

Judicial Review of Direct Democracy: A Reappraisal

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In his dissent in Arizona State Legislature v. Arizona Independent Redistricting Commission in 2015, Justice Clarence Thomas argued that the Supreme Court had been inconsistent in the rigor it employs when considering constitutional challenges to the products of direct democracy, i.e., referenda and initiatives. Some cases seemed to use stricter scrutiny, and others lesser scrutiny, as compared to challenges to ordinary legislation. Justice Thomas argued that the review of direct democracy should be the same as for ordinary legislation, a proposition with which this Article agrees. This Article challenges the position advanced by Professor Julian Eule over twenty-five years ago, and others since then, that the process and products of direct democracy are suspicious enough to warrant stricter judicial scrutiny. In contrast, this Article contends that, on the whole, direct democracy is sufficiently similar to ordinary legislation, and not particularly invasive of minority rights, such that no special judicial hostility is warranted.

INTRODUCTION

The United States Supreme Court often decides its most momentous and controversial cases at the end of a Term,² and the 2014–15 Term was no exception. This term included decisions involving same-sex marriage, the Affordable Care Act, and the use of independent commissions to redraw congressional districts, bypassing legislatures.³ Lost among the heated commentary was a reflection on

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² Lee Epstein, et al., *The Best for Last: The Timing of U.S. Supreme Court Decisions*, 64 DUKE L.J. 991, 1021 (2015).

³ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015) (finding a constitutional right to same-sex marriage); *King v. Burwell*, 135 S. Ct. 2480, 2489–90 (2015) (holding that Affordable Care Act authorizes creation of federal exchanges); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2677 (2015) (holding that independent redistricting commission, created by ballot initiative and bypassing state legislature, could constitutionally redraw congressional districts consistent with the Elections Clause).

direct democracy⁴ by Justice Clarence Thomas, dissenting in the Court's decision in *Arizona State Legislature v. Arizona Independent Redistricting Commission*.⁵ Justice Thomas argued that in the last days of the Term, the Court had not been consistent in its level of judicial review of the products of direct democracy.⁶ In the redistricting case, he contended, the Court offered “a paean to the ballot initiative”⁷ while only days earlier it had “cast aside state laws across the country—many of which were enacted through ballot initiative” in the same-sex marriage case.⁸ Justice Thomas gave still other examples of what he characterized as the “Court’s lack of respect for ballot initiatives,”⁹ and argued that the redistricting decision challenged in this particular case was “unusually democracy-reducing,” since it took “districting away from the people’s representatives and [gave] it to an unelected committee.”¹⁰ Rather than being deferential to or disrespectful of such initiatives, Justice Thomas stated that he “would instead treat the States in an evenhanded manner. That means applying the Constitution as written.”¹¹ By this, he apparently meant that he would apply the same judicial scrutiny to all products of state lawmaking, whether from the legislature or from the results of direct democracy.

Justice Thomas’s revisiting of the appropriate level of judicial scrutiny for ballot initiatives provides an opportunity to reexamine the issue. The issue was well framed in a leading article, twenty-six years ago, by the late Professor Julian N. Eule:

If the people are the sovereign from which all power originates, then why should their expression of will not carry more weight than the legislature’s crude effort to approximate it? If the root difficulty of judicial review is its counter-majoritarian nature, why does the argument for judicial intervention not abate as it becomes clearer what the majority prefers?¹²

⁴ See *infra* Part I.A. for further discussion of what measures are covered by this term.

⁵ *Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. at 2697–99 (Thomas, J., dissenting).

⁶ *Id.*

⁷ *Id.* at 2697.

⁸ *Id.*

⁹ *Id.* at 2698. Justice Thomas cited numerous examples from the 2014–2015 Term in which the Court denied certiorari or motions for stays from lower federal court decisions finding state laws passed by ballot initiative to be unconstitutional. *Id.* He also mentioned the sharp criticisms of ballot initiatives in a dissenting opinion from the previous term, which had upheld an initiative against a constitutional challenge. *Id.*, see also *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1651 (2014) [hereinafter *Schuette v. BAMN*] (Sotomayor, J., dissenting).

¹⁰ *Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. at 2698 (Thomas, J., dissenting). Justice Thomas caustically added that the “Court’s characterization of this as direct democracy at its best is rather like praising a plebiscite in a ‘banana republic’ that installs a strongman as President for Life.” *Id.* at 2698–99.

¹¹ *Id.* at 2699.

¹² Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1506 (1990) (footnotes omitted).

Scholarly debate on the appropriate level of scrutiny stretches back to the 1970s,¹³ but no academic consensus has emerged. Moreover, the results of the most recent term and Justice Thomas's focus on the issue illustrate that the Supreme Court also lacks a consistent view of the appropriate level of scrutiny. The American appetite for the continued use of direct democracy appears to be unabated, and this same appetite has increased in other parts of the world.¹⁴ There is little doubt that the Court (and lower courts) will continue to confront the doctrinal choices highlighted by Justice Thomas in his *Arizona* dissent.

Part I of the Article sets out the uncertain status quo in the Supreme Court regarding what level of deference (if any) the Court has variously given to constitutional challenges to state laws that are the product of direct democracy. It first reviews Supreme Court opinions that have addressed the issue prior to Justice Thomas in 2015, and shows a variety of views, and often no expressed view at all. The Article then turns to the academic literature and sets out differing views that have been expressed in that literature. Part II of the Article revisits the issue of scrutiny in light of more recent developments, and concludes that Justice Thomas is correct. This conclusion is justified on the basis that the *process* of direct democracy appearing on the ballot and being voted on does not, in ways important to judicial scrutiny, fundamentally differ from the process of legislative lawmaking; that similarly the *products* of direct democracy are not, on the whole, different from that of the legislative branch; and that proposals for a harder look judicial review of the result of direct democracy suffer from significant problems of

¹³ See generally WILLIAM N. ESKRIDGE, JR., ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 557–59 (4th ed. 2007) (citing literature from 1970s to the present); Note, *Judicial Approaches to Direct Democracy*, 118 HARV. L. REV. 2748, 2750–66 (2005) (reviewing scholarly literature on the subject).

¹⁴ See ESKRIDGE ET AL., *supra* note 13, at 525 (“The 1990s saw the most initiatives on the ballot, with more than 375 proposed, and the first decade of the 21st Century appears to be on track to match or exceed that figure.”); John Dinan, *State Constitutional Initiative Processes and Governance in the Twenty-First Century*, 19 CHAP. L. REV. 61, 63–67 (2016) (detailing 203 citizen-initiated amendments to state constitutions in 2000–2014); Todd Donovan, *Direct Democracy: Lessons from the United States*, POL. INSIGHT, Dec. 2014, at 26, 26–27 (pointing out that “[b]etween 2000 and 2012 Americans voted on nearly 1600 statewide referendums and initiatives” and discussing the use of such devices in Europe); see also REFERENDUMS AROUND THE WORLD: THE CONTINUED GROWTH OF DIRECT DEMOCRACY 11 (Matt Qvortrup ed., 2014) (noting that the use of referendums are “growing” and analyzing all the nationwide referendums covering all continents); Steven Erlanger, *Dutch Referendum Could Cause Trouble for European Union*, N.Y. TIMES (April 6, 2016), http://www.nytimes.com/2016/04/06/world/europe/dutch-referendum-could-cause-trouble-for-europe.html?_r=0 (“A trend toward more ‘popular democracy’ is visible in Europe . . .”).

definition and application. I will then conclude the Article with some final thoughts.¹⁵

I. THE STATUS QUO: SUPREME COURT JURISPRUDENCE AND ACADEMIC CRITIQUES

A. Direct Democracy in America: A Brief Overview

“Direct democracy” is a shorthand for a variety of tools whereby voters can bypass the legislature and enact legislation or amend state constitutions. The two principal methods are the initiative and the referendum.¹⁶ Through the direct initiative, a certain percentage of the electorate may place a proposal on the ballot to enact a law or amend the state constitution.¹⁷ Through the indirect initiative, the proposal is submitted to the legislature for action, and it is subsequently placed on the ballot if the legislature fails to pass the proposal or enacts a different one.¹⁸ In contrast, the referendum permits the electorate to pass on a law proposed by or already enacted by the legislature.¹⁹ The referendum may be placed directly on the ballot by the collection of a requisite number of signatures, or by the legislature itself.²⁰

The tools of direct democracy have deep and contested roots in American political history. At the Constitutional Convention, the framers rejected such tools in favor of representative government, but direct democracy devices appeared in state constitutions throughout the nineteenth century.²¹ The widespread adoption of direct democracy occurred around the turn of the last century, especially in the Western states.²² The primary proponents of this change were Populists and Progressives, seeking to bypass legislatures which, they argued, had been captured

¹⁵ There are several matters I will not be directly addressing. I am not concerned with the merits, or lack thereof, of direct democracy itself, but only of the scope of federal judicial review of constitutional attacks on initiatives and referenda. The Supreme Court has long, if controversially, held that arguments that direct democracy itself is incompatible with the Guarantee Clause are nonjusticiable. See *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 150–51 (1912). I am not revisiting that, either. My primary focus will be on judicial review of *state-wide* initiatives and referenda, and not direct democracy at the local level regarding taxes, recalls, and other issues, which raise issues beyond the scope of this Article. Finally, my primary focus will be on the proper stance of federal courts hearing challenges under federal law, not on state courts hearing challenges under state law.

¹⁶ ESKRIDGE ET AL., *supra* note 13, at 523–34.

¹⁷ *Id.* at 523.

¹⁸ *Id.*

¹⁹ *Id.* at 523–24.

²⁰ *Id.* For further details on the various types of initiative and referenda, see *id.* See also Eule, *supra* note 12, at 1510–13.

²¹ *Direct Democracy: Origin of the Species*, ECONOMIST (Apr. 20, 2011), <http://www.economist.com/node/18548119>.

²² KENNETH P. MILLER, DIRECT DEMOCRACY AND THE COURTS 37–39 (2009).

by business interests.²³ The result of efforts in the Progressive Era (and by adoptions in a few more states in later decades) is that twenty-four states now provide for some form of the initiative, and twenty-four states provide for some form of the referendum.²⁴

After the wave of many adoptions by the end of the Progressive Era, the numbers of initiatives and referendums submitted to voters, and the rate of approval, has waned and waxed. In most states, the devices were only infrequently used in the middle part of the 20th century.²⁵ Given the diverse political cultures among the states, generalizations must be made cautiously, but most observers attribute the decline to voters losing interest in the devices and to increased professionalism and activity by legislatures.²⁶ Resurgence started in the 1970s in many states and continues unabated to the present.²⁷ This is often attributed to the success of Proposition 13 in California in 1978 limiting property taxes; the initiative has been frequently used in California itself since then.²⁸ Western states accounted for most of the initial adopters of direct democracy, and they still dominate the numbers of voter adopted initiative and referenda.²⁹

²³ See ESKRIDGE ET AL., *supra* note 13, at 523. For a history of the initial rejection and later adoption of direct democracy in the United States, up to the close of the Progressive Era, see MILLER, *supra* note 22, at 37–39. For an “alternative story” to the prevailing view that direct democracy is the outgrowth of Populist impulses, see Eule, *supra* note 12, at 1512–13 n.38 (“There is evidence that expansion of direct democracy often was designed more as a political tactic to secure immediate victory against the existing political machine than as an alternative system of sustained decision-making.”).

²⁴ MILLER, *supra* note 22, at 35. The total number of states with at least one such device is twenty-seven. ESKRIDGE ET AL., *supra* note 13, at 524 (indicating that twenty-seven states have one or both devices); see also MILLER, *supra* note 22, at 35 n.70 (pointing out that six states have one but not both). Some sources report different numbers than those just mentioned. See, e.g., Eule, *supra* note 12, at 1509–10 (“Thirty-six states provide for statewide statutory referenda in some form . . .”). The difference appears to be due to different writers using different criteria to determine what counts as an initiative or referendum. For example, every state but Delaware requires approval of the electorate to amend state constitutions, and some states require various issues to be submitted to the voters for approval. See *id.* at 1510 & n.23. For further discussion of the definitional complexities, see *id.* at 1510–12. Ascertaining precise numbers or definitions is not necessary for the issues addressed in this Article. In the balance of the Article, I will usually use the terms initiative, referendum, ballot measures, plebiscites, and products of direct democracy in a more-or-less interchangeable way. Also, like Professor Eule, I do not differentiate between ballot measures that are enacted as statutes, as opposed to those that amend state constitutions. See *id.* at 1511 n.28. While that distinction can be important for interpretative and other reasons, it does not bear greatly on whether federal courts should engage in hard look review.

²⁵ MILLER, *supra* note 22, at 44–45.

²⁶ See *id.* at 41–46 (discussing the 1910s through the 1960s era); see also Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 COLUM. L. REV. 687, 694–97 (2010) (summarizing increase in use of initiatives and referenda in 20th and 21st centuries).

²⁷ MILLER, *supra* note 22, at 47.

²⁸ *Id.* at 46–50.

²⁹ *Id.* at 50–55 (detailing that California, Oregon, Washington, Colorado, and Arizona account for the highest number of initiatives in recent decades).

B. Supreme Court Review of Direct Democracy

A quarter century ago, Professor Eule ably documented that the United States Supreme Court had, in nearly three-dozen cases, considered constitutional challenges to state laws that were the products of direct democracy.³⁰ Despite the seemingly obvious impact of direct democracy on the counter-majoritarian difficulty,³¹ Eule pointed out that these decisions had “scarcely a word on the subject.”³² What little discussion there was consisted almost entirely of, in Eule’s words, “boilerplate statement[s]”³³ that the source of the legislation was irrelevant, because both legislatures and voters themselves can take actions that violate the Constitution.³⁴ The decisions Eule surveyed by Justice Hugo Black provided a counterargument to Eule’s finding.³⁵ In several cases, Justice Black, both writing for majorities and in dissent, emphasized the “democratic” origins of the state laws under challenge and seemed to imply that judicial review should be diluted in light of that fact.³⁶ Both lines of argument can charitably be described as undertheorized.

There has not been much change in the twenty-six years since Eule wrote. The Court, during this time, has rendered about eleven decisions reaching the merits of

³⁰ Eule, *supra* note 12, at 1505 & n.5 (listing decisions from 1912 to 1986).

³¹ *See id.* at 1506.

³² *See id.* at 1505.

³³ *Id.*

³⁴ *See id.* at 1505–06, 1506 n.6 (citing, among other cases, *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 295 (1981) and *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 737 (1964)).

³⁵ *Id.* at 1506 n.11.

³⁶ *See, e.g.*, *James v. Valtierra*, 402 U.S. 137, 141 (1971) (stating that referenda show a “devotion to democracy, not to bias, discrimination, or prejudice”); *Hunter v. Erickson*, 393 U.S. 385, 397 (1969) (Black, J., dissenting). *Cf.* Derrick A. Bell, Jr., *The Referendum: Democracy’s Barrier to Racial Equality*, 54 WASH. L. REV. 1, 3–7 (1978) (arguing that Justice Black’s opinions in *James* and *Hunter* did not even amount to rational basis review, much less any higher scrutiny).

constitutional challenges to state initiatives or referenda.³⁷ As before, most of these cases are silent on the issue of any extraordinary deference, or lack thereof, from the Court given the source of the laws. And what little discussion there is can be fairly described as being of the boilerplate nature. For example, in *U.S. Term Limits, Inc. v. Thornton*, a majority of the Court held that a state initiative establishing term limits for members of Congress was invalid by adding requirements for office beyond that found in the Constitution.³⁸ Justice Thomas, in a dissent joined by

³⁷ See *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015) (upholding an initiative establishing a redistricting commission); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (striking down initiatives invalidating same-sex marriage); *Schuette v. BAMN*, 134 S. Ct. 1623 (2014) (upholding an initiative restricting affirmative action in higher education); *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011) (striking down an initiative establishing a public campaign finance system); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008) (upholding initiative regulating various aspects of primary elections); *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177 (2007) (upholding initiative on agency fees for unions); *Ewing v. California*, 538 U.S. 11 (2003) (upholding initiative on three strikes in criminal sentencing); *Cook v. Gralike*, 531 U.S. 510 (2001) (striking down initiative instructing members of Congress to support term limits); *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000) (striking down initiative establishing blanket primary); *Romer v. Evans*, 517 U.S. 620 (1996) (striking down referendum limiting gay rights); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (striking down initiative establishing term limits for congressional candidates in the state). The Court, during this time, also decided several cases where the state law at issue was the product of direct democracy, but either the merits of a constitutional challenge were not reached or were not directly at issue. See *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (dismissing case on standing grounds); *Doe v. Reed*, 561 U.S. 186 (2010) (discussing disclosure of referenda petitions); *Gonzales v. Oregon*, 546 U.S. 243 (2006) (discussing whether federal statute preempted state initiative); *Gonzales v. Raich*, 545 U.S. 1 (2005) (discussing constitutionality of federal statute preempting state law); *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182 (1999) (discussing ballot-initiative process); *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997) (dismissing case as moot). The Court does not always clearly indicate that the state law it is reviewing is the product of direct democracy. For example, even though almost all of the laws barring same-sex marriage at issue in the consolidated cases in *Obergefell* were the result of ballot measures (and the same can be said of the rest of the laws from other states not directly before the Court in that case), the majority opinion makes only the briefest mention of this fact. See *Obergefell*, 135 S. Ct. at 2597, 2605. For more information on the laws at issue in *Obergefell*, see Elena Baylis, *Declining Controversial Cases: How Marriage Equality Changed the Paradigm*, 2015 N.Y.U. J. LEGIS. & PUB. POL'Y QUORUM 110, 128–29, <http://www.nyuilpp.org/wp-content/uploads/2013/03/Baylis-2015-nyuilpp-110.pdf> (noting that thirty-one of the anti-same sex marriage laws were enacted via initiative or referenda). This fact is also briefly mentioned by two of the dissents. *Id.* at 2627 (Scalia, J., dissenting); *id.* at 2638 (Thomas, J., dissenting). None of the opinions expressly address the issue of whether the source of these laws should impact judicial scrutiny. Two briefs filed in the case discussed the scope of judicial review of direct democracy. See Reply Brief for Petitioners at 22, *Obergefell*, 135 S. Ct. at 2584 (14-562), 2015 U.S. S. Ct. Briefs LEXIS 1492 (“Nor can deference to the democratic process shield the Non-Recognition Laws from judicial review.”); Brief of Amicus Curiae American Family Ass’n-Michigan in Support of Respondents at 13, 19–20, *Obergefell*, 135 S. Ct. at 2584 (No. 14-571), 2015 U.S. S. Ct. Briefs LEXIS 1344 (arguing against “[s]triking down this sovereign expression of the will of the People of the State of Michigan”).

³⁸ *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783 (1995). Similar to the circumstances in *Obergefell*, the Court in *Term Limits* considered the term limit provision of only one state, but no less than twenty-three states in the 1990s had adopted such provisions, all but one by initiative. MILLER, *supra* note 22, at 161–66.

three other Justices, observed that the majority, as he saw it, overruled the right of the people to choose whom they wanted by invalidating an initiative that carried with over sixty percent of the vote.³⁹ The implication, it seemed, was that the Court should take this into account, presumably by way of some special deference in its scrutiny.⁴⁰ In response, the majority stated that the source of the state law was immaterial: no party, it said, had argued that “the constitutionality of a state law would depend on the method of its adoption” and “[t]he people [of a state] have no more power than does the” legislature to undertake unconstitutional actions.⁴¹

Another recent example of a relatively brief discussion was in *Schuette v. BAMN*, where a majority of the Court upheld an amendment to the Michigan constitution passed by initiative that prohibited affirmative action efforts by state schools.⁴² All of the opinions, to varying degrees, discussed the source of the law, but only indirectly addressed whether the level of scrutiny should be modulated.⁴³ The plurality opinion, by Justice Kennedy, spent considerable time distinguishing precedent that seemed to stand for the proposition that direct democracy could not be used if it made it more difficult for racial minorities to use the ordinary legislative process to achieve their goals.⁴⁴ The plurality opinion then cautioned against reading these “political-process doctrine” cases too broadly, lest they be considered as creating impermissible racial categorization of their own, and because they could apply to a seemingly endless series of governmental policies.⁴⁵ In the present case, the plurality observed that “Michigan voters used the initiative system to bypass public officials who were deemed not responsive to the concerns of a majority of the voters,”⁴⁶ and that it was improper to assume that the issue

³⁹ *U.S. Term Limits*, 514 U.S. at 845 (Thomas, J., dissenting). He added that similar initiatives had been adopted in over twenty other states and praised the purpose of the initiatives, since members of state legislatures, who enjoyed high reelection rates, would be unlikely to voluntarily adopt them. *Id.* at 917 n.39, 922–23.

⁴⁰ An alternative explanation of Justice Thomas’s references to the source of the laws was that it was relevant to the merits of the case. He argued that states were free to enact term limits for members of Congress from a state because, among other things, initiatives were an example of “We the People” acting, when the balance of the Constitution was silent on the issue. *See id.* at 846–49, 846 n.1.

⁴¹ *Id.* at 822 n.32 (majority opinion).

⁴² *BAMN*, 134 S. Ct. at 1636–37 (plurality opinion).

⁴³ Only one of the briefs filed in the case appears to have directly addressed the issue. *See* Brief of the Leadership Conference on Civil and Human Rights and the Leadership Fund et al., as Amici Curiae in Support of Respondents at 6–7, 11, *BAMN*, 134 S. Ct. at 1623 (No. 12-682), 2013 U.S. S. Ct. Briefs LEXIS 3623 (“[H]eightened judicial scrutiny under the political restructuring doctrine is particularly appropriate for race-focused constitutional amendments passed by ballot initiative.”).

⁴⁴ *BAMN*, 134 S. Ct. at 1631–36 (plurality opinion) (discussing *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Hunter v. Erickson*, 393 U.S. 385 (1969); *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982)).

⁴⁵ *See id.* at 1626, 1634–35.

⁴⁶ *Id.* at 1636.

presented in the initiative was “too sensitive or complex to be within the grasp of the electorate.”⁴⁷

In a concurring opinion, Justice Scalia, joined by Justice Thomas, argued that the “political-process doctrine” cases should be overruled entirely.⁴⁸ He argued that the doctrine is undermined in this case since the initiative process was itself “one (perhaps the most basic one) of the rules of the State’s political process.”⁴⁹ Justice Scalia engaged in a running debate with dissenting Justice Sotomayor (joined by Justice Ginsburg), who embraced the political-process doctrine.⁵⁰ In the course of a lengthy dissent, Justice Sotomayor seemed to unfavorably compare the use of direct democracy by minority groups to the ordinary legislative process.⁵¹ She noted at one point the sometimes onerous and expensive signature requirements to place initiatives on the ballot.⁵²

Despite the frequent references to direct democracy, none of the opinions in *Schuette* directly argued that judicial review of direct democracy should be different from ordinary legislation. On the other hand, the opinions did directly engage the political-process doctrine, and that doctrine did seem to add some extra burden of justification (albeit in the arguably limited circumstances of those cases) when the products of direct democracy were challenged under the Equal Protection Clause.⁵³

Most recently, consider the Court’s discussion in *Arizona State Legislature v. Arizona Independent Redistricting Commission*. The primary issue in that case was whether an initiative could establish a commission, independent of the legislature, to redraw Congressional district lines, consistent with the Elections Clause of the Constitution.⁵⁴ The majority, in holding that there was consistency, did not explicitly address the level of review issue raised by Justice Thomas’s dissent.⁵⁵ But it did describe direct democracy in ways that might shed light on that issue. The majority observed that a “characteristic of our federal system [is] that States retain autonomy to establish their own governmental processes.”⁵⁶ It also invoked the familiar metaphor of the states as “laboratories for experimentation,”⁵⁷

⁴⁷ *Id.* at 1637.

⁴⁸ *Id.* at 1640 (Scalia, J., concurring).

⁴⁹ *Id.* at 1647.

⁵⁰ *Id.* at 1653–54, 1671–76 (Sotomayor, J., dissenting).

⁵¹ *Id.* at 1667–70.

⁵² *Id.* at 1661.

⁵³ *Id.* at 1634–36; *id.* at 1643–48 (Scalia, J., concurring); *id.* at 1648, 1650 (Breyer, J. concurring); *id.* at 1651, 1667–70 (Sotomayor, J., dissenting).

⁵⁴ *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2658–59 (2015). The Elections Clause says in part that the “Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof.” U.S. CONST., art. I, § 4, cl. 1. The Court also addressed whether the Arizona legislature had standing to bring the suit in federal court. *Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. at 2663–66.

⁵⁵ *Id.* at 2697–98 (Thomas, J., dissenting).

⁵⁶ *Id.* at 2673.

⁵⁷ *Id.* at 2673 (quoting *United States v. Lopez*, 514 U.S. 549, 581 (1995)).

and added that “[d]eference to state lawmaking ‘allows local policies more sensitive to the diverse needs of a heterogeneous society,’” and permits greater “innovation” and responsiveness by the States.⁵⁸ There are hints of a more deferential attitude toward judicial review of initiative, an attitude not lost on Justice Thomas, as already noted. What Justice Thomas did not mention is that he also had previously suggested a deferential attitude towards direct democracy in his dissent in *U.S. Term Limits*.⁵⁹

C. Academic Critiques

Most of the academic literature has called for courts to take a “hard look” at the products of direct democracy when they are subject to constitutional challenge.⁶⁰ Most of these critiques are premised on the perceived inadequacies of the process of enacting law through referenda and initiative as compared to that in the state legislative process.⁶¹ As I have already indicated, the most trenchant proponent of this position was Julian Eule. Professor Eule acknowledged that his critique was premised on the political process theory, most popularly associated with the Supreme Court’s decision in *Carolene Products*, and the work of Professor John Hart Ely.⁶² The Court in *Carolene Products* famously stated in dicta that “more exacting judicial scrutiny” was appropriate when legislation was the result of “prejudice against discrete and insular minorities,” or when legislation “restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation.”⁶³ In a similar vein, Professor Ely argued that “unblocking stoppages in the democratic process is what judicial review ought preeminently to be about.”⁶⁴ Ely identified process defects or malfunctions as when “(1) the ins are choking off the channels of political change to ensure that they will stay in and the

⁵⁸ *Id.* (quoting *Bond v. United States*, 564 U.S. 211, 221 (2011)).

⁵⁹ *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 845 (1995) (Thomas, J., dissenting).

⁶⁰ MILLER, *supra* note 22, at 91–93; Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI.-KENT L. REV. 707, 709–10, 710 n.5 (1991). For more recent critiques similar to Eule’s and arguments for a hard look approach, see, for example, Elise Hofer, *The Case for Judicial Review of Direct Democracy*, 4 J.L. 49, 50–51 (2014); *Judicial Approaches to Direct Democracy*, *supra* note 13, at 2766–69.

⁶¹ Eule, *supra* note 12, at 1524.

⁶² See Eule, *supra* note 12, at 1524–26. To be sure, the political process *doctrine* addressed above draws on, but is not the same as, the political process *theory* outlined here. It has been argued that the theory does not map directly onto the doctrine, because direct democracy might be a way for dispersed majorities to exercise political clout, as compared to that exercised in the political process by heretofore marginalized minorities or other interest groups. See David E. Bernstein, “Reverse *Carolene Products*,” *the End of the Second Reconstruction, and Other Thoughts on Schuette v. Coalition to Defend Affirmative Action*, 2014 CATO SUP. CT. REV. 261, 276–77, <http://object.cato.org/sites/cato.org/files/serials/files/supreme-court-review/2014/9/bernstein.pdf>.

⁶³ *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

⁶⁴ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 117 (1980).

outs will stay out, or (2) . . . representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility.”⁶⁵

Eule argued that direct democracy does a poor job of reflecting majority will for a variety of reasons, and thus did not solve the counter-majoritarian difficulty. He pointed out that elections for direct democracy are almost always characterized by considerable voter roll-off (i.e., voters not casting a ballot for a measure, even while voting for everything else on a ballot), ballot measures of such complexity and length that they are difficult to understand, and sometimes simultaneous ballot measures that compete with each other.⁶⁶ Aside from these problems in the ballot box, direct democracy lacks the deliberation and filtering of majority will that is presumably characteristic of many or most decision making in the legislative branch.⁶⁷ It is also often said that direct democracy, as a raw tool of the majority, is especially prone to limit minority rights. Eule observed that while the legislature may not always protect minority rights, direct democracy almost certainly will not, as it is in fact “*supposed*” to reflect the “[n]aked preferences” of the majority; it is not the result of “system breakdown” in the political system because it is outside the system of minority protection.⁶⁸ He argued that making a comparison between the legislative versus ballot record on minority rights was a difficult one, because, he felt, the task was a subjective one given the difficulties of defining “minorities” and

⁶⁵ *Id.* at 103. Given the prominence of political process theory in general and of Ely’s exposition of it in particular in constitutional theory, it will be my focus as well. See Nicholas O. Stephanopoulos, *Arizona and Anti-Reform*, 2015 U. CHI. LEGAL F. 477, 488 [hereinafter Stephanopoulos, *Arizona and Anti-Reform*]; David A. Strauss, *Is Carolene Products Obsolete?*, 2010 U. ILL. L. REV. 1251, 1259 n.4. Ely’s positions on the issues addressed in this Article are less clear. In his famed book, *Democracy and Distrust*, he makes only passing reference to the products of direct democracy. See generally ELY, *supra* note 64, at 138–180 (noting some of the economic and social classes effected by direct democracy). At one point he expressed apparent astonishment at the holding in *James v. Valtierra*, since as he saw it that case involved “de jure discrimination” against the poor. See *id.* at 162. That case involved a challenge to a California initiative that required local governments to obtain voter approval before building low-income housing projects. *James v. Valtierra*, 402 U.S. 137, 138–39 (1971). At another point, Ely addressed the argument that the Warren Court’s reapportionment decisions were ill-conceived to the extent they struck down state laws that resulted from direct democracy. ELY, *supra* note 64, at 120–25. In those situations, he posited that at least one of the decisions was “especially wrong because the malapportionment had been approved ‘by a substantial majority of the voters’ in a popular referendum.” *Id.* at 239 n.60 (quoting ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 110 (1970)). Ely commented that “[t]he argument sounds plausible at first, but is off the mark.” *Id.* He continued that the “reasons for judicial intervention are just as compelling when, say, 65 percent of the voters vote themselves 80 percent of the effective legislative power as when the representatives of 40 percent of the voters secure for themselves 55 percent of the effective power.” *Id.* I read him here to say that malapportionment is unconstitutional, under process theory, no matter how it comes about. That is, for Ely, direct democracy is not insulated from judicial review, but neither is it automatically called out for hard look review.

⁶⁶ Eule, *supra* note 12, at 1514–18. He concedes, however, that most ballot measures that pass are relatively accurate reflections of the desires of those that actually vote on them. *Id.* at 1518.

⁶⁷ *Id.* at 1520–22.

⁶⁸ *Id.* at 1551.

“rights.”⁶⁹ Nonetheless, he concluded that the filtering and deliberative process of most of the legislative process will typically lead to a better result for minority groups, as compared to a plebiscite.⁷⁰

For these reasons, Eule argued that the products of direct democracy should be subject to a “hard judicial look” when subject to constitutional challenge.⁷¹ Borrowing the paradigm of *Carolene Products* and Professor Ely, this harder look seemed necessary when the structure of government (i.e., direct democracy) lead to less representation of all of the people.⁷² Eule was less clear on what the harder look would consist of, and declined to “provide a detailed primer” for such “intensified review.”⁷³ He suggested that the usual “presumption of constitutionality should be relaxed” and that the standards of substantive review might be modified.⁷⁴ For example, Eule suggested that for a challenge under the Equal Protection Clause to a ballot measure, the requirement that a discriminatory purpose must be shown could be replaced with a mere showing of discriminatory impact.⁷⁵ Of the vast array of ballot measures, which should be subject to a harder look? For one, Eule argued it would be appropriate when individual rights are at issue. In contrast, ballot measures that “improve the processes of legislative representation . . . or reform campaign finance practices pose no distinctive threat of majoritarian tyranny” and thus should not be subject to a harder look.⁷⁶

Eule’s article remains the gold standard for proponents of harder judicial review of ballot measures.⁷⁷ The literature opposing a harder judicial look in these circumstances is modest in number. A leading example is by Professor Lynn Baker, published shortly after Eule’s article.⁷⁸ Baker revisited the issue of the rigor of judicial review of ballot measures through the lens of public choice theory.⁷⁹ She (as

⁶⁹ *Id.* at 1551–53. He added that “the task of comparison seems Herculean. Plebiscites number in the thousands annually. Legislative product no doubt can be counted in the millions. . . . Finally, the passage of every ballot measure is influenced by a myriad of factors, and broad-based comparisons run the risk of papering over these complexities.” *Id.* at 1552 n.214.

⁷⁰ *Id.* at 1555–58.

⁷¹ *Id.* at 1558.

⁷² *Id.* at 1558–59.

⁷³ *Id.* at 1559.

⁷⁴ *Id.* at 1558–59.

⁷⁵ *See id.* at 1561–62.

⁷⁶ *Id.* at 1559–60 (footnote omitted). However, Eule stated that “group alterations of government structure and reapportionment efforts” should not be placed in the “category of governmental reform” since these “reforms” are often a “facade for disfranchising minorities.” *Id.* at 1560. Fiscal measures “like taxation and spending limitations” might also be subject to harder look review, given that the brunt of such measures are “borne by the underrepresented poor and by racial minorities.” *Id.*

⁷⁷ According to Google Scholar, it has been cited over five hundred times by scholars and by courts. GOOGLE SCHOLAR, [https://scholar.google.com/scholar?hl=en&q=Eule+Judicial+Review+of+Direct+Democracy&btnG=&as_sdt=1%2C18&as_sdt= \(last visited Aug. 31, 2016\).](https://scholar.google.com/scholar?hl=en&q=Eule+Judicial+Review+of+Direct+Democracy&btnG=&as_sdt=1%2C18&as_sdt= (last visited Aug. 31, 2016).)

⁷⁸ *See generally* Baker, *supra* note 60.

⁷⁹ *Id.* at 710.

does much of the literature) focused on the effect of direct democracy on racial minorities, because “the persistence of racial prejudice and of the correlation between race and poverty in our society may make those interest groups unusually vulnerable to majoritarian oppression and unusually incapable of capturing lawmaking processes.”⁸⁰ She first argued that there are overlooked differences in the legislative and direct democracy processes as it concerns minorities.⁸¹ It may be difficult for minorities, by sheer numbers, to block disadvantageous enactments in the latter, but by the same token motivated minorities may find it easier to pass advantageous (or block harmful) legislation in the former.⁸² Public choice theory posits that the legislative process is subject to numerous infirmities that make it difficult for a legislature to truly express majority preferences.⁸³ Baker argues that the purported advantages of the legislative process in this regard are overstated, since no one can “conclude *a priori* that the decisions of legislatures will more often than those of plebiscites reflect consensus-building through conversation rather than the mere aggregation of bargained-over preferences.”⁸⁴

Not surprisingly, Baker questions the efficacy of hard look judicial review as well. First, she argues that it is doubtful that courts, in equal protection challenges, will find it more difficult to identify unconstitutionally discriminatory conduct emerging from a plebiscite as compared to a legislature.⁸⁵ She doubts that either drafters of initiatives or of legislation will couch their proposals in racially explicit terms, and discerning the intent of a mass of voters can be just as difficult (as students of statutory interpretation know) as discovering the intent of a large legislative body.⁸⁶ More than that, Baker argues that the Supreme Court on several occasions *has* found the products of direct democracy to be the result of unconstitutional discrimination.⁸⁷ For these reasons, Baker concludes that a different standard of review is not called for.⁸⁸

⁸⁰ *Id.*

⁸¹ *Id.* at 713.

⁸² *Id.* at 713.

⁸³ *See id.* at 715–52 (discussing at length the effect of characteristics of the legislative process (bicameralism, the executive veto, logrolling opportunities, agenda control, open voting, and capacity for deliberation), which are almost always absent from direct democracy); *see also* Eule, *supra* note 12, at 1549–51 (acknowledging these problems but not probing them in depth).

⁸⁴ Baker, *supra* note 60, at 737.

⁸⁵ *Id.* at 758–59.

⁸⁶ *Id.* She also argues that state legislative bodies may not produce a useful record on each piece of legislation, as compared to the information available about the purpose of any given plebiscite. *Id.* at 759.

⁸⁷ *Id.* at 759–62 (discussing *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982)). In general, she argues that the intent requirement has not proven to be an insurmountable barrier to legal challenges to legislation under the Equal Protection Clause. *See id.* at 763–66.

⁸⁸ *See id.* at 771–72.

II. A REAPPRAISAL: WHY JUSTICE THOMAS IS CORRECT

Professors Eule and Baker ably represented the two sides of the arguments on whether courts should engage in more intrusive review of the products of direct democracy as compared to that of legislatures. But they wrote a quarter of a century ago, and a reappraisal of the debate is warranted in light of Justice Thomas's comments in the *Arizona State Legislature* decision, the experience of direct democracy, and the contributions of the scholarly literature since that time. This section of the Article undertakes that task. It first focuses on the *process* of direct democracy, particularly on the campaigns for passage of ballot measures and how those measures reached the ballot in the first instance. It next considers the *products* of direct democracy, and examines the topics of the scores of state-wide ballot measures each year compared to legislation typically produced each year. The Article then reexamines the proposals for hard judicial looks at ballot measures. The section concludes with a hard look at Justice Black's apparent position that more, not less, judicial deference should come into play when courts consider constitutional challenges to ballot measures.

A. The Process of Direct Democracy

If carried on at a high level of generality, the debate over the proper scope of judicial review of ballot measures might suggest that such measures are hermetically sealed, in their creation and possible passage, from other elements of the political system. But a more nuanced analysis of such measures reveals that generalizations must be made with care. Such measures are often the result of complex interplay with political parties, interest groups, and the other branches of state government. That is, all these players might, at various times, alternatively support or oppose

ballot measures as one of many options to pursue policy goals.⁸⁹ Consider that referenda are typically placed on the ballot by the legislature, or that there are many examples of ballot measures being pursued multiple times after being first rejected.⁹⁰ In other words, measures do not spontaneously appear on the ballot, but rather are often the result of a complex, iterative process among many interested parties, not unlike the complexity of the (admittedly different) development of policy in the legislative or executive branches. One should not generalize this too much; some ballot measures might be regarded as one-shot efforts supported fiscally or otherwise by one or a small number of interest groups. But the supporters of a hard look review typically paint with a broad brush regarding all, or a significant subset of, ballot measures.

Supporters of a hard look review also point to the apparent pathologies of the campaigns for, and the knowledge (or lack thereof) of the voters on, ballot measures. It cannot be denied that ample evidence and studies continue to support the criticisms of voting on such measures outlined by Eule and others.⁹¹ Many voters do not even vote for ballot measures, and those that do are often hampered by confusion and ignorance about such measures.⁹² For example, some studies show that campaigns for direct democracy can differ from those for candidates, in that voters in the latter often rely on cues like partisanship or incumbency when they make decisions on candidates, while those in the former rely more directly on the

⁸⁹ Cf. Frederick J. Boehmke et al., *Pivotal Politics and Initiative Use in the American States*, 68 POL. RES. Q. 665, 675 (2015) (detailing a broad study of initiative use in twenty-four states over time that highlights “the interdependence of political institutions,” and finding that the “initiative process can break the traditional legislative gridlock” and “[p]olicies that formerly would have been gridlocked can now be moved, either through legislative preemption or through the ballot box”); Shaun Bowler, *When Is it OK to Limit Direct Democracy?*, 97 MINN. L. REV. 1780, 1789–91 (2013) (giving examples of how legislators use referenda to advance their policy interests); David F. Damore & Stephen P. Nicholson, *Mobilizing Interests: Group Participation and Competition in Direct Democracy Elections*, 36 POL. BEHAV. 535, 549 (2014) (detailing a study of initiatives and referenda from 2003 to 2008 on social and tax issues shows that they are likely to produce competition among interest groups, and that groups use direct democracy elections to “advance political goals such as shaping the composition of the broader electorate or setting the agenda in candidate races”); Vladimir Kogan, *When Voters Pull the Trigger: Can Direct Democracy Restrain Legislative Excesses?*, 41 LEGIS. STUD. Q. 297 (2016) (using Ohio as a case study, exploring how rejection by referendum of a controversial law passed by the state legislature subsequently induced moderation by the legislative majority); John G. Matsusaka, *Disentangling the Direct and Indirect Effects of the Initiative Process*, 160 PUB. CHOICE 345 (2014) (exploring how both successful initiatives and the threats of such measures have effects on public policy in the states). The interactions can even be said to include the federal government. See generally Kathleen Ferraiolo, *State Policy Innovation and the Federalism Implications of Direct Democracy*, 38 PUBLIUS: J. FEDERALISM 488 (2008) (detailing a study of state ballot measures that are responses to federal action or inaction).

⁹⁰ See Corey A. Johanninger, Note, *Law & Politics: The Case Against Judicial Review of Direct Democracy*, 82 IND. L. J. 1125, 1131–33 (2007).

⁹¹ See *supra* note 66 and accompanying text; see also Hofer, *supra* note 60, at 57–59.

⁹² See Bowler, *supra* note 89, at 1783.

(typically) single issue presented in the ballot measure.⁹³ Other studies have found these characteristics particularly acute for direct democracy proposals that affect minority rights. These proposals can present the opportunity for a “populist backlash” against the “counter-majoritarian aspects of democracy that are facilitated by courts and representative government.”⁹⁴ In turn, “compared to other measures that reach the ballot, direct-democracy campaigns offer more room for voting on rights questions to be based on animus, negative group affect, negative stereotypes about the targeted group, and animus toward general counter-majoritarian elements of democracy.”⁹⁵ The mostly successful campaigns in the past fifteen years to pass ballot measures to ban same-sex marriage are often attributed to such decision-making by voters.⁹⁶

Here, too, the story is more complex and nuanced. Other political scientists, in canvassing the literature and studies, argue that some of the criticism of voters in direct democracy is overstated in that “a large body of empirical work shows that voters can, by and large, align their votes on a measure with a perception of their own interests or ideologies.”⁹⁷ There is, alas, ample evidence that most Americans in general, and voters in particular, have little information on many issues, large and small, concerning political issues and campaigns of all sorts.⁹⁸ Based on this evidence, it seems unjustified to carve out voting behavior on ballot measures as some anomaly in American politics deserving of special judicial treatment. Indeed, the evidence, such as it is, can be characterized as showing that voters on ballot measures (those that actually vote) are in some ways *more* focused and informed about the issue at hand than the typical voter on other matters on the ballot.⁹⁹ More focused decision-making by such voters may be troubling to critics of direct democracy, but it essentially restates the normative issue of whether courts should

⁹³ See Todd Donovan, *Direct Democracy and Campaigns Against Minorities*, 97 MINN. L. REV. 1730, 1732–37 (2013).

⁹⁴ *Id.* at 1743.

⁹⁵ *Id.* (footnote omitted).

⁹⁶ See *id.* at 1746–72.

⁹⁷ Bowler, *supra* note 89, at 1785.

⁹⁸ For overviews of the evidence, see generally BRYAN CAPLAN, *THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES* (2007); ILYA SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER* (2013).

⁹⁹ One reason voters in direct democracy are more focused is due to the “single subject” rule of most states, which limits initiatives to one “subject.” Cooter & Gilbert, *supra* note 26, at 689. “The primary purpose of the rule is to eliminate logrolling—the combining of multiple measures, none of which would pass on its own, into an omnibus proposition that receives majority support,” and it seems to have the effect of making it easier (perhaps too easy, in the minds of some critics) for typical voters to decide how to cast their ballot on such measures. *Id.* That said, perhaps a better comparison is between the behavior of voters as a whole, and the behavior of their representatives in state legislatures. Both supporters and critics of hard look review acknowledge, to varying degrees, state legislatures are subject to institutional pathologies that limit their ability to directly represent the views of constituents or enact (or defeat) legislation reflecting those views. See *supra* note 83 and accompanying text; see also Jeffrey R. Lax & Justin H. Phillips, *The Democratic Deficit in the States*, 56 AM. J. POL. SCI. 148 (2012).

be especially concerned by the existence (and products) of direct democracy in the first instance.

B. The Products of Direct Democracy

The recent commentary on direct democracy has focused on ballot measures that arguably restrict minority rights, a subject to which I will turn momentarily. But that focus obscures the wide variety of issues that are the subject of initiatives and referenda. Kenneth Miller has cataloged initiatives into “seven broad policy areas:” political and government reform; health, welfare, and morals; economic regulation; environment; tax; criminal procedure and punishment; and education.¹⁰⁰ The numbers and types of the measures adopted vary from state to state, but over time the largest number has been for political and governmental reform, with the others trailing behind.¹⁰¹ Most of the recent controversial measures impacting minority or individual rights would be grouped under the “health, welfare, and morals” category.¹⁰² Similarly, data from 2000–2009 shows that only small percentages of adopted initiatives cover what would be by most accounts controversial issues of rights.¹⁰³

Many discussions of direct democracy and controversial social issues rely on relatively narrow examples of ballot measures that impose the death penalty, limit affirmative action, or otherwise lead to results on the conservative side of the spectrum.¹⁰⁴ In contrast, in recent years one could cite to examples on the progressive side of ballot measures passing that legalize marijuana use, raise the minimum wage, or legalize same-sex marriage.¹⁰⁵ These anecdotal accounts are useful, but if federal courts are to take the significant step of imposing hard look review on all initiatives and referenda—or important subsets of them—then a broader view of direct democracy is called for.

¹⁰⁰ MILLER, *supra* note 22, at 55.

¹⁰¹ *Id.* at 56 tbl.2.2 (relaying data from 1904–2008, showing a total of 919 initiatives adopted: 339 under political and government reform; 150 under health, welfare, and morals; 147 under economic regulation; 80 under environment; 106 under tax; 36 under criminal procedure and punishment; and 61 under education).

¹⁰² *Id.* at 59–60.

¹⁰³ Donovan, *supra* note 14, at 28 fig.2 (showing only 8.5% of popular initiatives from 2000–09 concerned “civil, constitutional matters”).

¹⁰⁴ See, e.g., John Dinan, *Policy Provisions in State Constitutions: The Standards and Practice of State Constitution-Making in the Post-Baker v. Carr Era*, 60 WAYNE L. REV. 155, 190, 195–96 (2014).

¹⁰⁵ Liz Essley Whyte, *How Democratic Are Ballot Initiatives?*, ATLANTIC: POL. & POL'Y (Jan. 6, 2016), <http://www.theatlantic.com/politics/archive/2016/01/ballot-initiatives-2016/422385/> (giving examples of state ballot measures expected to be advanced by liberal interest groups in 2016); see also Dinan, *supra* note 104, at 189–91; Julie Bosman, *Petition Drive in Nebraska Forces Vote on Abolishing Death Penalty*, N.Y. TIMES Oct. 17, 2015, at A12 (describing a petition drive that reestablished the death penalty); Ben Brumfield, *Voters Approve Same-Sex Marriage For the First Time*, CNN: POL. (Nov. 7, 2012, 2:24 PM), <http://www.cnn.com/2012/11/07/politics/pol-same-sex-marriage/>.

For a finer-grained look at coverage and results of direct democracy, consider data from the past two years (examining any one year might be misleading since there are typically fewer ballot measures in off-year elections). In all of 2014, there were 159 ballot measures in the states; about two-thirds passed.¹⁰⁶ The subject matters of measures that passed ranged from higher minimum wages, to marijuana legalization, to the right to hunt.¹⁰⁷ There were relatively few measures that would be said to implicate minority or individual rights, the primary focus of the debate revisited in this Article. Of those few examples, Colorado and North Dakota rejected “personhood” amendments, which would have given legal status to the unborn and considerably limited abortion rights.¹⁰⁸ On the other hand, two states (Connecticut and Missouri) rejected efforts to adopt early voting, Montana rejected an effort to repeal same-day voter registration, and Oregon refused to adopt the “top two” primary system, in which all political party candidates would run in the same primary.¹⁰⁹

In contrast, in 2015 there were twenty-eight ballot measures, twenty of which were approved.¹¹⁰ There were none that can be said to directly implicate individual rights. However, Ohio adopted a measure to require a bipartisan commission to draw state legislative districts, while Maine adopted a measure to increase public funding for political campaigns.¹¹¹ The most prominent measure rejected was in Ohio, concerning an effort to legalize marijuana.¹¹²

This small slice of the recent history of ballot measures shows that while most pass, the vast majority are noncontroversial and rarely implicate the sort of issues that are the *bête noire* of the critics of direct democracy. Whether controversial or not, voters do not reflexively adopt (or for that matter, reject) these measures. Indeed, voters in two conservative states rejected measures in 2014 that would have

¹⁰⁶ See *Ballot Measures Database*, NAT'L CONF. ST. LEGISLATURES, www.ncsl.org/research/elections-and-campaigns/ballot-measures-database.aspx (last visited Sept. 1, 2016) (select all states, all topics, all measure types, all elections, and 2014). This database breaks ballot measures into four categories: legislative referendum; initiative; popular referendum; and other. See *id.* Similar databases and information are found at www.ballotpedia.org and www.iandrinstitute.org.

¹⁰⁷ Wendy Underhill, *Ballot Measures: Yes on Wages and Weed, No on GMOS and Voting*, NAT'L CONF. ST. LEGISLATURES: NCSL BLOG (Nov. 5, 2014), <http://www.ncsl.org/blog/2014/11/05/ballot-measures-yes-on-wages-and-weed-no-on-gmos-and-voting.aspx>.

¹⁰⁸ *Id.*

¹⁰⁹ See *id.*

¹¹⁰ *Ballot Measures Database*, NAT'L CONF. ST. LEGISLATURES, www.ncsl.org/research/elections-and-campaigns/ballot-measures-database.aspx (last visited Sept. 2, 2016) (select all states, all topics, all measure types, all elections, and 2015).

¹¹¹ Wendy Underhill, *Voters Give Thumbs Up to Most Ballot Measures*, NAT'L CONF. ST. LEGISLATURES: NCSL BLOG (Nov. 4, 2015), <http://www.ncsl.org/blog/2015/11/04/voters-give-thumbs-up-to-most-ballot-measures.aspx> (focusing on fall 2015 elections).

¹¹² *Id.*

virtually outlawed abortion under most if not all circumstances.¹¹³ Still, these are only two years, and we can draw on more comprehensive studies of the adoption or rejection of measures concerning individual rights. Some studies of direct democracy and minority rights did seem to show that measures limiting those rights were adopted at a relatively high rate.¹¹⁴ Other studies suggest that these results have been overstated.¹¹⁵ But the principal limitation of all of these studies is the failure to compare it to the record of state legislatures, a problem anticipated by Eule.¹¹⁶ Recent work by Daniel C. Lewis has begun to fill that gap. Lewis has studied what he calls anti-minority policies by comparing states that have, and do not have, direct democracy from 1995 to 2004.¹¹⁷ He examines three proposals: those that involved homosexual rights, promoted English proficiency, or limited affirmative action programs, which, he said, “encompass nearly all the anti-minority policies considered during this period.”¹¹⁸ He found that such proposals pass at double the rate in states that have direct democracy as compared to those that do not.¹¹⁹ But the overall passage rates were modest: those for the former were about 20%, and those in the latter were less than 10%.¹²⁰

¹¹³ Jennifer Ludden, *Two of Three States Reject Ballot Measures Restricting Abortion*, NAT'L PUB. RADIO (Nov. 7, 2014), <http://www.npr.org/2014/11/07/362327684/two-of-three-states-reject-ballot-measures-restricting-abortion#>.

¹¹⁴ See, e.g., Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245 (1997) (studying state and local measures between 1960 and 1993 regarding AIDS testing, gay rights, language, school desegregation, and housing/public accommodations); Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referendums in which Majorities Vote on Minorities' Democratic Citizenship*, 60 OHIO ST. L.J. 399, 409 (1999) (studying state-wide and local ballot measures from 1960 to 1998 regarding limits on minority rights and showing a passage rate of over 80%). The problems with these and similar studies is the contested definition of what counts as a minority right, which I further address in Part II.C., and the inclusion of all ballot measures, both local and state-wide. The discrepancy mentioned in the text might even be higher if states with direct democracy also are less likely to legislatively pass measures to protect minorities. On the other hand, states with direct democracy might be less politically friendly to minorities anyway, meaning that they might pass anti-minority laws regardless of the presence of direct democracy mechanisms. So, we cannot always be sure that the availability of such mechanisms in the states is the cause of anti-minority measures; the direction of causation arrows can be difficult to sort out. Cf. Daniel C. Lewis, *Bypassing the Representational Filter? Minority Rights Policies Under Direct Democracy Democratic Institutions in the U.S. States*, 11 ST. POL. & POL'Y Q. 198, 209 (2011) (noting that “a myriad of factors can influence whether a single policy is ultimately adopted by the state.”).

¹¹⁵ See, e.g., Zoltan L. Hajnal, et al., *Minorities and Direct Legislation: Evidence from California Ballot Proposition Elections*, 64 J. POL. 154, 156 (2002); see also Dinan, *supra* note 14, at 88-93 (discussing initiatives for amendments to state constitutions that impair minority rights from 2000 to 2014 and concluding that the record does not offer strong support for the assertion that rights have been negatively impacted).

¹¹⁶ See *supra* note 69 and accompanying text; Eule, *supra* note 12, at 1551-52.

¹¹⁷ Lewis, *supra* note 114, at 203.

¹¹⁸ *Id.* The ballot proposals he studied were only those citizen proposals that qualified for the ballot. *Id.* at 218 n.7.

¹¹⁹ *Id.* at 204.

¹²⁰ *Id.* at 204-05, tbl.2.

Lewis's study does indeed show that states without direct democracy have a better record regarding minority provisions as compared to those that do. But the passage rates are surprisingly modest overall, especially as compared to prior studies. Perhaps this is due to Lewis restricting the proposals examined to the three categories and only those that were state-wide. A fuller comparative picture might examine the fate of other types of issues (like those, as suggested by Eule, that improve the political process), and how the ballot measures that passed were applied on the ground (or even modified or repealed by later action, including by the courts).¹²¹ Even so, his study should give those critical of the hard look judicial review some pause. But in my view, that pause does not lead to the conclusion that the difference between ballot measures and legislative action is so great that the scope of judicial review should be impacted.

C. Revisiting Hard Look Judicial Review

Even Julian Eule, the most articulate proponent of the hard look judicial review of (some) ballot measures, expressed uncertainty about when the hard look should take place and what it should look like.¹²² I believe he was right to be reticent. Here, I assume that some measures might be subject to a harder look, but revisit the parameters of that harder review.

First is the issue of what ballot measures should be subject to that review. Recall that Eule acknowledged that ballot measures can impact and limit a variety of federal constitutional rights, but argued that a harder judicial look should be reserved only for those measures that implicate "individual rights and equal application" of the laws.¹²³ On the other hand, a different approach should be taken for those measures "[w]here . . . the electorate acts to improve the processes of legislative representation, [as] the justification for judicial vigilance is absent."¹²⁴ However, from this second category he would exclude "group alterations of government structure and reapportionment efforts" or taxpayer revolt measures, since they can be "facade[s] for disfranchising minorities" and are "borne by the underrepresented poor and by racial minorities" respectively.¹²⁵

These inclusions and exclusions raise a number of difficult questions that courts would need to answer if they were to embrace the hard look theory. Consider the categories outlined by Eule. Those laws affecting individual rights seem easy

¹²¹ For an overview of the last point, albeit not one focusing on judicial invalidation of anti-minority ballot measures, see MILLER, *supra* note 22, at 104–17.

¹²² See Eule, *supra* note 12, at 1559.

¹²³ See *id.*

¹²⁴ *Id.* He gave as an example "[m]easures to enforce ethics in government, regulate lobbyists, or reform campaign finance practices." *Id.* at 1559–60 (footnotes omitted).

¹²⁵ *Id.* at 1560. See generally Nathaniel Persily & Melissa Cully Anderson, *Regulating Democracy Through Democracy: The Use of Direct Legislation in Election Law Reform*, 78 S. CAL. L. REV. 997, 1030–32 (2005).

enough to identify. For example, the same-sex marriage bans (many the result of ballot measures) invalidated by *Obergefell* limited the rights of gays.¹²⁶ Other examples may be more difficult to classify. Consider the much discussed decision of *Citizens United v. FEC*, where a 5–4 majority invalidated, on First Amendment grounds, a federal law that limited the ability of corporations and labor unions to make independent expenditures in campaigns for federal office.¹²⁷ Is that law (or a similar state ballot measure) one that limits free speech rights, or does it fall into the campaign finance reform category?

Classifying ballot measures that implicate minority rights or the Equal Protection Clause can also prove difficult. Anti-affirmative action measures might seem easy to classify to some, but even this implicates a debate over the political process theory, as we have seen.¹²⁸ What groups qualify as “discrete and insular minorities” in the *Carolene Products* sense has also come to be contested.¹²⁹ How exactly to identify and measure the purported “political powerlessness” of certain minorities has not been clarified by the Supreme Court, and has been subject to any kind of consensus by scholars.¹³⁰

Finally, consider the “government structure” category. Here, Eule refers to state legislative malapportionment schemes (successfully challenged in federal courts in the 1960s), some of which were enacted through ballot measures.¹³¹ Yet this category would also seem to cover initiatives, like Ohio’s in 2015, that require legislative apportionment to be done by a bipartisan commission, rather than on a partisan basis by the legislature itself.¹³² Such initiatives have been much lauded on political process grounds since they replace legislatures that often draw districts to preserve incumbency or partisan advantages.¹³³ However, some commissions

¹²⁶ See *Marriage and Family on the Ballot*, BALLOTPEdia, https://ballotpedia.org/Marriage_and_family_on_the_ballot (last visited Sept. 1, 2016).

¹²⁷ *Citizens United v. FEC*, 558 U.S. 310 (2010).

¹²⁸ See *supra* notes 42–53 and accompanying text; see also Persily & Anderson, *supra* note 123, at 999 (discussing how certain types of election reforms, such as term limits, are more prevalent in initiative states).

¹²⁹ See, e.g., Felix Gilman, *The Famous Footnote Four: A History of the Carolene Products Footnote*, 46 S. TEX. L. REV. 163, 218 (2004).

¹³⁰ See Nicholas O. Stephanopoulos, *Political Powerlessness*, 90 N.Y.U. L. REV. 1527, 1530 (2015).

¹³¹ Eule, *supra* note 12, at 1560 n.255 (referring to, inter alia, *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713 (1964)). It is worth noting that prior to the reapportionment revolution in the Supreme Court in the early 1960s the public voted on initiatives that would have reapportioned legislatures to reflect population changes in at least nine states. Jonathan Woon, *Direct Democracy and the Selection of Representative Institutions: Voter Support for Apportionment Initiatives, 1924–62*, 7 ST. POL. & POL’Y Q. 167, 171, 184 n.7 (2007).

¹³² *Ohio Bipartisan Redistricting Commission Amendment, Issue 1*, BALLOTPEdia, [https://ballotpedia.org/Ohio_Bipartisan_Redistricting_Commission_Amendment_Issue_1_\(2015\)](https://ballotpedia.org/Ohio_Bipartisan_Redistricting_Commission_Amendment_Issue_1_(2015)) (last visited Sept. 2, 2016).

¹³³ Stephanopoulos, *Arizona and Anti-Reform*, *supra* note 65, at 489–91.

themselves have been accused of acting in partisan ways.¹³⁴ Similarly, the passage of term limits in many states by ballot measures has been a matter of controversy regarding whether they advance or hinder the goals of government reform.¹³⁵

The point here is that classifying the ballot measures subject to harder look review is fraught with difficult empirical and normative questions. True enough, courts confront these questions in other areas of public law, but that does not mean they are any less difficult for the topic at hand. I would let courts confront these issues when considering the nature of the constitutional challenge to any law, whether the result of direct democracy or not, and let the chips fall as they may. It seems superfluous to engage in yet another inquiry to determine if the challenge to a ballot measure deserves yet a different layer of scrutiny.¹³⁶

If there was an extra layer of scrutiny to resolve the proper level of review for ballot measures, we could anticipate courts confronting a series of second-order issues that could make the inquiry even more complicated. For example, what weight, if any, should a court give to a measure passing by a large majority, as opposed to just scraping by? What if the measure was preceded by defeats of the same or similar measure? What about the somewhat different methods of adoption in the states that have direct democracy? What weight, if any, should be given to the fact that the same or similar measures were passed in other states?¹³⁷ Answering

¹³⁴ *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2691–92 (2015) (Roberts, J., dissenting) (discussing the partisan behavior of Arizona's Commission). For an overview of the operation of these commissions, see Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 *YALE L.J.* 1808, 1812–20 (2012).

¹³⁵ See MICHAEL DIMINO, ET AL., *VOTING RIGHTS AND ELECTION LAW* 549–50 (2d ed. 2015) (discussing arguments for and against term limits).

¹³⁶ It could be argued that some of these problems might be ameliorated if hard-look review was limited to fewer or narrower categories than those outlined by Eule. For example, such review could be confined to initiatives that limit the rights of minority groups. This would blunt some of my criticisms of the Eule categories, but there would still be the problem of identifying minority rights in this context. See *supra* notes 128–130 and accompanying text. Even when so limited, I would still conclude that hard-look review of direct democracy is not, on balance, justified for all of the reasons I outline.

¹³⁷ The last question is raised by the *Obergefell* and *U.S. Term Limits* decisions. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015); *U.S. Term Limits v. Thornton*, 514 U.S. 779, 870 (1995). For more information on this question, see Justin Driver, *Constitutional Outliers*, 81 *U. CHI. L. REV.* 929, 940 (2014); Matthew E. K. Hall & Ryan C. Black, *Keeping the Outliers in Line? Judicial Review of State Laws by the U.S. Supreme Court*, 94 *SOC. SCI. Q.* 395, 396, 406 (2013). However, neither article directly addresses state laws enacted via direct democracy.

these questions might require an initiative-by-initiative review rather than courts reviewing all products of direct democracy in the same way.¹³⁸

This brings me to the scope of the proposed harder look review itself. Presumably, it would be akin to the sort of strict scrutiny found in other areas of constitutional law,¹³⁹ or the “hard look” doctrine of administrative law.¹⁴⁰ Eule also suggested that the harder look might involve reversing the usual presumption of the constitutionality of legislation, or (at least in Equal Protection challenges) only requiring that discriminatory impact, rather than purpose, be shown.¹⁴¹ Eule alternatively suggested that the burden of proving discriminatory motive could be relaxed, rather than abandoned, by making it easier to prove such motive in this context by relying on evidence from the campaign for or against the ballot measure in question.¹⁴²

These seem to be reasonable measures for an advocate of a hard look review, but I wonder how or why courts would adopt them. Courts have shown relatively little reticence in ruling on the constitutionality of ballot measures under the normal rules of review. Consider that since Eule wrote, the Court has ruled on the

¹³⁸ The advantage of a case-by-case approach is that it might ameliorate the criticisms of the hard-look review advanced here, since the hard-look review would presumably only apply to a subset of cases. The disadvantage to the approach is that it would likely increase the complexity of the judicial inquiry by requiring an intensive examination of the factors listed in the text. A case-by-case approach is suggested in Steve Sanders, *Mini-DOMAs as Political Process Failures: The Case for Heightened Scrutiny of State Anti-Gay Marriage Amendments*, 109 NW. U. L. REV. ONLINE 12, 15 (2014). The author concludes that all state ballot measures that banned same-sex marriage should be subject to a hard-look review because “[b]y strong-arming marriage discrimination into state constitutions—which typically are far more difficult to change than ordinary statutes—during a relatively brief period from 1998 to 2012, mini-DOMA proponents intended to freeze marriage discrimination in place and put it beyond the reach of ordinary democratic deliberation.” *Id.* at 14. The implication of this is that Sanders would not subject *all* ballot measures to hard-look review. That said, Sanders essentially considered all of the same-sex ballot measures *en masse*, and not on a strict state-by-state basis.

¹³⁹ See, e.g., *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227–28 (2015); *McCutcheon v. FEC*, 134 S. Ct. 1434, 1445 (2014); see also Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1268–75 (2007).

¹⁴⁰ Thomas W. Merrill, *Presidential Administration and the Traditions of Administrative Law*, 115 COLUM. L. REV. 1953, 1967 (2015); Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 761–63 (2008); see also *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41–44 (1983).

¹⁴¹ See Eule, *supra* note 12, at 1558–59, 1561–62.

¹⁴² See *id.* at 1562. Similar arguments have been advanced reading the interpretation of ballot measures in litigation other than constitutional challenges. See, e.g., Jane S. Schacter, *The Pursuit of “Popular Intent”: Interpretative Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 109 (1995); see also D. Zachary Hudson, Comment, *Interpreting the Products of Direct Democracy*, 28 YALE L. & POL’Y REV. 223, 223–24 (2009). But see Michael D. Gilbert, *Interpreting Initiatives*, 97 MINN. L. REV. 1621, 1623 (2013) (arguing that “judges should interpret initiatives consistent with the preferences of the median voter”); Michael M. O’Hear, *Statutory Interpretation and Direct Democracy: Lessons from the Drug Treatment Initiatives*, 40 HARV. J. ON LEGIS. 281, 322–37 (2003) (arguing that differences between ballot measures and legislation have been overstated, and ordinary methods of statutory interpretation should apply to both).

merits of at least eleven constitutional challenges to state law that resulted from ballot measures.¹⁴³ Granted, the Court and individual Justices have been unclear and mostly silent on the issue raised by this Article, as highlighted by Justice Thomas at the end of the 2014–15 Term. However, in those eleven cases, a majority of the Court struck down the laws in six instances.¹⁴⁴ It would seem that the ordinary tools of constitutional inquiry sufficed for the Justices.

It appears that in these decisions there was virtually no direct discussion of the motives of the voters in passing these ballot measures. Both Eule and Baker addressed what a hard look review might look like for Equal Protection challenges, and it is instructive to consider what the Court has done in that regard since they wrote. In one decision that presented an unsuccessful Equal Protection challenge, *Schuette v. BAMN*, none of the opinions addressed the motives of the voters except in the most oblique ways, or referenced the sort of interpretative sources suggested by Eule.¹⁴⁵ Similarly, in *Obergefell v. Hodges*, the Court considered both Due Process and Equal Protection challenges to four same-sex marriage bans.¹⁴⁶ However, with respect to either challenge, neither the majority opinion, holding that the bans violated both Clauses, nor any of the four dissents, engaged in any discussion of, or discussed any evidence about, the motives of the voters who passed the ballot measures in question. In short, in these and the other recent cases involving constitutional challenges to ballot measures, under any Clause of the Constitution, a hard look review, despite the fears of Eule and others, has proven to be unnecessary.

D. Was Justice Black Wrong?

No discussion of judicial deference in this context would be complete without a consideration of Justice Black's views. So far I have argued that a hard judicial look at ballot measures under constitutional challenge is unwarranted. Do those arguments also lead to the conclusion that *more* (or even total?) judicial deference is warranted? As noted above,¹⁴⁷ opinions by Justice Black, and later at least one by Justice Thomas, have led some observers to conclude that these Justices were

¹⁴³ See *supra* note 37 & accompanying text.

¹⁴⁴ See *supra* note 37 & accompanying text.

¹⁴⁵ *Schuette v. BAMN*, 134 S. Ct. 1623 (2014). Indeed, Justice Sotomayor thought it unnecessary to address any possible “racial animus” by the voters, since the political process doctrine “operates irrespective of discriminatory intent, for it protects a process-based right.” *Id.* at 1663 n.8 (Sotomayor, J., dissenting).

¹⁴⁶ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015).

¹⁴⁷ See *supra* Part I.B.

discarding even rational basis review and would seemingly reject constitutional challenges to ballot measures under all, or virtually all, circumstances.¹⁴⁸

A careful reading of the opinions in question by these Justices suggests that they were not calling for a hyper-deferential review of ballot measures. For example, in *James v. Valtierra*, the Court considered a challenge under (among other things) the Equal Protection Clause to a provision of the California Constitution, adopted by initiative, that required any low-rent housing project must be approved by the voters of the town or county in question.¹⁴⁹ Writing for the majority and upholding the provision, Justice Black referred in glowing terms to direct democracy. In California, he said, referenda had been frequently used “to give citizens a voice on questions of public policy. . . . [They] demonstrate devotion to democracy, not to bias, discrimination, or prejudice.”¹⁵⁰

But that was not his sole point. Elsewhere in the opinion, he distinguished *Valtierra* from an earlier Court decision in the political process line of cases, in that the California referendum was not based on racial distinctions, only income.¹⁵¹ He added that “the record here would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority.”¹⁵² He further observed that California law requires local referenda for mundane items like the issuance of long-term bonds or land acquisition, so if the plaintiffs here prevailed, it might lead to the absurd proposition that all such referenda violate the Equal Protection Clause.¹⁵³ Justice Black did not specifically mention the standard of review, and one reading of that might be that he was virtually abdicating any judicial review. But a better reading is that he was using rational basis scrutiny, albeit one without bite, given the origin of the provision under challenge.

A similar conclusion is suggested by Justice Thomas’s dissent in *U.S. Term Limits, Inc. v. Thornton*.¹⁵⁴ Recall that he mentioned several times the initiative in Nebraska and elsewhere that had resulted in term limits for members of Congress

¹⁴⁸ See, e.g., Bell, *supra* note 36, at 4–7 (commenting on Justice Black’s opinions on this subject); Eule, *supra* note 12, at 1506 (commenting on Justice Black’s opinions on this subject). As a corollary of such deference, some federal judges have seemed to suggest that state legislation should be more readily upheld when a ballot measure to overturn it has failed. See *Bhd. of Locomotive Firemen & Enginemen v. Chi., Rock Island & Pac. R.R. Co.*, 393 U.S. 130, 136 (1968) (Black, J.). Other judges have suggested that federal constitutional rights should not be recognized when a ballot measure that would have established such a right as a matter of state law failed. See *Compassion in Dying v. Washington*, 85 F.3d 1440, 1446 (9th Cir. 1996) (O’Scannlain, J., dissenting from denial of rehearing en banc).

¹⁴⁹ *James v. Valtierra*, 402 U.S. 137, 139 (1971).

¹⁵⁰ *Id.* at 141.

¹⁵¹ *Id.* at 140–41 (distinguishing *Hunter v. Erickson*, 393 U.S. 385 (1969)).

¹⁵² *Id.* at 141.

¹⁵³ See *id.* at 142–43. Three Justices dissented on the basis that the provision discriminated on the basis of income and therefore strict judicial scrutiny was warranted. *Id.* at 143–45 (Marshall, J., dissenting). The force of the dissent’s position has been undermined by later decisions, which have held that those with low incomes do not form a suspect class, so strict scrutiny is not required. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28–29 (1973).

¹⁵⁴ See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 845, 925–26 (1995) (Thomas, J., dissenting).

and for other elected officials.¹⁵⁵ However, this was hardly the focal point of Justice Thomas's analysis. Over the course of a lengthy dissent, he closely analyzed the text and history of the relevant provisions, discussed judicial precedent, and responded to the arguments of the majority.¹⁵⁶ Like Justice Black in *Valtierra*, Justice Thomas did not specifically dwell on the standard of judicial review when he concluded the state law was constitutional, but it is a far stretch to conclude that he was not engaging in any review at all. At best, perhaps, he was giving a ballot measure the benefit of the doubt, though he did not seem very doubtful about his conclusions in the rest of the dissent.

But even if not embraced by Justices Black and Thomas, *should* there be total abdication of judicial review (or something close to it) of ballot measures? No judge or scholar, as far as I know, has advocated such a position,¹⁵⁷ and I think with good reason. In my view, no provision of the U.S. Constitution, or of the history of the drafting of the documents, including the Reconstruction Amendments, or of some federal (or state) judicial tradition, can be drafted in aid of such a position.¹⁵⁸ Of course, this silence is not surprising, since direct democracy did not emerge among the States until the end of the nineteenth century.¹⁵⁹ More broadly, a position of complete judicial abdication would give too much weight to the counter-majoritarian difficulty as the principal problem facing the exercise of judicial review by federal courts. Aside from the fact that direct democracy itself faces some problems in revealing the wishes of a majority (just like the legislative and executive branches), the difficulty itself can be overstated as a foundational problem in American jurisprudence.¹⁶⁰ While I think judges and Justices should be aware of the difficulty, it is best responded to by doctrines like a presumption of constitutionality for state law, not complete abdication of their review by courts.¹⁶¹

¹⁵⁵ See *id.* at 859–60, 862, 917; MILLER, *supra* note 22 at 161–62, 166.

¹⁵⁶ See *U.S. Term Limits*, 514 U.S. at 845–923 (Thomas, J., dissenting).

¹⁵⁷ See, e.g., MILLER, *supra* note 22, at 89–91 (discussing limited support for some greater deference, as compared to complete judicial abdication).

¹⁵⁸ Not even the introductory words to the Constitution, “We the People.” That phrase was drafted at a time when direct democracy did not exist.

¹⁵⁹ See *History, INST. FOR DIRECT DEMOCRACY*, <http://idd-bg.com/en/democracy/history/worldwide.html> (last visited Sept. 1, 2016).

¹⁶⁰ For an extensive discussion of the counter-majoritarian difficulty, inside and outside of the Supreme Court, see BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009). Friedman concludes that, on the whole, the Court has been a majoritarian institution, in most instances following the majority view on various issues. See *id.* at 371–80. For a skeptical appraisal of that position, see Richard H. Pildes, *Is the Supreme Court a “Majoritarian” Institution?*, 2010 SUP. CT. REV. 103.

¹⁶¹ A similar conclusion is suggested by a more formalist critique of the distinction between state legislative action and the products of direct democracy. In both situations, the products have the force of law and states do not make a distinction between the two when implementing those laws. It would seem to follow that courts should not rank-order the two types of law when considering constitutional challenges.

CONCLUSION

Even while criticizing the products of direct democracy and calling for a harder judicial look for at least some constitutional challenges to ballot measures, Julian Eule, with his characteristic insight, wondered if he should be careful for what he wished for. He observed:

Plebiscites serve as an escape valve for the frustrations of day-to-day encounters with faceless, unresponsive, and oppressive bureaucracies. If courts afford this spleen-venting little deference, and we block judicial accountability by placing the dirty task of checking in the Federal court, will something have to give? Could it take the form of diminished respect for and obedience to the courts, resentment toward Washington by an increasingly alienated populace, or apathetic retreats from civic responsibility?¹⁶²

Eule was probably overstating the downsides of hard look judicial review, but his cautionary tale is worth pondering.

Ballot measures in the states show no sign of diminishing since their revival in the past thirty years. They can and have been described as a form of “unorthodox lawmaking”¹⁶³ that might become increasingly characteristic of public policy in a political environment, at both the federal and state level, which seems increasingly fractured and polarized.¹⁶⁴ Perhaps if direct democracy began to take an outsized role in the creation of public policy and increasingly displaced the role of state legislatures, the case for a harder judicial review might be better justified. Until such time, I think Justice Thomas has it right that constitutional challenges to the products of direct democracy in federal court should be subject to the same scrutiny as legislative and executive action.

¹⁶² Eule, *supra* note 12, at 1585.

¹⁶³ Abbe R. Gluck, et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1823 (2015) (describing direct democracy as an example of unorthodox lawmaking).

¹⁶⁴ On the increasing polarization of American politics, see Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 808–818 (2014). For a prediction that both liberal and conservative forces will increasingly turn to state ballot measures to advance policy goals, in part to respond to the other side, see Whyte, *supra* note 105.

