures. Judicial review of the validity of legislation based on the adequacy of lawmaking procedures and the quality of legislative deliberations was initially coined "due process of lawmaking" in a seminal article by Hans Linde.[248]

The circumstances under which courts should enforce principles of due process of lawmaking are currently the subject of vigorous debate on the Supreme Court and in the scholarly literature.[249] Despite occasional objections,[250] the conventional wisdom

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248. Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 225 (1976); *see also* Frickey & Smith, *supra* note 213, at 1709-18 (describing various models of due process of lawmaking, including the model of due deliberation).

249. *See* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 368-70 (2001) (invalidating legislation enacted pursuant to the Enforcement Clause of the Fourteenth Amendment based on inadequate congressional findings); *id.* at 376-89 app. A (Breyer, J., dissenting) (arguing that the legislation should have been upheld under rational basis scrutiny, challenging the majority's claim that the legislative record was inadequate, and providing an institutional critique of the Court's approach); United States v. Morrison, 529 U.S. 598, 614-15 (2000) (holding that the Violence Against Women Act exceeded Congress's authority and explaining that while the statute was "supported by numerous findings" in the legislative record "regarding the serious impact that gender-motivated violence has on victims and their families," those findings were "substantially weakened" by Congress's reliance on a legally invalid "method of reasoning"); *id.* at 637-38, 647-52 (Souter, J., dissenting) (arguing that heightened judicial scrutiny of the exercise of congressional authority was inappropriate because of tbe existence of adequate political safeguards to protect state interests); *id.* at 660-64 (Breyer, J., dissenting) ("Congress, not the courts, must remain primarily responsible for striking the appropriate state/federal balance," partly because of existing "procedural limitations in keeping the power of Congress in check."); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 89 (2000) ("Our examination of the ADEA's legislative record confirms that Congress' 1974 extension of the Act to the States was an unwarranted response to a perhaps inconsequential problem."); *id.* at 93 (Stevens, J., dissenting) (arguing that heightened judicial scrutiny was inappropriate because "the Framers designed important structural safeguards to ensure that, wben the National Government enacted substantive law (and provided for its enforcement), the normal operation of the legislative process itself would adequately defend state interests from undue infringement"); Fla. Prepaid Postsecondary Ed. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 643 (1999) (invalidating a portion of a federal patent statute partly because of perceived inadequacies in the legislative record); *id.* at 654-55 (Stevens, J., dissenting) (pointing out the unfairness of retroactive application of a requirement of legislative findings and arguing that the legislative record was adequate to support tbe legislation); City of Boerne v. Flores, 521 U.S. 507, 530-31 (1997) (comparing the legislative records of the Voting Rights Act and the Religious Freedom Restoration Act to assess whether the latter statute was authorized by the Enforcement Clause

holds that it is appropriate for courts to review an administrative record to determine whether agency officials engaged in reasoned decisionmaking during the legislative rulemaking process.[251] In contrast, the Supreme Court's recent practice of closely examining the legislative record when it reviews the constitutionality of congressional legislation under the Commerce Clause and the Enforcement Clause of the Fourteenth Amendment has provoked a flood of scholarly criticism.[252] Accordingly, this section briefly examines the relevant circumstances under which judicial review of the validity of legislation based on the contents of a lawmaking record is appropriate and concludes that lawmaking by initiative is compatible with the fundamental criteria for enforcing principles of due process of lawmaking.

Judicial review of a legislative record to assess the validity of ordinary congressional legislation is problematic for several related reasons.[253] First, there is no constitutional requirement that the

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of the Fourteenth Amendment); United States v. Lopez, 514 U.S. 549, 562-63 (1995) (claiming that "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce," but indicating that such findings could enable the Court "to evaluate the legislative judgment"); *see also* A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328, 329 (2001) (arguing that the Court's approach in its recent federalism cases "is fundamentally ill-advised, most importantly because it constitutes a constitutionally suspect intrusion on congressional investigative and legislative procedures"); William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87 (2001) (explaining that the nature of the legislative process belies the existence of a comprehensive legislative record and that the Court's recent federalism decisions conflict with separation of powers principles); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 83 (2001) (arguing that "the Court is using its authority to diminish the proper role of Congress" in its recent federalism decisions by "treat[ing] the federal legislative process as akin to agency or lower court decisionmaking" and "undermin[ing] Congress's ability to decide for itself how and whether to create a record in support of pending legislation"); Frickey & Smith, *supra* note 213, at 1709 (concluding that "Congress is capable of meeting the Court's fact-gathering requirements, but cannot satisfy the Court's requirement of due deliberation and rational, articulated decision").

250. *See infra* note 300.

251. *See, e.g.*, Buzbee & Schapiro, *supra* note 249, at 126 ("Hard look review of agency decisionmaking is now well established."); Cross, *supra* note 247, at 1245 ("The existence of authority for courts to review agency rulemaking is broadly presumed.").

252. *See supra* note 249; *see also Garrett*, 531 U.S. at 376 (Breyer, J., dissenting) (criticizing the majority for "[r]eviewing the Congressional record as if it were an administrative agency record").

253. As explained above, courts usually do not examine the legislative record when assessing the validity of statutes under the rational basis standard of review. *See supra* notes 203-07 and accompanying text. That is not to say, however, that courts should never examine the contents of a legislative record for *any* purpose when reviewing congressional legislation. For example, the use of legislative history by courts to interpret the meaning of ambiguous statutes raises somewhat different questions that require separate treatment. *See* Colker & Brudney, *supra* note 249, at 136-41 (recognizing the tension between the new textualist approach to statutory

legislative branch compile a formal lawmaking record sufficient for courts to assess the rationale for a law's enactment.[254] Second, the legislative records that exist are unlikely to provide the requisite information because the traditional legislative process is so diffuse, competitive, and legitimately susceptible to a wide range of informal influences.[255] Perhaps most important, judicial invalidation of

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interpretation and legislative record review in the federalism cases); Frickey & Smith, *supra* note 213, at 1750-52 (same). Moreover, courts will sometimes examine lawmaking records when they engage in heightened judicial scrutiny of the constitutionality of legislation that interferes with fundamental rights or adversely affects members of a suspect class. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 239 (1976) (holding that facially neutral laws with a racially discriminatory purpose violate equal protection); Lemon v. Kurtzman, 411 U.S. 192 (1973) (holding that the validity of public aid to church-related schools includes close inquiry into the purpose of the challenged statute); *see also* Buzbee & Schapiro, *supra* note 249, at 137 ("The imposition of a requirement that evidence supporting the enactment appear in legislative materials represents an approach akin to heightened scrutiny usually applied only in review of legislation implicating fundamental rights or suspect classifications.").

Indeed, the Supreme Court's recent examination of legislative records in cases involving challenges to the validity of legislation enacted pursuant to Congress's authority under the Commerce Clause and Section 5 of the Fourteenth Amendment has proven controversial in part because the Court was essentially applying a form of heightened scrutiny to decisions that had previously been reviewed under the most deferential "rational basis" standard—while at the same time claiming that it was not changing the standard of review. *See* Buzbee & Schapiro, *supra* note 249, at 137-39. As a result, much of the debate between the majority and dissenting opinions involved questions of how much deference was owed to Congress, the appropriate institutional role of the Court, and the adequacy of the structural safeguards of the legislative process to protect principles of federalism. *See supra* note 249.

254. In this regard, the federal Constitution merely requires Congress to "keep a Journal of its Proceedings, and from time to time publish the same . . . ." U.S. CONST. art. 1, § 5, cl. 3. Moreover, the Constitution expressly provides that "each House may determine the Rules of its Proceedings . . . ." U.S. CONST. art. I, § 5, cl. 2. The Constitution does not further specify the contents of the legislative journals or the rules of congressional proceedings, and courts therefore traditionally have been reluctant to entertain challenges to Congress's internal procedures. *See, e.g.*, United States v. Ballin, 144 U.S. 1, 3-6 (1892) (rejecting a challenge to the validity of a law based on the alleged absence of a legislative quorum because "[t]he Constitution empowers each house to determine its rules of proceedings"); Field v. Clark, 143 U.S. 649, 668-71 (1892) (concluding that the contents of legislative journals were left largely to the discretion of the respective houses of Congress); *see also* Bryant & Simeone, *supra* note 249, at 376 (arguing that "the Supreme Court's recent treatment of the legislative record in constitutional cases appears inconsistent with the spirit, if not also the letter, of several constitutional provisions and established jurisprudential doctrines designed to shelter the federal legislative process from the threat of judicial intrusion"); Frickey & Smith, *supra* note 213, at 1749-50 (recognizing that "the judicial intrusion into internal congressional processes seems in tension with the Constitution itself, which provides that each house is responsible for making its own rules").

255. The nature of the legislative process undermines the utility of the legislative record for ascertaining the reasoning of Congress for two reasons. First, it is often impossible to attribute a single instrumental purpose to a statute because Congress ordinarily seeks to accomplish a number of competing objectives when it enacts legislation. *See* Frickey & Smith, *supra* note 213, at 1740-44 (arguing that the assumption of a deliberative legislature, "where deliberation is defined as reasoned discussion in which the outcome is consensus on ends and means * * * is clearly undesirable for a competitive legislative process"); Linde, *supra* note 248, at 225 ("Whatever may be required of agencies in the pursuit of stated goals, it is clear that . . . no such

congressional legislation raises separation of powers concerns because Congress is a coordinate branch of government that is expressly authorized by the Constitution to make laws within the scope of its enumerated powers. Elected representatives take an oath to uphold the Constitution; they are accountable to their constituents, and they must overcome the structural filters of Article I, Section 7 to enact legislation. Concerns regarding judicial activism and the countermajoritarian difficulty are therefore at their zenith when courts invalidate the work of the elected branches based on perceived deficiencies in the lawmaking process.[256] Not surprisingly, review of the legislative record by the Supreme Court in its recent federalism decisions has been criticized by commentators on all of the preceding grounds.[257]

In contrast, administrative agencies are required by statute to compile an administrative record that can be examined by courts to assess the agency's reasoning in promulgating a challenged policy.[258]

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model of rational inquiry [can be imposed] on legislative bodies that select and compromise opposing versions of truth and justice in a single act of lawmaking."). Second, the collective nature of the legislative process makes it difficult to identify an authoritative rationale for congressional action or to attribute authoritative weight to any particular legislative records. *See* Buzbee & Schapiro, *supra* note 249, at 92 (recognizing that "a complete or 'formal' legislative record does not exist"); Frickey & Smith, *supra* note 213, at 1731-36 (explaining that "treating Congress as a unitary actor that contemplates evidence and creates a legislative record . . . is only a fiction" and that bicameralism "limits the utility of claims about what Congress said or did not say").

256. *See* Bryant & Simeone, *supra* note 249, at 329 (arguing that the Court's new approach "constitutes a constitutionally suspect intrusion on congressional investigative and legislative procedures"); Buzbee & Schapiro, *supra* note 249, at 87 ("In defiance of separation of powers principles, legislative record review actually embodies more rigorous judicial scrutiny than commonly employed even in 'hard look' review of administrative action."); Colker & Brudney, *supra* note 249, at 86-87 ("We are disturbed by the Court's emerging vision in which Congress has substantially diminished powers to conduct its internal affairs or to engage in factfinding and lawmaking that the judicial branch will respect."); Frickey & Smith, *supra* note 213, at 1750 ("There is a deep separation-of-powers problem at the heart of what we perceive to be the new due-deliberation model of due process of lawmaking."). This is particularly true when due process of lawmaking principles are invoked retroactively to invalidate legislation that was enacted at a time when courts did not impose any particular factfinding requirements. *See* Colker & Brudney, *supra* note 249, at 111 (explaining that by retroactively applying newly adopted record-keeping requirements, "the Court required a degree of legislative omniscience that is highly troubling as a matter of constitutional discourse between the branches"); Frickey & Smith, *supra* note 213, at 1723 (recognizing that the Court imposed due process of lawmaking requirements "retroactively upon existing statutes, which were of course enacted in a different time, when Congress had no notice of the necessity of generating a carefully crafted legislative history").

257. *See supra* notes 249-56.

258. The APA requires an administrative agency to publish a general notice of proposed rulemaking in the *Federal Register*. *See* 5 U.S.C. § 553(b) (2000). The Act also requires an agency to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." § 553(c). Finally, the APA provides that "[a]fter consideration of the relevant matter presented, the

Second, the nature of the administrative process is far more conducive to producing an authoritative record that can be utilized by courts to examine the reasoning of lawmakers than is the legislative process.[259] Third, hard-look judicial review of agency action does not seriously conflict with separation of powers principles or implicate the countermajoritarian difficulty. On the contrary, lawmaking by administrative agencies is itself constitutionally suspect because it lacks the structural safeguards of representative democracy.[260] Moreover, the scope of an agency's rulemaking authority is much more sharply circumscribed than the lawmaking authority granted to Congress by the Constitution.[261] Finally, judicial review of agency

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agency shall incorporate in the rules adopted a concise general statement of their basis and purpose." *Id.* Courts have interpreted this latter provision to require administrative agencies to provide an explanation sufficient for courts to engage in "hard-look" judicial review of their actions. *See, e.g.*, Rossi, *supra* note 211, at 779 ("The hard look doctrine is a judicially-enunciated twist on two standards in the APA: (1) the requirement that an agency 'incorporate in the rules adopted a concise general statement of their basis and purpose'; and (2) the 'arbitrary and capricious' review standard."); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 485-86 (1997) (recognizing that "the hard look test" is a "judicially created administrative law doctrine").

259. In this regard, the legislative rulemaking process is composed of relatively streamlined procedures—publication of a proposed rule, the submission of "written data, views, or arguments" by interested parties, followed by the publication of "a concise general statement" of the "basis and purpose" of the final rule that is promulgated by an agency. *See* § 553. Moreover, an agency can relatively easily assign the tasks of compiling an administrative record and articulating the agency's positions to a small number of employees, who can, in turn, solicit input from other knowledgeable agency officials. As a result, the administrative record that is provided to the court is reasonably likely to reflect the agency's actual reasoning in promulgating the final rule at issue. *See* Buzbee & Schapiro, *supra* note 249, at 147 ("In the agency setting, . . . there is at least the possibility of locating key decisionmakers who can explain the final agency decision.").

This is not to say, of course, that the agency's explanation for its action will not be influenced by the prospect of subsequent judicial review. The agency will undoubtedly feel compelled to engage in a reasoning process that it believes will withstand judicial scrutiny. Proponents of deliberative democracy tend to believe, however, that the need to justify a policy with publicly stated reasons that can be accepted by third parties will tend to improve the deliberative process. *See* AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 52 (1996). As indicated below, administrative law scholars debate the extent to which this theory operates effectively in practice. *See infra* note 300.

260. *See supra* Part III.B.

261. Indeed, administrative agencies can only engage in rulemaking within the scope of their delegated authority. Moreover, the Supreme Court has consistently maintained that Congress must articulate "an intelligible principle" to guide an agency's discretion when it confers rulemaking authority on an administrative agency. *See Whitman*, 531 U.S. at 473-74. As Hans Linde explained:

> When [agency] officials are delegated the authority to perform some prescribed function, to manage a program, or to pursue some stated objective, no matter how broad their discretion may be, they are obliged to justify their actions in instrumentalist terms, as a means toward a goal within the scope of their assignment. From this obligation, with or without the aid of administrative procedure acts or

action under the arbitrary and capricious standard is expressly authorized by the APA and similar state statutes.[262] As a result, the enforcement of principles of due process of lawmaking has been the accepted norm in administrative law for decades.

The enactment of state and local laws that impose additional procedural requirements on initiative proponents and authorize hard-look judicial review of their reasoning would eliminate many of the otherwise valid objections to the enforcement of principles of due process of lawmaking in direct democracy.[263] Application of the agency

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> statutory standards of judicial review, courts have spun out various procedural duties of agencies which require them to articulate their aims and their assumptions of fact, to examine available evidence and consider alternative solutions, and sometimes to subject their bypotheses to scrutiny and possible rebuttal by interested parties.

Linde, *supra* note 248, at 225. In other words, because administrative agencies are only delegated authority to accomplish specific instrumental goals, judicial review of the administrative record is necessary to ensure that agencies are proceeding in a reasoned fashion toward their stated objectives. *See* Buzbee & Schapiro, *supra* note 249, at 121-25 (claiming that judicial review of agency action ensures that "legislative desires made manifest in a statute prevail over potentially different executive branch and agency preferences").

A related distinction between lawmaking by administrative agencies and the legislature is that while rulemaking is justified in part by an agency's expertise, Congress is authorized to engage in purely political decisionmaking. *See id.* at 122 (recognizing that "one of the key justifications for the administrative state is to allow expert agencies to exercise their judgment and experience in resolving tasks delegated by Congress"). Because administrative agencies must necessarily exercise policymaking discretion to fill gaps in their statutory authority, however, this distinction is typically one of degree rather than of kind. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-45 (1984) (explaining that courts should defer to an agency's reasonable resolution of policy questions not specifically addressed by Congress).

262. Indeed, the *scope* of judicial review of agency action—and, specifically, hard-look judicial review of the administrative record for reasoned decisionmaking—is governed by those authorizing statutes and could therefore arguably be narrowed or even eliminated by the legislature. *See* Seidenfeld, *supra* note 258, at 503-24 (describing and evaluating various proposals to relax hard-look judicial review of agency action). *But see* Shapiro & Levy, *supra* note 18, at 440 (arguing that hard-look judicial review of agency action has constitutional underpinnings and claiming that "[s]uch an understanding of the reasons requirement is preferable to the common assumption that the requirement is solely a product of the APA's arbitrary and capricious standard of review"). As indicated above, a number of states have declined to authorize hard-look judicial review of legislative rules adopted by state administrative agencies. *See supra* note 201. This approach is in tension with the view that hard-look judicial review has constitutional underpinnings.

263. A couple of commentators have summarily rejected judicial review of successful ballot measures for reasoned decisionmaking. For example, Hans Linde argued as follows:

> Initiated laws like all others must meet constitutional standards. They will fail if by design or in effect they overstep constitutional bounds. But can it be contended that one of those standards is a rational way of matching means and ends? The initiative process flies in the face of the idea. Whatever the private goals of the sponsors, once a measure is drafted it is past systematic factfinding, analysis, amendment, or compromise. Aside from newspaper editorials or an occasional official voters' pamphlet, the debate leading to decision is left to the electioneering slogans of competing advertising firms. Yet such a measure may repeal, alter, or contradict the most carefully studied and best designed enactment of the legislature.

model to direct democracy would enable initiative proponents to adopt amendments, accept compromises, and engage in the type of fact-finding necessary to allow reasoned decisionmaking to occur in the first place. Moreover, the enactment of APA-like procedures in the initiative context would result in the creation of a formal lawmaking record that courts could utilize to engage in hard-look judicial review. The provision of express statutory authority for heightened judicial scrutiny would also foreclose objections that the invalidation of successful ballot measures under an arbitrary and capricious standard was the result of unwarranted judicial activism. Finally, adoption of the agency model in this context would streamline the initiative process and thereby enable courts to discover the officially articulated reasoning of the initiative proponents. Because the initiative proponents would be entirely capable of expressing an authoritative rationale for their actions in precisely the same manner as administrators, the problems courts face when they attempt to attribute a single animating purpose or authoritative basis for congressional action would be almost entirely absent from heightened judicial scrutiny of successful ballot measures.[264]

While application of the agency model to the initiative process would therefore be judicially manageable, the normative appeal of this approach depends largely upon whether one accepts the myth of popular sovereignty in direct democracy. For example, if one believes that the initiative process constitutes lawmaking by "the people," judicial invalidation of successful ballot measures would represent the epitome of the countermajoritarian difficulty.[265] This conclusion would

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Linde, *supra* note 248, at 227-28; *see also* Baker, *supra* note 5, at 766-72 (rejecting judicial enforcement of principles of due process of lawmaking in the initiative context). While Justice Linde's description of the existing initiative process is undoubtedly accurate, the application of the agency model to direct democracy would be specifically designed to encourage "systematic factfinding, analysis, amendment, [and] compromise" in the initiative lawmaking process. Not only are such reforms desirable, but the adoption of the proposals advocated in this Article would render judicial enforcement of principles of due process of lawmaking possible as well.

264. This Article previously suggested that courts should accept evidence from outside of the lawmaking record when reviewing the validity of an initiative on statutory or constitutional grounds—by considering, for example, public statements or deposition testimony from the initiative proponents. *See supra* Part III.C. Although this practice could limit the practical benefits of a strictly record-based review, the difficulties associated with judicial consideration of "extra-record evidence" in this context would be limited. Unlike the legislature, which typically consists of two chambers and hundreds of members—not to mention committees, support staff, and agencies responsible for assisting lawmakers, the initiative proponents are a relatively discrete and easily identifiable group of people. *See supra* note 106. Accordingly, courts should have relatively little difficulty determining which statements are entitled to probative value for purposes of reviewing the validity of successful ballot measures.

265. *See* Miller, *supra* note 98, at 1053 (describing the Washington courts' invalidation of an initiative as "a sweeping counter-majoritarian act" and claiming that "[o]ne solitary judge, and

probably hold true regardless of whether the initiative proponents engaged in reasoned decisionmaking or whether courts were given statutory authority to make this determination. Similarly, this view of the initiative process would probably lead one to claim that the power of initiative—being reserved by state constitutions to "the people"—stands on the same constitutional footing as lawmaking by the legislature.[266]

Rejecting the myth of popular sovereignty in direct democracy, however, leads to some very different conclusions. The *initiative proponents* who control the lawmaking process are hardly a coequal branch of government—or even elected officials who are held accountable for their decisions by significant institutional constraints. The imposition of additional procedural requirements on initiative proponents is not inconsistent with a "reservation" of direct lawmaking authority for "the people," but it is necessary to replace the structural safeguards of the traditional legislative process and thereby hold initiative proponents accountable for their decisions. In these fundamental respects, the similarities between the work of initiative proponents and unelected bureaucrats are unmistakable, and the contrast between these alternative lawmaking processes and laws enacted by the legislature could not be more stark. Not only should successful ballot measures therefore routinely be given less deference by courts than statutes enacted by Congress, but heightened judicial scrutiny of a lawmaking record for reasoned decisionmaking by initiative proponents is consistent with principles of separation of powers.

Even if one rejects the myth of popular sovereignty in direct democracy, however, judicial review of successful ballot measures for reasoned decisionmaking by initiative proponents is not entirely without difficulties. There is admittedly one significant difference between agency rulemaking and lawmaking by initiative proponents that may be in tension with the justifications for hard-look judicial review based on a lawmaking record. As explained above, the scope of

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after him, eight justices of the Washington Supreme Court overturned the will of nearly a million voters"); *id.* at 1054 (claiming that the invalidation of a successful ballot measure "nullifie[s] the decisions of the people themselves"); Pak, *supra* note 12, at 238 (claiming that the counter-majoritarian difficulty "increases when judicial review is exercised to overturn voter-enacted initiatives, which are conceptualized as the direct will of the people"); Lazos Vargas, *supra* note 12, at 404 (claiming that "when courts review actions taken directly by the public, rather than their elected representative, the judiciary's counter-majoritarian hubris is more readily apparent").

266. *See* Charlow, *supra* note 5, at 583 ("The public as lawmaker . . . plays an official part in the separation of powers structure of the governments in those states that provide for plebiscites.").

an agency's rulemaking authority is much more sharply circumscribed than the lawmaking authority granted to Congress by the Constitution; agencies can only engage in rulemaking within the scope of their congressionally delegated authority.[267] Accordingly, hard-look judicial review is premised in part on the need to ensure that agencies follow the legislature's instructions and take reasoned actions towards accomplishing an instrumental goal.

In many state and local jurisdictions, however, the initiative power—like the lawmaking power of the legislature—can be utilized for any purpose that is consistent with constitutional limitations.[268] In theory, then, successful initiatives may not have a specific instrumental goal to which courts can be expected to enforce adherence. In practice, however, most jurisdictions have single-subject rules and other procedural requirements that are designed to ensure that initiative proposals have an identifiable purpose.[269] Moreover, although the finer points of an initiative's meaning are often ambiguous, the general purpose of such a measure is typically apparent to interested observers.[270] Finally, the progressives who originally championed direct democracy, as well as its modern-day supporters, have emphasized that the initiative process is only intended to supplement representative democracy when the legislature proves unresponsive to identifiable problems.[271]

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267. *See supra* note 261.

268. Some jurisdictions do, however, place subject-matter limitations on the use of the initiative. For example, some states preclude the use of the initiative process to adopt laws that interfere with the legislature's ability to collect revenue. *See* NEB. REV. STAT. ANN. § 32-1408 (2002):

> The Secretary of State shall not accept for filing any initiative or referendum petition which interferes with the legislative prerogative contained in the Constitution of Nebraska that the necessary revenue of the state and its governmental subdivisions shall be raised by taxation in the manner as the Legislature may direct.

Similarly, the State of Mississippi precludes the adoption of initiative measures that would alter the state's bill of rights. *See* MISS. CONST. art. 15, § 273(5)(a).

269. Although many jurisdictions also have single-subject rules applicable to the legislature, courts tend to enforce these requirements more stringently in the context of direct democracy. *See supra* note 213. Many jurisdictions also have provisions, for example, that require an initiative's caption and summary to state its chief purpose plainly. *See* CAL. COMM'N ON CAMPAIGN FIN., *supra* note 6, at 228-35 (describing state procedures for preparing the captions and summaries that appear on initiative petitions and election ballots).

270. *See* Schacter, *supra* note 5, at 146 (recognizing that initiative laws are frequently "a general policy approved by a majority of voters" and "that policy is a relevant consideration for interpretation"); *see also supra* Parts I.B, II.B-C.

271. *See* Briffault, *supra* note 102, at 1368 (arguing that "[t]he best case for direct legislation in a system of representative government is that it may play an important role in just those areas in which institutional pressures cause representatives to stray from the interests of popular majorities: government structures and regulation of the political process, taxation, and spending"); Hirsch, *supra* note 27, at 205 (claiming that "[w]e can benefit from the advantages of

Accordingly, there would appear to be no barriers to judicial review of a lawmaking record to ensure that initiative proponents engage in reasoned decisionmaking because direct democracy *is* often used to accomplish identifiable, instrumental goals.[272]

The greatest difficulty in applying hard-look judicial review to successful ballot measures would involve those initiatives that address questions of morality upon which reasonable people are virtually certain to disagree.[273] For initiatives that address questions of moral judgment, judicial acceptance of purely moral reasoning could turn the arbitrary and capricious standard into a tautology.[274] For example, if courts were to accept as an explanation for an anti–gay rights initiative that the proponents "believe that homosexuality is wrong," the statutory requirement of reasoned decisionmaking would lose much of its force. On the other hand, it is sometimes difficult to conceive of alternative explanations that could be considered substantially more "reasonable" for such legislation. The problem is simply that some ballot measures are not particularly conducive to purely "rational" argument or explanation.[275]

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a representative system, subject to the availability of initiatives when citizens find representation inadequate"); Selmi, *supra* note 186, at 307 ("The initiative and referendum are intended as exceptional political instruments to be employed when representative government becomes unresponsive to the citizenry."); *see also* 2 RAY STANNARD BAKER & WILLIAM E. DODD, THE PUBLIC PAPERS OF WOODROW WILSON 287-88 (1925) (describing President Wilson's view that direct democracy was intended "to restore, not destroy, representative government"); CRONIN, *supra* note 18, at 59 ("The growing paradox of the direct democracy crusade is that even though its most fervent champions often intended less to strengthen representative democracy tban to bypass or punish it, it simultaneously helped remedy the defects of representative political institutions.").

272. Of course, in the agency context, the instrumental goal is identified by Congress. Application of the agency model to direct democracy would, however, require the purpose of a ballot measure to be identified by the initiative proponents. There is no reason to think that the entity that identifies the instrumental purpose of legislation should matter for purposes of hard-look judicial review. *Cf.* DAVIS, *supra* note 212, § 3:15 (arguing for a reformulation of the nondelegation doctrine that would encourage courts to examine the totality of legislative and administrative standards and safeguards to determine whether administrative discretion has been adequately confined); Bressman, *supra* note 194, at 1401-02 (arguing for a nondelegation doctrine that focuses on whether administrative agencies have adequately limited their own discretion).

273. Although the highest profile initiatives occasionally present such questions, many direct democratic measures address more mundane issues. *See supra* note 3 (citing a database of all statewide initiatives that have appeared on ballots since 1990); MAGLEBY, *supra* note 47, at 133 (providing a "health science bond" proposal in California as an example of "relatively obscure legislatively initiated measures").

274. Hans Linde has pointed out that when a rational basis "challenge is to a law that reflects such a non-rational human impulse, judges will sometimes try to credit the law's acceptance of that impulse with being itself a rational policy." Linde, *supra* note 248, at 234.

275. Justice Linde recognized this problem in one of bis articles about direct democracy. *See* Linde, *supra* note 8, at 42 ("Of course proponents may pretend utilitarian goals for any measure, but initiatives of this type will rarely obscure their noninstrumentalist, emotional wellsprings.").

There are at least two potential solutions to this admittedly difficult problem. First, jurisdictions could prohibit the use of the initiative for addressing certain moral questions on the grounds that direct democracy is not an appropriate procedure for addressing such issues.[276] This categorical limitation on the use of the initiative would go a long way toward eliminating abuse of the initiative process and placating those who have expressed legitimate concerns about the "tyranny of the majority" that often results from direct democratic measures.[277] Alternatively, courts could engage in judicial review for "reasoned decisionmaking" by requiring initiative proponents to respond to comments by amending their proposals to minimize their rejection of the opponents' positions to the greatest extent possible.[278] In other words, courts could require initiative proponents to accept proposed compromises that would minimize objections to their proposal without undermining the primary purpose of the ballot measure. In any event, courts should, at least, require initiative proponents to articulate the reasons for their actions and explain how existing empirical evidence supports their positions. As Clayton

276. *Cf.* Hampton v. Mow Sun Wong, 426 U.S. 88, 116 (1976) (recognizing that due process requires certain deprivations of important liberty interests to be imposed by an accountable governmental body); Brown, *supra* note 192, at 1516 (arguing that "government action that jeopardizes government process poses a concomitant danger to individual rights and that the potential for such danger should be a significant factor in separation-of-powers analysis"). The definitional problems of this suggestion, of course, have not escaped the author's attention. The most promising solution probably would be to prohibit initiative measures that limit the "civil rights" of certain segments of the population. *Cf.* Gamble, *supra* note 236, at 246, 251 (defining anti–civil rights initiatives for purposes of her study).

277. *See* William E. Adams, Jr., *Is it Animus or a Difference of Opinion? The Problems Caused by the Invidious Intent of Anti-Gay Ballot Measures*, 34 WILLAMETTE L. REV. 449, 451, 467-77 (1998) (arguing that "direct democracy is comparatively more dangerous than representative democracy" with respect to biases against gays and lesbians and "may, in fact, intensify them"; Bell, *supra* note 12, at 20-21 (claiming that direct democracy "reflects all too accurately the conservative, even intolerant, attitudes citizens display when given the chance to vote their fears and prejudices, especially when exposed to expensive media campaigns"); Eule, *supra* note 2, at 1550 (stating that "my principal concern is with laws that are unduly insensitive to minority rights"); Linde, *supra* note 8, at 21 (arguing that the "legitimate use" of statewide initiatives "must exclude measures for motives that the designers of republican government most feared"); Lazos Vargas, *supra* note 12, at 425 (claiming that "direct democracy, for the most part, has been an important lawmaking mechanism that has decreased the content of, or staved off advances in, minority rights"); Jodi Miller, Note, *"Democracy in Free Fall": The Use of Ballot Initiatives to Dismantle State-Sponsored Affirmative Action Programs*, 1999 ANN. SURV. AM. L. 1, 3, 23-38 (arguing that "the ballot initiative is particularly unsuited to the issues involved in affirmative action"). *But see* Baker, *supra* note 5, at 710 (purporting to refute "confident claims that racial minorities are better served by representation than direct lawmaking processes" and arguing that heightened judicial review of successful ballot measures is unwarranted).

278. *See* GUTMANN & THOMPSON, *supra* note 259, at 84-85 (describing an "economy of moral disagreement" in which "citizens should seek the rationale that minimizes rejection of the position they oppose" when "justifying policies on moral grounds").

Gillette has explained, when assessing whether legislation serves the "public interest," there may be no "single conception of the good on which all informed individuals would agree," but "individual decisionmakers acting in the public interest would be able to justify their decisions by reference to the resulting increased welfare for society at large."[279] While an arbitrary and capricious standard might be difficult to apply in some cases, lawmaking authority should not be exercised in our republic without safeguards to assure this minimal level of deliberation and accountability.

In sum, the enactment of procedural safeguards that (1) require initiative proponents to compile a lawmaking record; and (2) authorize judicial review of that record for reasoned decisionmaking is entirely appropriate in the context of direct democracy. The adoption of APA-like lawmaking procedures for the initiative process would ensure that the application of hard-look judicial review is manageable. Furthermore, rejection of the myth of popular sovereignty in direct democracy compels the conclusion that heightened judicial scrutiny of ballot measures is consistent with principles of separation of powers and necessary to promote deliberation and reasoned decisionmaking in the lawmaking process. Although some cases will undoubtedly present difficult questions of application for the agency model of judicial review, the need for "the give-and-take of moral argument about the substance of controversial political issues" suggests that those who value deliberative democracy should be willing to bear that risk.[280]

C. The Agency Model and the First Amendment

The agency model would authorize courts to review the validity of successful initiative measures based, in part, on the contents of a formal lawmaking record. Moreover, the proposals advocated in this Article contemplate that courts would also examine other public statements of the initiative proponents when assessing the validity of successful ballot measures. A successful initiative could be invalidated by a court under these proposals based on what the initiative proponents said or failed to say during the lawmaking process. This prospect could, in turn, have the effect of "chilling" the initiative proponents' speech during the initiative campaign and subsequent litigation proceedings. At the same time, the agency model would force initiative proponents to address issues in the notice-and-comment

279. Gillette, *supra* note 5, at 932.

280. GUTTMAN & THOMPSON, *supra* note 259, at 37.

proceeding, which they might otherwise have preferred to ignore. Accordingly, one could argue that a jurisdiction's application of the agency model to direct democracy would constitute a "law . . . abridging the freedom of speech" in violation of the First Amendment.[281]

Such an argument is without merit for a number of reasons. First, application of the agency model to direct democracy would not impose any limitations on the amount of speech-related activity in which initiative proponents could engage. In contrast to restrictions on campaign contributions or expenditures, which have been invalidated in the context of ballot elections,[282] the initiative proponents would remain free under the agency model to raise and spend as much money as they want to qualify an initiative for the ballot and convince the electorate to vote in its favor. The agency model would also leave all of the existing avenues for reaching qualified voters unaffected. The initiative proponents could therefore continue to hire consultants, pay petition circulators, engage in unlimited broadcast advertising, appear on talk shows, write editorials, or use any other available method of promotion and persuasion they deem appropriate.

Second, application of the agency model to direct democracy would not impose any limitations on what the initiative proponents could say. Although one of the goals of the proposals advocated in this Article is to improve the quality of the deliberations surrounding initiative campaigns (and thereby *further* the values underlying the First Amendment), the agency model would not require the initiative proponents to change the content of their message in any respect. Indeed, initiative proponents could lawfully promote their proposals under the agency model by invoking appeals to the electorate that were nonsensical, misleading, false, racist, or even libelous.[283] While a

281. U.S. CONST. amend. I.

282. *See* Meyer v. Grant, 486 U.S. 414, 414 (1988) (holding that a state's prohibition of paid circulators of initiative petitions violated the First Amendment); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 300 (1981) (holding that a city ordinance that placed limitations on contributions to committees formed to support or oppose ballot measures violated First Amendment rights of association and free expression); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 767 (1978) (holding that state limits on corporate contributions or expenditures for ballot campaigns violated the First Amendment); *cf.* Biddulph v. Mortham, 89 F.3d 1491, 1498 (11th Cir. 1996) (recognizing that "[a]bsent some showing that the initiative process substantially restricts political discussion of the issue [a proponent] is seeking to put on the ballot, [the foregoing precedent] is inapplicable").

283. Although the initiative proponents could be subject to legal sanctions based on certain deliberately false, libelous, or defamatory statements, such liability would result from existing legal remedies rather than the agency model's application to direct democracy. *See generally* Kruse, *supra* note 138 (describing state statutes that prohibit false initiative advertisements and assessing their validity under the First Amendment).

successful initiative based on such appeals might subsequently be invalidated for violating the Constitution (under, say, the Equal Protection Clause) or the arbitrary and capricious standard of review, the initiative proponents would not otherwise be punished for their statements.

The First Amendment is typically invoked to challenge laws that limit designated speech or speech-related activity and subject persons who fail to comply with the law to potential criminal prosecution, civil penalties, or civil liability.[284] In contrast, the agency model does not threaten initiative proponents with legal sanctions under any circumstances. The initiative proponents could rest assured that they would not be subject to legal penalties or civil liability under the agency model regardless of what they said during the lawmaking process. As a result, the underlying basis for the challenge in a typical First Amendment case simply does not exist in the present situation.

The initiative proponents could nonetheless complain that their required participation in a notice-and-comment proceeding, where they would be obligated to respond in a reasoned fashion to the concerns raised by interested commenters, constitutes compelled speech of the kind that has raised First Amendment problems in other contexts.[285] Moreover, they could argue that the threat of judicial invalidation of a ballot measure based on their statements is a meaningful penalty that undermines their right to free speech, especially when this threat would likely lead savvy initiative proponents to hedge what they say during ballot campaigns to minimize the risk of subsequent judicial invalidation. In this regard, initiative proponents could attempt to invoke the unconstitutional conditions doctrine and argue that the government cannot condition

284. *See, e.g.*, United States v. Eichman, 496 U.S. 310, 312 (1990) (holding that a federal statute criminalizing flag desecration violated the First Amendment); N.Y. Times v. Sullivan, 376 U.S. 254, 277 (1964) ("What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel."); *cf.* Laird v. Tatum, 408 U.S. 1, 11-14 (1972) (holding that plaintiffs lacked standing to challenge the Army's surveillance of lawful civilian political activities under the First Amendment because "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm" and distinguishing other cases on the ground that "the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging").

285. For example, the Supreme Court has held that the compelled disclosure of group membership is subject to strict scrutiny where it would chill freedom of association. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958) (invalidating an Alabama law which required out-of-state corporations to meet certain disclosure requirements and recognizing "the vital relationship between freedom to associate and privacy in one's associations"); Shelton v. Tucker, 364 U.S. 479, 485-88 (1960) (invalidating a state law that required all teachers to disclose their group memberships on an annual basis).

the benefit of using direct democracy to enact laws on their willingness to forgo the right to speak freely.[286]

The notion that the proposals described above would "compel speech" or otherwise impose unduly burdensome procedures on initiative proponents in violation of the First Amendment is without merit. In the context of direct democracy, the agency model would simply require initiative proponents to explain in a cogent fashion the meaning of, and rationale underlying, their proposals. They would also be required to explain, in response to comments from interested parties, why their proposal is desirable and why they rejected alternative approaches to the problem. The neutral imposition of such requirements on unelected lawmakers is not unreasonable and may, in fact, be necessary if courts are to engage in meaningful judicial review of successful initiative measures. Most states that authorize the direct initiative already place analogous procedural burdens on initiative proponents, such as requiring them to participate in the drafting of the titles, summaries, and statements in support of their measures that appear on the ballots and ballot pamphlets presented to voters.[287] Those requirements have never been thought to "compel speech" by initiative proponents or otherwise raise First Amendment difficulties.[288]

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286. *See, e.g.*, Regan v. Taxation with Representation of Wash., 461 U.S. 540, 545 (1983) (stating that "the government may not deny a benefit to a person because he exercises a constitutional right") (quoting Perry v. Sindermann, 408 U.S. 593, 597 (1972)); Speiser v. Randall, 357 U.S. 513, 518-19 (1958) (holding unconstitutional a California law that conditioned a property tax exemption on the disavowal of a belief in overthrowing the government by force or violence on the grounds that this requirement would "have the effect of coercing the claimant to refrain from the proscribed speech"); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 11.2.4.4, at 795-98 (1997) (describing the Supreme Court's inconsistent application of the unconstitutional conditions doctrine).

287. *See* CAL. COMM'N ON CAMPAIGN FIN., *supra* note 6, at 227-53.

288. In *Biddulph v. Mortham*, the Eleventh Circuit rejected an initiative proponent's First Amendment challenge to provisions of Florida's initiative process that authorized the state supreme court to remove an initiative petition from the election hallot if the hallot title or summary was unduly amhiguous. 89 F.3d 1491, 1493-94 (11th Cir. 1996). The plaintiff argued that those procedures were required to withstand strict scrutiny because "initiative sponsors must complete Florida's costly and time-consuming initiative requirements without any assurance that the supreme court will ultimately deem their initiative proposals legally sufficient for hallot inclusion." *Id.* at 1496. In rejecting this argument, the court explained that it was not required by precedent "to suhject a state's initiative process to heightened First Amendment scrutiny simply hecause the process is hurdensome to initiative proposal sponsors." *Id.* at 1497. The court recognized that "the Constitution does not require Florida to structure its initiative process in the most efficient, user-friendly way possihle," and held that "a state's broad discretion in administering its initiative process is subject to strict scrutiny only in certain narrow circumstances." *Id.* at 1500-01. The court explained:

> We obviously would be concerned ahout free speech and freedom-of-association rights were a state to enact initiative regulations that were content based or had a disparate impact on certain political viewpoints. We also would he troubled were a state to apply

Similarly, the prospect of judicial invalidation of an initiative measure based in part on the statements of initiative proponents should not raise any First Amendment problems under the unconstitutional conditions doctrine. The fundamental purpose of judicial review is not to sanction lawmakers for their statements or limit what can be said during the lawmaking process, but rather to ensure that regulated parties are subject to a valid rule of law.[289] A

> facially neutral regulations in a discriminatory manner. Nor as *Meyer* held, could a state impermissibly burden the free exchange of ideas about the objective of an initiative proposal.

Id. at 1500; *accord* Marijuana Policy Project v. D.C. Bd. of Elections and Ethics, 191 F. Supp. 2d 196, 198-99 (D.D.C. 2002) (invalidating congressional legislation that prohibited the District of Columbia from expending any monies to enact a ballot measure that would decrease the penalties for use or distribution of a Schedule I controlled substance on the grounds that the statute "is a viewpoint discriminatory restriction on plaintiffs' political speech and is consequently unconstitutional" under the First Amendment). As the Eleventh Circuit recognized, however, "[m]ost restrictions a state might impose on its initiative process"—including, by analogy, those provided by the agency model—"would not implicate First Amendment concerns." *Biddulph*, 89 F.3d at 1500.

Indeed, the requirement that initiative proponents submit petitions signed by a substantial number of registered voters to qualify for the ballot is a significant hurdle which—while arguably compelling speech—has never been thought to raise First Amendment problems. *See* Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 205 (1999) ("To ensure grass roots support, Colorado conditions placement of an initiative proposal on the ballot on the proponent's submission of valid signatures representing five percent of the total votes cast for all candidates for Secretary of State at the previous general election."); *Meyer*, 486 U.S. at 425-26 (recognizing that the state's "interest in ensuring that an initiative has sufficient grass roots support to be placed on the ballot . . . is adequately protected by the requirement that no initiative proposal may be placed on the ballot unless the required number of signatures has been obtained"). On the other hand, the Supreme Court has held that certain regulations of *petition circulators* have violated the First Amendment. *See Buckley*, 525 U.S. at 186 (holding that a Colorado statute violated the First Amendment by (1) requiring circulators of initiative petitions to be qualified voters, (2) requiring circulators of initiative petitions to wear badges identifying their names, and (3) requiring initiative proponents to report the names and addresses of all paid circulators and the amount paid to each circulator). This precedent is perfectly consistent with the claim that the neutral imposition of reasonable procedural requirements *on initiative proponents* raises no First Amendment difficulties. *See id.* at 195 n.16 ("[T]oday's decision, . . . like *Meyer*, separates petition circulators from the proponents and financial backers of ballot initiatives."); *id.* at 204-05 ("Through less problematic measures, Colorado can and does meet the State's substantial interests in regulating the ballot-initiative process. . . . To inform the public 'where the money comes from, . . . the State legitimately requires sponsors of ballot initiatives to disclose who pays petition circulators, and how much.") (internal citations omitted). It is perfectly sensible for the Court to allow greater regulation of initiative proponents than petition circulators under the First Amendment because the former group's role is not limited to advocating ideas, but also extends to lawmaking itself.

289. *See* Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 14 (1998) (explaining that "[a] constitutional right is a legal right targeted against a particular rule—a rule with the wrong predicate or history[,]" which "furnishes the rights-holder a legal power to secure, in some measure, the judicial invalidation of a particular rule"; Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 242-51 (1994) (claiming that all persons have a right to be judged

law will therefore be invalidated under the agency model if a court determines that lawmakers relied on an impermissible purpose or failed to engage in reasoned decisionmaking during the lawmaking process. The basis for the judicial invalidation of a law under this model is not the existence of inappropriate "statements" by the lawmakers, but rather the flaws in the resulting law that are *evidenced by* those statements. When viewed in this light, judicial review under the agency model would not sanction initiative proponents for their statements, but would merely consider those statements as probative evidence to prevent the application of an invalid rule of law.

This understanding of judicial review explains why using the statements of lawmakers as evidence of a law's invalidity has never been thought to raise First Amendment problems in other contexts. For example, while the subjective intentions of particular legislators is an unusual basis for invalidating laws under the Constitution, the Supreme Court has occasionally used statements made by legislative sponsors as persuasive evidence of a statute's impermissible purpose.[290] Moreover, courts routinely examine the statements of agency officials when evaluating the validity of legislative rules under the APA. The notion that judicial reliance upon such statements to invalidate a law would violate the First Amendment rights of those lawmakers seems absurd—but only if one recognizes that judicial review operates to prevent the application of invalid rules of law rather than to regulate the statements of lawmakers.

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by a valid rule of law); Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 3 ("[A] litigant has always had the right to be judged in accordance with a constitutionally valid rule of law").

290. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 56-60 (1985) (relying on the statements of a state law's sponsor in deposition testimony and other legislative records to conclude that the law lacked a secular purpose and therefore violated the Establishment Clause); Hunter v. Underwood, 471 U.S. 222, 224-30 (1985) (relying in part on the proceedings of the state's constitutional convention to invalidate a facially neutral provision of the Alabama Constitution because it was enacted with the intent of disenfranchising African-Americans); *see also* Doe v. Sch. Bd., 274 F.3d 289, 293-95 (5th Cir. 2001) (relying on statements of an amendment's sponsors and other legislators to conclude that the word "silent" was deleted from a statute autborizing school prayer for the impermissible purpose of promoting prayer in public schools); Consol. Edison Co. of New York, Inc. v. Pataki, 117 F. Supp. 2d 257, 269 (N.D.N.Y. 2000) (citing a legislator's statements as evidence that a law preventing a utility rate increase was an unlawful bill of attainder because it was intended as punishment for alleged negligence on the part of the utility company); United States v. Parma, 494 F. Supp. 1049, 1066-69 (N.D. Ohio 1980) (relying on statements of elected officials to conclude that the City of Parma engaged in intentional discrimination when it denied building permits for an affordable housing project). The unusual nature of these cases is partly a function of the immunity conferred upon legislators by the Speech or Debate Clause of the U.S. Constitution and similar state constitutional provisions. *See supra* note 231.

In sum, the application of the agency model to direct democracy is consistent with the First Amendment because it would not impose any limitations on the amount of speech-related activity in which initiative proponents could engage or on the content of those statements. To the extent that it would require initiative proponents to explain and justify their proposals, the agency model would merely impose reasonable procedural requirements of the kind that have never been considered problematic. Finally, because the nature of judicial review of legislation (under the agency model or otherwise) is to ensure that citizens are only subject to valid rules of law, using the initiative proponents' statements during the lawmaking process as evidence to assess the validity of a ballot measure should pose no First Amendment difficulties. Indeed, the application of the agency model to direct democracy would merely treat the statements of initiative proponents in the same manner as those of other lawmakers. When the myth of popular sovereignty in direct democracy is rejected, one should not expect otherwise.

D. Stacking the Odds Against Initiative Proponents?

Advocates of direct democracy may be concerned that the agency model would unfairly disadvantage the initiative proponents and render ballot measures unduly difficult to enact and defend in subsequent judicial proceedings. First, the notice-and-comment proceedings required by the agency model would impose additional costs and burdens on initiative proponents. Second, the heightened judicial scrutiny authorized by the agency model would render more successful ballot measures vulnerable to invalidation based on the failure of initiative proponents to engage in reasoned decisionmaking. Finally, it could be considered inequitable to impose these procedural requirements on initiative proponents without imposing similar requirements on the initiative opponents—who are probably already better situated to use large sums of money during ballot campaigns to defeat initiative measures about which the voters are undecided.[291]

291. Several commentators have concluded from empirical studies that substantial spending during ballot campaigns can be sufficient to defeat a measure by its opponents, but not to ensure its enactment by proponents. *See* GERBER, *supra* note 109, at 61-62 (explaining that "[w]hen . . . the goal is to pass a new initiative, monetary resources are simply not enough," but that "[b]ombarding voters with paid campaign advertisements that promise horrible consequences if the measure passes, even if the messages contained in these ads are barely believable, may be enough to create sufficient concern" to defeat a ballot measure); Lowenstein, *supra* note 138, at 511 (examining spending and election outcomes in a number of initiative campaigns and concluding that "there emerges a strong pattern indicating that one-sided spending has been ineffective when it is in support of the proposition but has been almost invariably successful

Although these concerns are worthy of consideration, they ultimately do not present compelling arguments against the application of the agency model to direct democracy.

The costs of a notice-and-comment proceeding would vary depending on the degree of interest in a ballot measure and the technical complexity of the subject matter.[292] Those costs are likely to be manageable for most initiative measures. While a few particularly controversial ballot measures receive substantial publicity, most initiatives do not engender widespread public interest until immediately before the election and could therefore be expected to result in a limited number of comments from interested parties.[293] Responding to those comments would not entail an inordinate amount of difficulty, time, or expense. Moreover, proposed initiatives that address nontechnical policy questions are unlikely to be informed by a great deal of empirical data. The initiative proponents would be required to explain the *reasons* justifying their proposals, but they would not be faced with the substantial burdens associated with squaring their decisions with potentially voluminous and conflicting scientific data. While the absence of any experience with notice-and-

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when it is in opposition"); Robyn R. Polashuk, Comment, *Protecting the Public Debate: The Validity of the Fairness Doctrine in Ballot Initiative Elections*, 41 UCLA L. REV. 391, 405-08 (1993) (describing several major studies on the influence of spending on ballot initiative elections and concluding that "[t]he result in every study is the same: Money is an overwhelming factor in defeating ballot initiatives, and is a slight, but notable, factor in passing such measures.").

292. Although the costs of the APA's rulemaking procedures have been the subject of voluminous debate, *see infra* note 300, empirical data quantifying those costs is surprisingly difficult to obtain. *See* HOUSE COMM. ON COMMERCE, THE COSTS OF FEDERAL REGULATIONS (conducting a survey of thirteen federal agencies on the costs of rulemaking and reporting that "[a]gencies do not maintain documents of the administrative costs specifically associated with regulatory activities"), *at* http://www.house.gov/commerce/fedregs/regshome.htm (last visited Feb. 17, 2003). Nonetheless, it is axiomatic that the costs of administrative rulemaking will depend largely on the number of comments submitted in response to a proposed rule, its technical complexity, and the amount of relevant data available. Numerous legal scholars have pointed out the difficulties associated with rulemaking in areas of scientific uncertainty. *See, e.g.*, THOMAS O. MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY 5-6 (1991) (arguing that regulators should employ a "rationality that recognizes the limitations that inadequate data, unquantifiable values, mixed societal goals, and political realities place on the capacity of structured rational thinking, and it does the best that it can with what it has"); Frank B. Cross, *Pragmatic Pathologies of Judicial Review of Administrative Rulemaking*, 78 N.C. L. REV. 1013, 1041 (2000) (recognizing that "[r]egulatory decisionmaking typically requires the use of scientific evidence, ranging from epidemiology to economics," and that "science seldom offers conclusive answers").

293. *See* MAGLEBY, *supra* note 47, at 123-30 (describing political science studies on the interest and knowledge of voters regarding ballot campaigns and reporting that "[s]ubstantial proportions of the electorate report not having seen or heard anything about even very controversial or highly publicized propositions," and that "[v]oters are not very interested in most propositions—including some controversial ones . . . ; they become very interested in only a few initiative propositions").

comment proceedings in the context of direct democracy renders any conclusions on this score necessarily speculative, many initiative measures seem likely to have one or both of the characteristics associated with relatively simple and inexpensive procedures of this nature.[294]

On the other hand, some proposed initiative measures, such as those dealing with controversial environmental issues, would likely engender a great deal of public interest and empirical debate. Notice-and-comment proceedings involving issues of this nature could very well involve a significant amount of time and expense.[295] Although the cost-effectiveness of these procedures has certainly been questioned in the administrative law context, the prevailing view for many years has been that the time and expense of notice-and-comment proceedings is justified by the increased deliberations and accountability that result from the agency model.[296] Indeed, we should expect—and perhaps encourage—unelected lawmakers to face more substantial procedural hurdles when they seek to enact laws involving highly contested policies on controversial issues.

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294. A description of every initiative to have appeared on statewide ballots since 1990 is readily available, *see* BALLOT MEASURES DATABASE, *supra* note 3, but more empirical work is needed regarding the level of public attention devoted to initiative measures and their technical complexity, particularly at the local level. It would seem to be a plausible hypothesis, however, that the most technically complex measures would be most likely to fly beneath the general public's radar screen, while those raising purely "moral issues" would generate the greatest public interest. A challenge to this simple hypothesis may be the "English only" propositions to eliminate bilingual education that have appeared on ballots in several states. Those measures raise conflicting empirical evidence while simultaneously involving highly controversial issues of moral judgment. *See* Linda A. Cistone-Albers, *Deconstructionist and Pragmatic Analyses Reveal the "Intent to Discriminate" in Proposition 227—A California Initiative*, 27 W. ST. U. L. REV. 215, at 252-54 (2000) (describing the federal court's self-declared incompetence to consider empirical evidence submitted in litigation regarding a ballot initiative to end bilingual education in California); Lisa Ellern, *Proposition 227: The Difficulty of Insuring English Language Learners' Rights*, 33 COLUM. J.L. & SOC. PROBS. 1, 11-15 (1999) (describing the debate regarding the effectiveness of bilingual education that surrounded the English-only ballot measure in California).

295. For example, E. Donald Elliot, the former general counsel of the EPA, estimated in 1994 that it cost the agency about $2 million and took approximately two years to adopt a rule, without considering the additional delays imposed by judicial review and potential judicial remand. Asimow, *supra* note 197, at 134 n.42; *see also* Cross, *supra* note 292, at 1038 (arguing that the "EPA is probably the best example of the disadvantages of judicial review").

296. *See, e.g.*, Asimow, *supra* note 197, at 127-29 (claiming that notice-and-comment rulemaking "provides an ingenious substitute for the lack of electoral accountability" of agency officials because "people who care about legislative outcomes produced by agencies have structured opportunities to provide input into the decisionmaking process"); Manning, *supra* note 197, at 660-61 (recognizing that notice-and-comment rulemaking holds agency officials accountable and provides opportunities for public participation and deliberation). *But cf. infra* note 300 (discussing the ossification hypothesis in administrative law scholarship).

In any event, it is unnecessary to impose all of the costs of the agency model on the initiative proponents. On the contrary, some or all of the costs associated with notice-and-comment proceedings could be financed with public funds. In developing a public financing scheme for this purpose, some factors that would need to be considered include (1) whether the proponents of every initiative that qualified for the ballot would be eligible or whether financial assistance would be limited to "grass-roots" organizations, (2) whether initiative proponents would be entitled to have all, or a certain designated amount, of their costs reimbursed, (3) the appropriate source of such funding at a time when many state and local governments are facing serious budget problems,[297] and (4) whether the difficulty of qualifying for the ballot should be increased to limit the number of proposed initiatives that would qualify for public funding. Whatever the precise details of such a scheme, it must be acknowledged that direct democracy is a state-authorized institution that results in the enactment of binding state and local laws. It is, therefore, appropriate for the government to take some responsibility for ensuring that this lawmaking institution operates in an accountable, deliberative, and effective manner. Indeed, most states that authorize direct democracy have implicitly recognized this principle by bearing the substantial costs associated with the creation of a ballot pamphlet, which describes the initiatives that will appear on an upcoming election ballot, and the dissemination of such material to millions of registered voters.[298]

At the same time that the agency model would impose additional procedural requirements on the initiative proponents during the lawmaking process, it would also authorize hard-look judicial review of successful ballot measures under an arbitrary and capricious standard. Because this form of heightened judicial scrutiny of ballot measures is not currently authorized in any jurisdiction, the application of the agency model to direct democracy could only lead to

297. Ironically, those budget problems have been exacerbated in many jurisdictions by previously enacted ballot measures. *See, e.g.*, SCHRAG, *supra* note 7, at 222 (describing the "widely known" phenomenon of "ballot box budgeting" in which each successful initiative "eats up an ever greater chunk of the public purse and makes it still harder for government to establish priorities and respond to new needs"); Gastil et al., *supra* note 8, at 1029 ("Initiatives passed by voters have severely limited the tax money available to provide needed state services.").

298. According to David Magleby, the costs of voter pamphlets during the 1980s ranged from $350,000 per election in Massachusetts to over $2 million per election in California. MAGLEBY, *supra* note 47, at 138; *see also* CAL. COMM'N ON CAMPAIGN FIN., *supra* note 6, at 236 (recognizing that "California invests over $5 million in printing and mailing the [ballot] pamphlets each election"); Collins & Oesterle, *supra* note 73, at 99 (stating that a ballot pamphlet is mailed to all registered voters in Colorado at no charge to the initiative proponents).

the judicial invalidation of more successful initiative measures. Although the same ballot measures could often be reenacted by the electorate after the initiative proponents repeated the lawmaking process and cured the defects identified by the courts, the adoption of hard-look judicial review would undoubtedly impose additional—and sometimes substantial—costs on the lawmaking process.[299]

As with the additional costs associated with notice-and-comment procedures, the costs of hard-look judicial review have been accepted for many years as a central feature of lawmaking by administrative agencies.[300] Previous sections have explained that the

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299. It would, however, be unnecessary for the initiative proponents to recirculate signature petitions when a successful ballot measure was invalidated and "remanded" to the initiative proponents under the agency model. The affirmative vote on the original measure by the electorate would typically constitute a sufficient display of public support for the proposition to appear on a subsequent election ballot in this situation.

300. It must be acknowledged, however, that many prominent jurists and legal scholars have criticized hard-look judicial review on the grounds that it tends to "ossify" the informal rulemaking process. *See, e.g.*, McGarity, *supra* note 212, at 1410-26, 1462 (concluding that the courts have played a prominent role in the ossification of informal rulemaking and the consequent inability of regulatory agencies to implement their statutory missions and suggesting that one partial solution to the ossification problem is for the courts to "back off" by applying a more deferential standard of review); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 65-66 (1995) (claiming that "courts have transformed the simple, efficient notice and comment process into an extraordinarily lengthy, complicated, and expensive process that produces results acceptable to a reviewing court in less than half of all cases in which agencies use the process"); *see also* Jordan, *supra* note 212, at 394 (claiming that "it has become a virtual article of faith that judicial review of agency rules under the current hard look version of the 'arbitrary, capricious, or abuse of discretion' standard bas been a major culprit in the 'ossification' of informal rulemaking"); Richard J. Pierce, Jr., *The APA and Regulatory Reform*, 10 ADMIN. L.J. 81, 82-83 (1996) ("There is a broad consensus among scholars that ossification of the rulemaking process is the largest single implementation problem [facing the APA] today."). Professor Jordan has recently summarized the "ossification hypothesis" as follows:

> Those who believe that hard look review has caused the ossification of informal rulemaking present two basic arguments. The first is that hard look review is so intrusive that agencies ultimately stop trying to pursue their regulatory goals through informal rulemaking. The second is that hard look review results in excessive data gathering, analysis, and long-winded explanations, often of marginal points, all of which imposes unnecessary costs and delays upon the agencies' regulatory programs. Both of these positions are frequently accompanied by an assertion that, whatever its burdens, hard look review does not improve either the substance of regulation or the regulatory process.

Jordan, *supra* note 212, at 394-95. The proposed solutions to the ossification hypothesis include the adoption of alternative tribunals to consider challenges to agency lawmaking, application of a more deferential method of judicial review of agency rules, and, most radically, the complete abolition of judicial review of agency lawmaking. *Id.* at 402-03 (summarizing proposals to modify hard-look judicial review); Seidenfeld, *supra* note 258, at 503-24 (same); *see also* Cross, *supra* note 247, at 1334 (arguing that the burden of proving "that the intervention of courts can improve" administrative rulemaking "cannot be borne successfully").

It is beyond the scope of this Article to provide a comprehensive defense of hard-look judicial review of agency action, *but see supra* Part III.B (claiming that the procedural requirements of the APA and hard-look judicial review of agency action have made rulemaking more consistent

with republican principles of government and have played an important role in checking potentially excessive uses of administrative authority), but many others have attempted to do so. *See, e.g.*, Rossi, *supra* note 211, at 811-26 (defending hard-look judicial review as a protector of deliberative democratic values); Seidenfeld, *supra* note 258, at 487-90 (claiming that the undesirable effects of hard-look judicial review are likely outweighed by its considerable benefits, which include "the need to ensure that agencies act not only within acceptable legal and political bounds, but also exercise their discretion in a deliberative manner"); *see also* Jordan, *supra* note 212, at 403-04 (summarizing some of the most prominent defenses of hard-look judicial review and arguing that the consequences of abandoning the doctrine "could be quite serious"); Seidenfeld, *supra* note 202, at 1543-51 (advocating a civic republican model of judicial review of agency rulemaking, which "explicitly provides that the reviewing court's proper function is to ensure that the agency interpreted the statute in a deliberative manner").

While a complete evaluation of this debate would require a separate article (or two), several points bear noting for purposes of this project. First, the claim that hard-look judicial review of agency action ossifies the rulemaking process has not been proven empirically, but rather continues to be hotly contested. *See, e.g.*, Jordan, *supra* note 212, at 445 (reviewing ten years of decisions of the D.C. Circuit and claiming that "[i]t is clear that agencies that do pursue informal rulemaking are generally able to achieve their regulatory goals, usually with no significant judicial interference," but that "[m]ore research is needed for a complete understanding of the value and effects of judicial review"); Patricia M. Wald, *Regulation at Risk: Are Courts Part of the Solution or Most of the Problem?*, 67 S. CAL. L. REV. 621, 634-37 (1994) (claiming that judicial review, at least in the D.C. Circuit, "is not a major cause of delay in the implementation of a rule," and that the court only invalidated agency action under the hard-look doctrine in six out of the thirty-six cases surveyed). *Compare* Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 490 (2002) (presenting a "modest defense" of judicial review of agency rulemaking and arguing "that the psychology of individual decisionmaking biases and group decisionmaking dynamics suggests" that hard-look judicial review "does improve the overall quality" of administrative rules), *with* Cross, *supra* note 292, at 1013 (arguing that "the consequences of judicial review of rulemaking are consistently and inescapably perverse"). Second, one of the major premises of the ossification hypothesis—that courts are incompetent to evaluate highly technical decisions by expert agencies—is essentially inapplicable in the context of direct democracy. *See, e.g.*, Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 388 (1986) (questioning the extent to which "a group of men and women, typically trained as lawyers rather than as administrators or regulators, operating with limited access to information and under the constraints of adversary legal process, [can] be counted upon to supervise the vast realm of substantive agency policymaking"); ATTORNEY GENERAL'S COMM. ON ADMIN. PROCEDURE, FINAL REPORT ON ADMINISTRATIVE PROCEDURES 77-79 (1941) (stating that judicial review should serve only as a retrospective check on the legality and rationality of administrative action, not as a means of influencing or insuring "correct" administrative decisions; while review must be available, it "must not be so extensive as to destroy the values—expertness, specialization, and the like—which . . . were sought in the establishment of administrative agencies"). Many ballot measures do not involve highly technical subjects and, when they do, there are no assurances that the initiative proponents have the necessary expertise or will apply their knowledge in a remotely "neutral" fashion. Accordingly, there is an even greater need for alternative structural safeguards in the context of direct democracy than in the agency context. Third, the most common proposals to remedy agency ossification advocate a more deferential application of the hard-look doctrine, rather than the abandonment of notice-and-comment rulemaking and judicial review of the reasoning of agency action. *See, e.g.*, Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61, 72, 91 (1997) (claiming that "inadequate reasoning is the most frequent basis for judicial rejection of agency decisions" and arguing that "a persuasive case can be made in support of adopting a less demanding version of the duty to engage in reasoned decisionmaking in response to the phenomenon of diminishing agency resources"); McGarity, *supra* note 212, at 1410-26, 1462.

agency model's safeguards are necessary to replace the structural filters of the traditional legislative process and counteract the otherwise constitutionally suspect nature of lawmaking by unelected actors in our political system by ensuring a sufficient degree of deliberation and accountability.[301] While those who criticize the costs associated with the application of heightened judicial review and other procedural requirements in the administrative context might object to the agency model's extension into other spheres of lawmaking, the presence of similar shortcomings in the initiative process suggests that similar procedural safeguards are necessary in direct democracy as well.

In any event, a cost-benefit analysis of the agency model's procedural requirements may be misguided. Those procedural requirements are arguably justified—regardless of their costs—by the otherwise constitutionally suspect and ill-advised nature of lawmaking outside of the parameters set forth in Article I, Section 7.[302] Moreover, it is commonly recognized that the structural safeguards of the Constitution, which are absent from administrative lawmaking and direct democracy, contain an inherent status quo bias and were intentionally designed to make lawmaking difficult and prevent majority faction.[303] If the alternative structural safeguards

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Those proposals are not entirely incompatible with the ideas set forth in this Article. On the contrary, a relatively deferential application of the reasoned decisionmaking requirement in the context of initiative lawmaking would be vastly superior to the current situation where no such judicial review occurs—and, indeed, where no mechanisms to encourage deliberation and reasoned decisionmaking exist. Finally, assuming that the ossification hypothesis is correct, the consequences of those problems are likely to be much more severe in the administrative context where the prospect of hard-look judicial review would interfere with the objectives of ongoing regulatory programs that have already been authorized and funded by the legislature. *See, e.g.*, Cross, *supra* note 292, at 1027-39 (claiming that judicial review of agency rulemaking disrupts the agendas of regulatory programs and results in the misallocation of resources); McGarity, *supra* note 212, at 1392 ("[T]he fact that the ossification of the informal rulemaking process frustrates statutory goals is a primary reason for inquiring into the causes of and cures for the ossification phenomenon."). In contrast, the costs and delays attributable to hard-look judicial review are more justifiable when unelected initiative proponents seek to adopt newly enacted laws entirely of their own accord—often in the form of amendments to a state's constitution.

301. *See supra* Part III.B.

302. *Cf.* Shapiro & Levy, *supra* note 18, at 440 (arguing that hard-look judicial review of agency action has constitutional underpinnings and claiming that "[s]uch an understanding of the reasons requirement is preferable to the common assumption that the requirement is solely a product of the APA's arbitrary and capricious standard of review").

303. *See* ESKRIDGE ET AL., *supra* note 167, at 66-68 (describing the "hurdles" that bills must overcome before they are enacted into law and explaining that "[t]he Framers believed that the Constitution's requirement of bicameral approval and presentment to the President . . . would assure that most social and economic problems would not generate legislation at all, because the two bodies would have different views about what should be done"); Eule, *supra* note 2, at 1522-28 (describing the structural safeguards provided by representative democracy, which are absent

that are provided by the agency model increase the difficulty of enacting and defending laws outside of the context of Article I, Section 7, those procedural requirements are perfectly consistent with this constitutional design, especially when the requirements would increase deliberation and encourage reasoned decisionmaking in the lawmaking process.

For similar reasons, the fact that the agency model would impose procedural requirements on initiative proponents that would not be imposed on the initiative opponents is hardly surprising. The initiative proponents would be required to conduct a notice-and-comment proceeding and engage in reasoned decisionmaking under the agency model precisely because they are the relevant lawmakers in the context of direct democracy. The same cannot be said for the initiative opponents. Thus, while agency officials are required to comply with the foregoing procedural requirements when they engage in legislative rulemaking, no one could seriously complain that the agency model is unfair because similar requirements are not imposed upon parties who submit comments in opposition to a proposed rule but do not act in any formal lawmaking capacity.

While it seems perfectly logical to limit the requirements of the agency model to those who are acting in a lawmaking capacity, this limitation raises unique difficulties in the context of direct democracy because, unlike a proposed agency rule, a proposed ballot measure must subsequently be submitted to the voters for ratification or rejection. Moreover, an initiative measure is submitted to the voters following a ballot campaign in which proponents and opponents vigorously contest the adoption of a proposal. By requiring the initiative proponents to engage in reasoned decisionmaking during the ballot campaign, without imposing similar constraints on the initiative opponents, the agency model might make it substantially more difficult to enact direct democratic measures.

Although equitable concerns of this nature are certainly legitimate, the desire for evenhanded treatment of initiative proponents and opponents is outweighed by the need for reasoned decisionmaking by those who are delegated lawmaking authority in our republic. The initiative opponents may very well engage in rhetoric that is blatantly false, misleading, inconsistent, or even racist. The state and local governments that authorize direct democracy, however, can and should take a principled stand against allowing those who make laws on their behalf from freely

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from direct democracy); Schoenbrod, *supra* note 177, at 371-81 (describing tbe structural safeguards provided by representative democracy, which are absent from agency lawmaking).

reciprocating in kind. Moreover, if the purpose of judicial review of successful ballot measures is to ensure that citizens are subject only to valid rules of law, the relevant lawmakers should be required to abide by constitutional limitations and give reasoned explanations for their decisions during ballot campaigns regardless of the tactics of their opponents. In other words, we should require lawmakers to engage in reasoned decisionmaking—and for courts to invalidate laws when unelected lawmakers fail to do so—even if the initiative opponents fail to satisfy our aspirations and obtain a tactical advantage during the ballot campaign based on their admittedly regrettable conduct.

In any event, it is unlikely that the imposition of a reasoned decisionmaking requirement only on initiative proponents would give the initiative opponents a meaningful advantage during ballot campaigns. First, the notice-and-comment proceeding required by the agency model would provide the initiative opponents with new incentives to present their objections to a ballot measure during the early stages of an initiative campaign.[304] The initiative proponents would then be required to respond to those objections as part of the formal lawmaking record, either by amending their proposal to respond to those concerns or by explaining in a cogent fashion why those concerns are being rejected. More important for present purposes, the initiative proponents would be informed of the primary objections to their proposals early in the lawmaking process and would therefore be in a better position to address those concerns during the ballot campaign. Rather than simply being ambushed with a host of unknown objections during the final weeks of an election campaign, the initiative proponents would be able to address the primary concerns of the opponents in a meaningful fashion in their campaign advertising.

One would hope that the initiative opponents would also focus their campaign advertising on the substantive merits of the issues addressed during the notice-and-comment proceeding. Nonetheless, if

304. Hard-look judicial review of a final agency rule is typically limited to the objections raised hy commenters during the rulemaking process. *See, e.g.*, Nat'l Ass'n of Mfrs. v. U.S. Dep't of Interior, 134 F.3d 1095, 1111 (D.C. Cir. 1998) ("Our cases . . . require complainants, before coming to court, to give the agency a fair opportunity to pass on a legal or factual argument.") (quotations and citations omitted); R.I. Consumers' Council v. Fed. Power Comm'n, 504 F.2d 203, 212 (1974) (indicating that this requirement is implicit in hard-look judicial review because "tbe agency cannot reasonably be expected to take a hard look" if the objecting party fails to "participate in the task of identifying the hard problems" and bring "to light pertinent information and analysis"). As Professors Buzbee and Schapiro recently explained, "the record requirement seeks to enhance the rationality of the agency's deliberative process by requiring that all information, botb positive and negative, be presented to the agency." Buzbee & Schapiro, *supra* note 249, at 130.

the initiative opponents raised novel or misleading objections to the proposed measure in their campaign advertising, the initiative proponents would be better situated to respond to those attacks by explaining that such concerns were not timely raised during the lawmaking process—when something could have been done about the alleged problem—or that the opponents' claims are contradicted by the official lawmaking record.[305] In short, the legitimate issues addressed during the notice-and-comment proceeding could be debated in a more meaningful fashion on the merits during the ballot campaign, while the misleading arguments and scare tactics of the parties would simultaneously be easier to debunk.

Rather than providing the initiative opponents with a substantial advantage during ballot campaigns, application of the agency model to direct democracy would likely improve the quality of the campaign advertising about proposed initiative measures. Even if this is wishful thinking, however, there is no reason to think that the imposition of additional procedural requirements on initiative proponents would make the quality of the rhetoric surrounding ballot campaigns any worse—and, indeed, some commentators have suggested that the quality of this rhetoric could not get much worse.[306] In any event, state and local governments should not be shy about attempting needed reforms of direct democracy that would almost certainly increase deliberation, improve accountability, and encourage reasoned decisionmaking by those who are delegated lawmaking authority in our republic—particularly when such reforms are unlikely to be cost-prohibitive or unduly disadvantageous to the initiative proponents, and when they could, in fact, markedly improve the quality of the campaign debates surrounding ballot measures.

E. Legitimizing an Illegitimate Enterprise?

Application of the agency model to direct democracy would impose greater responsibilities on initiative proponents and authorize heightened judicial scrutiny of successful ballot measures. By providing alternatives to the structural safeguards required by the Constitution in the traditional legislative process, the agency model would alleviate the constitutionally suspect nature of direct democracy

305. Daniel Lowenstein has pointed out that some of the most blatant attempts by initiative proponents to mislead the voters typically fail because such tactics are "too easily unraveled" during the ballot campaign. *See* Lowenstein, *supra* note 138, at 563-67. As explained above, the application of an agency model to direct democracy would similarly enable initiative proponents to more easily "unravel" misleading claims made by opponents during a ballot campaign.

306. *See supra* note 138 and accompanying text.

and potentially improve the quality of the laws that are enacted. Such reforms would therefore directly address the fundamental problems with initiative lawmaking and thereby help to legitimize direct democracy. The immediately preceding sections of this Article have responded to the primary concerns that advocates of direct democracy are likely to raise in response to these proposals. This section addresses a potential concern of those who believe that lawmaking by initiative is irredeemably flawed—namely, that the application of the agency model to direct democracy would fail to achieve its intended purposes and have the perverse consequence of legitimizing an illegitimate enterprise.

The agency model would likely improve the operation of direct democracy for the reasons described above.[307] It should be obvious, however, that APA procedures and heightened judicial scrutiny of initiative measures are *additional* safeguards that do not currently exist. In theory, nothing would be lost if the imposition of those additional structural safeguards did not operate in precisely the intended manner. On the other hand, critics of direct democracy could argue that the imposition of additional structural safeguards on initiative proponents could have the unfortunate by-product of lending an *appearance* of legitimacy to direct democracy that could backfire if the suggested reforms were ultimately ineffective.

The application of the agency model to direct democracy could potentially backfire in two ways, both of which assume that a successful initiative measure was upheld under the highly deferential arbitrary and capricious standard of review.[308] First, the agency model would arguably delegate *greater* lawmaking authority to the initiative proponents by authorizing courts to use the official lawmaking record created during the notice-and-comment proceeding for interpretive guidance. Second, courts might be tempted to review the constitutionality of direct democratic measures in a *more* deferential

307. *See supra* Parts III.C & IV.D.

308. Courts routinely acknowledge that the scope of review under the arbitrary and capricious standard is narrow and that the judiciary is not to substitute its judgment for that of the relevant lawmaking official. *See, e.g.*, *State Farm*, 463 U.S. at 43; Nat'l Treasury Employees Union v. Horner, 854 F.2d 490, 498 (D.C. Cir. 1988). Instead, the agency model would merely require initiative proponents to articulate a thorough and cogent explanation for their actions and to respond to significant criticisms by participants in the notice-and-comment proceeding. *See* GELLHORN & LEVIN, *supra* note 201, at 108 (describing hard-look judicial review under the APA). On pure questions of policy that do not involve technical expertise, courts would typically uphold the initiative proponents' decisions under the agency model when they could plausibly "be ascribed to a difference in view." *See, e.g.*, *State Farm*, 463 U.S. at 43; Natural Res. Def. Council, Inc. v. EPA, 822 F.2d 104, 111 (D.C. Cir. 1987).

fashion after they have concluded that the initiative proponents engaged in reasoned decisionmaking during the lawmaking process.

As explained above, however, courts already privilege the intentions of the initiative proponents when they interpret direct democratic measures.[309] While they tend to couch their analyses in terms of "voter intent," courts routinely interpret direct democratic measures by relying on formal legal sources that are controlled by—or at least accessible to—the initiative proponents. Courts should therefore reject the myth of popular sovereignty in direct democracy and more candidly acknowledge that their interpretations of successful initiatives are, in reality, the implementation of the intentions of the initiative proponents. Judicial reliance on statements of the initiative proponents during the lawmaking process for interpretive guidance would merely provide courts with an additional tool for more accurately ascertaining that intent.

Moreover, the conclusion that the initiative proponents engaged in reasoned decisionmaking during the lawmaking process should have no bearing on the constitutionality of a successful initiative measure. Judicial review of the validity of a law under the APA and the Constitution are entirely distinct analytical inquiries. Courts should have no problem maintaining this distinction when initiatives involve suspect classifications or fundamental rights. Indeed, such measures would be more likely to be invalidated under the agency model because courts could examine the statements of the initiative proponents for evidence of an impermissible purpose. On the other hand, courts might be tempted to conclude that a successful initiative that survived APA review must also be rationally related to a legitimate government purpose. While this conclusion would be true in the vast majority of cases, there may well be important exceptions. For example, the Supreme Court's conclusion that the state constitutional amendment at issue in *Romer v. Evans* was unconstitutional under the Equal Protection Clause[310] would have been unaffected even if the proponents of the initiative measure had engaged in reasoned decisionmaking throughout a lawmaking process conducted pursuant to the agency model. As long as courts understand that the statutory validity of a successful initiative measure under an APA-like standard of review requires an inquiry distinct from the assessment of a ballot measure's constitutional validity, application of the agency model to direct democracy would not undermine—and should, if anything, strengthen—constitutional rights.

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309. *See supra* Part II.C.

310. Romer v. Evans, 517 U.S. 620, 623 (1996).

In any event, the use of direct democracy is here to stay in many jurisdictions and will probably only increase in the foreseeable future.[311] Adoption of the agency model would address the fundamental problems that currently exist in direct democracy by providing essential structural safeguards that do not currently exist to encourage deliberation and hold initiative proponents accountable for their decisions during the lawmaking process. This model, which has proven workable during many years of operation in the agency context, could therefore substantially improve the legitimacy of direct democracy. Although the staunchest critics of direct democracy would undoubtedly be disappointed by such an outcome, those who favor good government—and recognize the inevitability of the continued use of direct democracy—should nonetheless conclude that such reform proposals are worth a try.

CONCLUSION

The inherent tension between direct democracy and the republican form of government adopted by the Framers of the United States Constitution has been recognized for some time now. Several commentators have also recognized that direct democracy poses challenges for courts because of the difficulties associated with ascertaining the intentions of the voters. These fundamental problems with direct democracy can be squarely addressed, however, by recognizing the dominant role played by initiative proponents in the lawmaking process.

Initiative proponents are not the only unelected lawmakers in our democracy. Administrative agencies have freely engaged in legislative rulemaking based on broad delegations of authority from the legislature for more than half a century. Although still considered constitutionally suspect, this development has continued unabated in large part because adequate structural safeguards have been adopted to replace those provided in the traditional legislative process by representation and the provisions of Article I, Section 7. The procedural requirements of the APA and hard-look judicial review ensure that agency officials engage in deliberation and reasoned decisionmaking during the lawmaking process and have thereby legitimized administrative lawmaking.

Application of an agency model to direct democracy would provide the alternative safeguards needed to legitimize initiative lawmaking as well. Meanwhile, the creation of an official lawmaking

311. *See supra* note 4 and accompanying text.

record would help courts overcome the difficulties of judicial review that are currently associated with initiative lawmaking. Courts could also examine the public statements of initiative proponents for persuasive evidence from which to evaluate the validity of successful ballot measures. These reforms would, of course, require state and local governments to acknowledge the dominant lawmaking role played by the initiative proponents. This Article has argued that it is time for those states that champion initiative lawmaking to reject the myth of popular sovereignty in direct democracy and adopt reforms that would improve the process and hold the private citizens that exercise lawmaking authority in our republic to meaningful standards of accountability.

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