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Direct Democracy and Hastily Enacted Statutes

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DIRECT DEMOCRACY AND HASTILY ENACTED STATUTES

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Phil Frickey qualifies as the leading explorer of the borderline between statutory interpretation and constitutional law. And I agree with him that borderline issues take on an added importance in the context of direct democracy.[1] The fruits of direct democracy—state constitutional amendments and state statutes—present an inordinate number of constitutional problems and interpretive quandaries.

A quick look at the enactments considered by the electorate in November 1996 proves the point nicely. Constitutional issues abounded in California's anti-affirmative action initiative,[2] term limits measures on the ballot in fifteen states,[3] and campaign finance proposals approved in six states.[4] Interpretive disputes featured prominently in the debate over Colorado's proposed parental rights initiative.[5] The Supreme Court's decision in *Romer v. Evans*[6] and its consideration of Arizona's English language-only initiative[7]

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1. *See* Philip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1996 ANN. SURV. AM. L. 477, 481.

2. *See* California Secretary of State, *Proposition 209: Text of Proposed Law* (visited Aug. 24, 1996) <http://Vote96.ss.ca.gov/Vote96/html/BP/209text.htm>; *see also* Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480 (N.D. Cal. 1996), *vacated by* 122 F.3d 692 (9th Cir. 1997), *cert denied* 118 S. Ct. 397 (1997).

3. *See* Louis Jacobson & Jennifer C. Daskal, *Issues Galore*, 28 NAT'L J. 2460 (Nov. 9, 1996) (summarizing the term limits initiatives voted on in November 1996).

4. *See id.* at 2460-61. For an excellent summary and analysis of all measures on the state ballots in 1996, see KENNETH MULLIGAN, STATEWIDE MEASURES ON THE 1996 GENERAL ELECTION BALLOT (1996).

5. *See* Colorado General Assembly, Legislative Counsel, *Analysis of 1996 Ballot Proposals: Amendment 17: Parental Rights* (last modified Oct. 3, 1996) <http://www.state.co.us/gov_dir//leg-dir/96bp/amd17.html> (official state summary of the arguments for and against Amendment 17).

6. 116 S. Ct. 1620 (1996).

7. *See* Yniguez v. Arizonans for Official English, 69 F.3d 920 (9th Cir. 1995) (en banc), *vacated as moot*, 117 S. Ct. 1055 (1997).

are only the most recent manifestations of the tension between direct democracy and the Constitution.

Faced with such problems, Frickey explores ways to mediate the borderline between statutory interpretation and constitutional adjudication in the context of direct democracy.[8] His is an enormously helpful attempt to reconcile the constitutional issues discussed by Julian Eule[9] and the statutory interpretation issues discussed by Jane Schacter.[10] I agree with many of Frickey's suggestions. Indeed, I will suggest some additional devices that can perform the same role. But I wonder whether Frickey has proved more than he set out to accomplish. The problems of direct democracy are special, but they are not unique. Systemic failures in representative democracy give rise to the same kinds of constitutional and interpretive problems. My task, then, is to approach the interpretation of direct democracy in light of the constitutional concerns it often raises, and to suggest that other kinds of legislative enactments deserve the same kind of interpretive care as direct democracy—though I remain uncertain what kind of care that should be.

I
MINIMIZING THE CONSTITUTIONAL PROBLEMS PRESENTED BY DIRECT DEMOCRACY

Frickey posits that the borderline between constitutional law and statutory interpretation is imprecise.[11] Faced with the likelihood of conflicts between direct democracy and the Constitution, he contends that judicial consideration of ballot propositions should aim "to give the electorate their due [while] protect[ing] public values."[12] To achieve the correct balance, Frickey proposes three guidelines for interpreting statutes enacted through the direct democracy process. First, read initiatives to avoid serious constitutional doubts whenever plausible.[13] Second, employ a general working assumption of narrow construction, under which preexisting law is displaced by a ballot proposition only when the clear text or the evident, core purposes of the electorate so require.[14] Third,

8. *See* Frickey, *supra* note 1, at Part II.

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

10. *See* Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107 (1995).

11. *See* Frickey, *supra* note 1, at Part II.

12. *Id.* at 521.

13. *See id.* at 522.

14. *See id.*

apply specialized substantive canons with "somewhat more force" for direct democracy than for legislative enactments.[15] These substantive canons address issues of federalism, nondelegation, retroactivity, implied repeals, and the rule of lenity.

I am attracted to the rules suggested by Frickey. They can play an important role in softening the seemingly harsh edges of direct democracy. I want to expand upon one of these remedies, and to add another suggestion of my own.

A. Interpreting Initiatives to Avoid Constitutional Problems

At first glance, the canon instructing courts to interpret statutes to avoid constitutional problems seems to deserve special application in the context of direct democracy. Voters do not always understand constitutional limitations, and initiatives are often ambiguous, so there should be good reason for choosing the constitutionally safe interpretation of initiatives. Indeed, one judge has suggested that the canon "applies with particular appropriateness to initiative measures because the initiative process has no method of legislative scrutiny to work out problems in proposed legislation."[16]

But sometimes initiatives knowingly present constitutional questions. The voters approving Colorado's Amendment 2 and California's Civil Rights Initiative were well-informed of the constitutional dangers of their actions. The whole point of California's most recent defeated campaign finance proposal was to challenge *Buckley v. Valeo*.[17] Thus, Frickey is right to say that one cannot employ this canon when the voters enacted an initiative knowing that it presented a constitutional problem.

This approach sounds straightforward, but in practice the canon gives the courts fits. One reason is that the canon is selectively invoked: sometimes state courts read direct democracy to avoid constitutional problems,[18] and sometimes they do not.[19] Judges often disagree in particular cases as to whether they should or

15. *Id.* at 522-23.

16. State v. Shumway, 630 P.2d 796, 809 (Or. 1981) (Tanzer, J., specially concurring).

17. 424 U.S. 1 (1976).

18. *See, e.g.*, People v. Smith, 667 P.2d 149 (Cal. 1983) (construing Proposition 8, "The Victim's Bill of Rights" initiative, to avoid constitutional doubts).

19. *See, e.g.*, Legislature of California v. Eu, 816 P.2d 1309, 1316 (1990) (reading a California term limits proposition to impose a lifetime ban on candidacy for office despite alleged constitutional objections, because extrinsic evidence demonstrated the people's intent and because a lifetime ban is constitutional).

should not interpret statutes to avoid constitutional problems.[20] Of course, this same confusion appears when using this interpretive device for the work of the legislature. The proper application of the canon has divided courts interpreting statutes such as: the abortion counseling restrictions in *Rust v. Sullivan*;[21] the congressional restriction on the funding of performance artists by the National Endowment for the Arts;[22] and the applicability of federal open meeting requirements to judicial nominations.[23] *NLRB v. Catholic Bishop*,[24] a case Frickey has questioned elsewhere,[25] and which he rightly describes as particularly ill-suited for direct democracy,[26] divided the Supreme Court 5-4.

A second reason for the judicial struggles with the canon is the ambiguous nature of the canon itself. *Catholic Bishop* represents its most extreme version. By requiring a clearly-targeted statement of intent on the particular issue at hand, *Catholic Bishop* avoids constitutional problems in every situation except those in which the legislature (or the electorate) was clairvoyant. Other articulations of the canon are not so strict. In particular, courts often emphasize that the alternative interpretation of a statute must be "fairly possible," and that the canon cannot be "pressed 'to the point of disingenuous evasion.'"[27]

Moreover, there are actually *two* canons. Courts—particularly state courts—often interpret a statute to avoid actually holding it unconstitutional, rather than relying on mere doubts about a statute's constitutionality in order to avoid deciding the constitutional

20. *See* Whitman v. Superior Court, 820 P.2d 262, 268 (Cal. 1991) (noting the court's disagreement as to whether a California proposition governing the admission of hearsay evidence should be read to avoid constitutional questions); Carlos v. Superior Court, 672 P.2d 862 (Cal. 1983) (noting the Court's disagreement as to whether a death penalty initiative should be read to avoid Eighth Amendment problems), *overruled on other grounds by* People v. Anderson 742 P.2d 1306 (Cal. 1987); Patterson v. County of Tehama, 235 Cal. Rptr. 867 (Cal. Ct. App. 1987) (noting the limits of a court's ability to save a county "Landowners Bill of Rights" initiative from a constitutional deficiency through creative judicial construction).

21. 500 U.S. 173 (1990).

22. *See* Finley v. Nat'l Endowment for the Arts, 100 F.3d 671 (9th Cir. 1996), *cert. granted*, 118 S. Ct. 554 (1997).

23. *See* Public Citizen v. United States Dep't of Justice, 491 U.S. 440 (1989).

24. 440 U.S. 490 (1979).

25. *See* WILLIAM N. ESKRIDGE & PHILIP P. FRICKEY, CASES AND MATERIAL ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 686 (1988) (listing three things that are "odd" about *Catholic Bishop*).

26. *See* Frickey, *supra* note 1, at 512-13.

27. Communications Workers v. Beck, 487 U.S. 735, 762 (1988) (quoting George Moore Ice Cream Co. v. Rose, 289 U.S. 373, 379 (1933) (Cardozo, J.)).

question altogether. This "unconstitutionality" canon predates the "doubts" canon; in fact, it was the only canon of this type to be applied until early this century.[28] The doubts canon is the more common one today, but the unconstitutionality canon still appears in some decisions. For example, in *Brownsburg Area Patrons Affecting Change v. Baldwin*,[29] a federal district court recently interpreted an Indiana state campaign finance statute not to apply to groups that only engage in "issue advocacy" so that the statute would not be held unconstitutional under *Buckley v. Valeo*.[30] The unconstitutionality canon, however, is absent from the state court direct democracy cases.

A final concern attacks the entire theoretical underpinning of the doubts canon. Frederick Schauer and a number of prominent judges have argued that the doubts canon disregards the best evidence of legislative intent in favor of a misplaced assumption about the legislature's desire to avoid enacting any statutes that skirt close to constitutional lines.[31] The standard justifications for the doubts canon—that the judiciary does not want to engage in unnecessary constitutional adjudication, and that the legislature (or the people) did not intend to pass a law that even raises a constitutional concern—are quite different from the justifications for the unconstitutionality canon. Reading a statute to avoid holding it unconstitutional means that the answer to the constitutional question has been decided. The justification for applying the unconstitutionality canon, therefore, depends on how the statute was enacted. If the legislature and the executive created the statute, then the court strives to respect the coordinate branches of the government that take the same oath of office to uphold the Constitution. If the people enacted the statute themselves, then reading the statute to prevent it from being struck down is simply an application of the absurd results doctrine. Presumably, the people would not have undertaken the vain task of enacting a statute that could never be applied. But if the statutory text or other sources show that the

28. *See* John Copeland Nagle, *Delaware & Hudson Revisited*, 72 NOTRE DAME L. REV. 1495 (1997). What I call the "doubts" canon, Frickey calls the "avoidance" canon. *See* Frickey, *supra* note 1, at 511-21. I prefer the former label because both canons seek to avoid something.

29. 943 F. Supp. 975 (S.D. Ind. 1996).

30. 424 U.S. 1 (1976).

31. *See* Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 16, 71; RICHARD POSNER, THE FEDERAL COURTS 284-85 (1985); HENRY J. FRIENDLY, BENCHMARKS 210-12 (1967); *see also* Reno v. Flores, 113 S. Ct. 1439, 1453 n.9 (1993) (Scalia, J.) (characterizing the canon as "the last refuge of many an interpretive lost cause").

people's intent is unmistakable, then Frickey's "give the people their due" counsel comes into effect and the courts should hold the statute unconstitutional.[32]

B. The Severability of Unconstitutional Initiative Provisions

Another way of mediating the borderline between constitutional law and statutory interpretation is to apply the severability doctrine. Courts are often able to remove the unconstitutional provisions of an initiative without affecting the balance of the proposition. In fact, severability is presumed in all cases, it is further presumed when the legislature has included a severability clause in the statute, and it is presumed when the remainder of a statute can function without the unconstitutional parts.[33] For example, a federal district court held that California's 1994 immigration initiative was unconstitutional insofar as it sought to regulate immigration or to deny educational benefits.[34] To the extent that the initiative denied other benefits, the court held that those provisions were constitutional and capable of being enforced notwithstanding the invalid parts of the initiative. The court helpfully added two appendices to its opinion: one reprinting the original initiative and another containing the redacted statute after severability.[35] The resulting statute is less than the California voters desired but as much as the Constitution permits.

Like the canons for reading statutes to avoid constitutional problems, the severability doctrine is not uniformly applied. Consider the state courts that have considered the severability of initiatives seeking to impose term limits on both federal and state representatives. The Nebraska Supreme Court held that term limits on state representatives could not survive the invalidation of term limits on federal representatives.[36] The Arkansas Supreme Court reached the opposite (and in my view, correct) conclusion.[37] Both the Arkansas and Nebraska initiatives had a provision dealing with congressional term limits and other provisions dealing with state term limits. The two groups of provisions seem readily distinguishable, and Frickey's "giving the voters their due" admonition

32. Frickey, *supra* note 1, at 513.

33. *See* John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203, 218-25 (1993).

34. *See* League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755 (C.D. Cal. 1995).

35. *See id.* at 787-794.

36. *See* Duggan v. Beerman, 544 N.W.2d 68, 79 (Neb. 1996).

37. *See* U.S. Term Limits, Inc. v. Hill, 872 S.W.2d 349, 353 (Ark. 1994), *aff'd sub. nom.* U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995).

supports a severability holding that preserves as much of an initiative as possible.[38] The Nebraska court, however, concluded that the congressional term limits were interwoven with the entire initiative because the state term limits provisions contained several references to the congressional term limits provisions.

The Nebraska court also insisted that the congressional term limits were the primary inducement offered to the voters for passage of the entire initiative.[39] This inducement theory relied on two pieces of evidence. First, the petition to place the initiative on the ballot neglected to mention state term limits.[40] The relevance of the petition—as opposed to the initiative itself—went unexplained by the court and was undercut in any event by the court's subsequent analysis of the severability clause. Second, only the *state* term limits were subjected to the possibility of future elimination by the voters, which the court understood to mean that the supporters of the initiative were more concerned about congressional term limits.[41] Both claims are dubious in light of the real inducement question: why would any Nebraska voter support state term limits only if congressional term limits would be established too? The court also discounted the severability clause in the initiative, which provided that "if any of the provisions hereby adopted shall be held void for any reason, the remaining provisions shall continue in full force and effect."[42] The court emphasized that the severability clause was not printed on the ballot itself.[43] Thus, the Nebraska Supreme Court seemingly established a new rule for interpreting direct democracy: the statutory text only counts if it is present on the ballot itself. The court, however, did not justify its new rule or question the clarity and accessibility of the initiative's actual severability language.

Severability may be especially appropriate for direct democracy because initiatives are not based on carefully negotiated legislative compromises. To the extent that opponents of severability fear that a holding of severability will disrupt the bargain struck in the legislature, that concern disappears in the context of direct democracy when the voters lack the power to bargain about the scope or language of a proposed measure. The failure to take advantage of the ability to remove constitutionally problematic provisions during the

38. *See generally* Frickey, *supra* note 1.
39. *See Duggan*, 544 N.W.2d at 80.
40. *See id.*
41. *See id.*
42. *Id.* at 80-81.
43. *See id.* at 81.

legislative process argues against severability; the inability to remove such provisions from an initiative does not lead to a similar inference regarding severability.

On the other hand, the all-or-nothing nature of the voting on initiatives may suggest that courts should treat initiatives the same way. Moreover, Eule argues that straightforward reliance on a statute's severability clause is inappropriate in the context of direct democracy.[44] His assertion that voters were unaware of the severability clause in California's Proposition 103 is plausible, though by no means beyond dispute.[45] What Eule does not mention is that severability clauses are among the clearest statutory provisions extant. Nor does Eule identify any better evidence of the people's intent regarding severability amidst the limited sources of popular intent. If the severability of California's affirmative action initiative ever becomes an issue, it is difficult to imagine why the initiative's own proclamation that "[a]ny provision held invalid shall be severable from the remaining portions of the section" should not be controlling.[46] The unwillingness to fully apply an initiative's severability clause seems to be misplaced.

II
THE ANALOGY TO HASTILY DRAFTED LEGISLATIVE ENACTMENTS

These approaches and the others Frickey suggests soften the conflict between direct democracy and the Constitution while remaining cognizant of legislative or electoral intent. Frickey is right to endorse such devices. But the reformulation he advocates holds equal promise for judicial consideration of legislatively-enacted stat-

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44. *See* Eule, *supra* note 9, at 1570 & n.305.

45. *See* Philip Hager, *Prop. 103's Fate May Hinge on Clause*, L.A. TIMES, Feb. 1, 1989, at 3 (reporting that "the little-heralded provision, known as a 'severability clause,' could well determine how much of the landmark insurance reform initiative will survive" in the California Supreme Court). That article, however, appeared *after* the initiative had already passed. On the other hand, voters considering Proposition 103 might have read about the severability clause in another California initiative in an article published in the Los Angeles Times four months before the vote on Proposition 103. *See* Ted Vollmer, *Foes Sue to Get Drilling Measure Off City Ballot*, L.A. TIMES, July 7, 1988, pt. 2, at 1 (describing the effect of a severability clause in an oil drilling initiative). The availability of the full text of initiatives on the internet may soon deflect any contentions about the public accessibility of the severability clauses (and other provisions) contained in initiatives.

46. Proposition 209, § 31(h), *reprinted in* California Secretary of State, *Proposition 209: Text of Proposed Law* (visited Mar. 30, 1997) <http://Vote96.ss.ca.gov/Vote96/html/BP/209text.htm> (adopted in 1996 as CAL. CONST. art. I., § 31(h)).

utes. Indeed, the same tests apply regardless of whether the legislature or the people enacted the law. In both cases, the courts generally follow the same test for deciding constitutionality and the same test for statutory interpretation.[47] More specifically, they follow the same test for avoiding constitutional issues,[48] and the same test for severability.[49] Why, then, is a special set of interpretive rules needed only for direct democracy?

A. The Similarities Between Direct Democracy and the Legislature

Professors Eule, Schacter, and Frickey have proposed special rules for the constitutional and statutory interpretation of direct democracy. Eule wants less judicial deference to the constitutionality of direct democracy.[50] Schacter wants to look at more sources and to construe direct democracy narrowly in most cases.[51] Frickey wants to employ several devices aimed at giving the people their due while respecting public values.[52] Their proposals are different, but each advances a special interpretive scheme for direct democracy.

The case for fashioning special rules for the interpretation and constitutional adjudication of direct democracy proceeds from two sources, one textual and one functional. The textual source is the Constitution's republican form of government clause.[53] Frickey premises his special rules for the interpretation of direct democracy

47. *See* Schacter, *supra* note 10, at 119 (noting that a study of fifty-three decisions indicates "that courts have transported to the context of direct democracy the techniques and principles used to construe legislatively enacted law"); Eule, *supra* note 9, at 1505 (describing "the unspoken assumption . . . that the [constitutional] analysis need not vary as a result of the law's popular origin").

48. *See supra* text accompanying notes 16-31.

49. *See, e.g.*, McAlpine v. University of Alaska, 762 P.2d 81, 92 (Alaska 1988) (holding that standard severability doctrine applies to initiatives even though the relevant state statute only authorizes judicial severance of legislative enactments); Santa Barbara Sch. Dist. v. Superior Ct., 13 Cal.3d 315, 332 n.7 (Cal. 1975) (rejecting the argument that a different test for severability applies to initiatives); Montana Auto. Ass'n v. Greely, 632 P.2d 300, 303-04 (Mont. 1981) (applying standard severability doctrine to an initiative); *In re* Initiative Petition No. 362 State Question 669, 899 P.2d 1145, 1152-53 (Okla. 1995) (applying standard severability doctrine to an initiative). *But see* American Fed. of Labor v. March Fong Eu, 686 P.2d 609, 629 n.27 (Cal. 1984) (holding that a different test for severability applies to pre-election review of initiatives).

50. Eule, *supra* note 9, at 1558-60.

51. Schacter, *supra* note 10, at 152-161.

52. *See supra* text accompanying notes 12-15.

53. U.S. CONST., art. IV, § 4 ("The United States shall guarantee to every State in this Union a republican form of government . . . .").

on the tension between direct democracy and the constitutional guarantee of a republican form of government.[54] Because the Supreme Court has treated the republican form of government clause as nonjusticiable, Frickey posits that rules of statutory interpretation should be crafted to enforce the values underlying that clause. Canons that give life to unenforced constitutional norms are attractive to me,[55] so Frickey's suggestion is appealing. The case for a republican form of government clause canon of statutory interpretation, however, rests on a contested understanding of that clause. If there is no conflict between direct democracy and the proper reading of the republican form of government clause, as Akhil Amar and others have argued,[56] then the justification for fashioning a special interpretive regime for direct democracy disappears. I have no intention of joining that debate now, but simply note that some other justification for special interpretive rules for direct democracy becomes necessary if the republican form of government clause claim fails.

That other justification could lie in the formal differences between direct democracy and the legislature. The committee review, bicameralism, other "vetogates" and legislative filtering devices that constrain the legislature are absent when the people vote directly on the law. Nor can the executive veto an initiative, a particularly telling absence given the role of the veto in checking majority passions.[57] From these formal characteristics of direct democracy flow the empirical claims of lack of deliberation, lack of careful drafting, and the inability to ascertain the people's intent.[58]

These differences are real but exaggerated. The direct democracy process is not as naive or as malleable as some critics suggest.

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54. *See* Frickey, *supra* note 1, at 478.

55. *See* John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WIS. L. REV. 771, 805-13.

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

57. *See* THE FEDERALIST No. 73, at 443 (Alexander Hamilton) (Clinton Rossiter, ed. 1961) (indicating that the secondary purpose of the veto power "is to increase the chances in favor of the community against the passing of bad laws, through haste, inadvertence, or design"). The primary purpose of the veto was to enable the executive to "defend himself." *Id.* at 442.

58. *See* Frickey, *supra* note 1, at 495-98, 522-26. In addition to Frickey's numerous examples, I offer but one of my own. *See* Harper v. Greely, 763 P.2d 650, 657 (Mont. 1988) (Sheehy, J., dissenting) (describing an initiative that would amend the Montana constitution to give the legislature greater discretion in aiding those in need as "shabby," "flagrantly deceitful," and "trickily masked in self-effacing language").

The voters themselves screen many of the constitutionally problematic or ambiguous provisions. Some of the most constitutionally problematic initiatives presented to the voters in 1996 were defeated by the voters themselves, including California's campaign finance proposal, Idaho's radioactive waste compact, and five of the numerous term limits proposals at issue.[59] The initiative most criticized as ambiguous—Colorado's parental rights proposal—lost as well.[60] Frickey himself observes that many of the drafters of initiatives today are professionals and repeat players in state legislatures throughout the country.[61] The effort to impose term limits on elected officials is only the most striking example of such a coordinated, professional effort. Also, public choice theory reminds us that the people do not have to worry about the impact of their votes on re-election campaigns or on other legislative issues to be considered in the future.

Conversely, a lack of deliberation, a lack of careful drafting, and the inability to ascertain the people's intent characterize statutes that are hastily enacted by the legislature. Deliberative processes can be short-cut, and the executive often declines to veto provisions despite the same kinds of criticisms that are often leveled at direct democracy.[62] In particular, both the legislature and the executive are frequently reluctant to block legislation for constitutional reasons, especially when such proposals are designed to remedy a perceived emergency. In addition, courts frequently complain that statutes have been hastily enacted by the legislature.[63] The effectiveness of the filters embedded in the legislative process can only be judged by what they actually screen out.

The relevant comparison, therefore, is not *all* direct democracy and *all* legislation. At times the legislative process shares many of the same apparent failings of direct democracy. Accordingly, I want to focus on hastily enacted statutes to determine how the applicable constitutional and interpretive rules compare to the possible approaches to direct democracy.

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59. *See, e.g.*, Jacobson & Daskal, *supra* note 3, at 2460-61.

60. *Id.* at 2461.

61. *See* Frickey, *supra* note 1, at 519.

62. *See* Richard Briffault, *Distrust of Democracy*, 63 TEX. L. REV. 1347, 1362 (1985) (book review) (asserting that "much legislation is enacted without the informed, thoughtful analysis or extensive consideration contemplated by the legislative ideal").

63. *See infra* text accompanying notes 69-71.

B. Special Rules for Hastily Enacted Legislation

So how are hastily enacted statutes viewed by the courts? For constitutional issues, the formal rule is that the circumstances surrounding a statute's enactment by the legislature make no difference. The D.C. Circuit, for example, refused to infer that the hurried enactment of the Anti-Drug Abuse Act of 1986 suggested a racially discriminatory motive for punishing crack cocaine crimes more severely than powdered cocaine crimes.[64] The defendant's version of the statute's history focused on the lack of committee consideration and on news reports suggesting that some members of Congress viewed crack dealers in racial terms, a view that was not fully rebutted during the minimal debate on the measure.[65] The court, however, perceived "Congress' undeniable haste in passing the 1986 Act [as] more naturally attributed to a very real public concern over the generic elements of the crack phenomenon."[66] Other cases agree that a statute's rushed enactment and lack of legislative deliberation is irrelevant for purposes of determining the statute's constitutionality.[67]

In fact, such circumstances may make a difference in some constitutional cases. The New Jersey legislature's rush to pass Megan's Law affected the Third Circuit's view of the constitutional issues raised by the required registration of sex offenders.[68] The care with which Congress deliberates now seems to affect the constitutionality of legislation pressing the outer boundaries of the com-

64. United States v. Johnson, 40 F.3d 436, 440 (D.C. Cir. 1994), *cert. denied*, 514 U.S. 1041 (1995).

65. *See id.*

66. *See id.*

67. *See, e.g.*, Independent Community Bankers Ass'n of South Dakota v. State, 346 N.W.2d 737, 745 (S.D. 1984) ("The haste with which an act is passed cannot be considered in determining its constitutionality . . . .").

68. *See* Artway v. Attorney General, 81 F.3d 1235, 1264 (3d Cir. 1996). As the court explained:

> The circumstances of this enactment, which generated such sparse legislative history, give us pause. Megan's Law was rushed to the Assembly floor as an extraordinary measure, skipping committee consideration and debate entirely. It is just these "sudden and strong passions to which men are exposed" that the Framers designed the Ex Post Facto and Bill of Attainder Clauses to protect against.

Id. (quoting Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 137-38 (1810)). The court nonetheless held that the registration provisions of Megan's Law satisfied the ex post facto and bill of attainder clauses because there was adequate evidence that the New Jersey legislature intended that those provisions serve a non-punitive purpose. *See id.*

merce clause.[69] Justice Stevens has suggested that the amount of legislative deliberation preceding the enactment of a statute matters for purposes of the Due Process Clause.[70] More generally, some courts have cited a statute's hurried enactment as an explanation for the legislature's failure to heed constitutional strictures.[71] By contrast, elsewhere Frickey has identified several cases in which the great care with which the legislature deliberated a proposed statute later helped save that statute from constitutional challenge.[72]

The haste with which a legislature passes a law is even more relevant in statutory interpretation. There is no formal interpretive rule that accounts for the circumstances of a statute's enactment,[73] but sometimes these circumstances matter. Exactly *how* they matter depends on who is asked. Many cases treat a statute's hasty enactment as a justification for giving less weight to the statutory text.[74]

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69. *See* United States v. Lopez, 115 S. Ct. 1624, 1631-1632 (1995); *see also* Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and* United States v. Lopez, 46 CASE W. RES. L. REV. 695 (1996).

70. *See* Hampton v. Mow Sung Wong, 426 U.S. 88 (1976).

71. *See, e.g.*, Franklin Sav. & Loan Ass'n v. Director of the Office of Thrift Supervision, 740 F. Supp. 1535, 1541 (D. Kan. 1990) (indicating that the congressional rush to respond to the savings and loan crisis resulted in an "innovative and politically expedient statutory method of selecting the director of [the Office of Thrift Supervision that] is wholly unconstitutional"); Casbah, Inc. v. Thone, 512 F. Supp. 474, 479 (D. Neb. 1980) (noting that "lawmakers have rushed to pass laws banning [drug] paraphernalia and in the process have trampled upon a host of rights protected by the Constitution").

72. ESKRIDGE & FRICKEY, *supra* note 25, at 347.

73. *See, e.g.*, Newlan v. State, 535 P.2d 1348, 1352 (Idaho 1975) ("We treat appellants' argument that the Tort Claims Act was ill conceived and hastily drafted only with the observation that once this court has determined the statute to be constitutional we have no alternative but to interpret and apply it . . . .").

74. *See* Sorenson v. Secretary of the Treasury, 475 U.S. 851, 867 (1986) (Stevens, J., dissenting) (concluding that "'it defies belief' to assume that a substantial number of legislators were sufficiently familiar with OBRA to realize that somewhere in that vast piece of hurriedly enacted legislation there was a provision that changed the 6-year-old Earned Income Credit Program"); Burstein v. United States Lines, 134 F.2d 89, 91 (2d Cir. 1943) (rejecting a literal construction of a statute that "was in fact enacted under circumstances and with a haste which go far to demonstrate that no such sophisticated precision of meaning could have been in mind"); *In re* Consol. Litig. Concerning Int'l Harvester's Disposition of Wisc. Steel, 681 F. Supp. 512, 523 (N.D. Ill. 1988) (rejecting a literal interpretation of an ERISA amendment that resulted from "a Senate compromise reached in some haste"). Note, too, that Justice Stevens's dissenting opinion in *United States v. Locke*, 471 U.S. 84, 119 (1985), suggested that Congress could not have really meant to impose a December 30 filing deadline—instead of a December 31, end of the year deadline—because the Federal Land Management Policy Act (FLPMA) contained numerous other obvious drafting errors.

The corollary to this approach is that extended legislative deliberation indicates that the statutory words were chosen with care, and that view finds support in other cases.[75] But, some courts draw the opposite conclusion from a statute's hasty enactment. They insist that the words should be treated with even greater respect than usual because of the uncertainty surrounding other possible sources of statutory meaning. Thus, courts often follow the plain meaning of a statute regardless of how little deliberation the words actually received.[76]

Consider, for example, a recent Clean Air Act case that divided two of President Clinton's appointees to the D.C. Circuit. Section 209(e)(2) of the 1990 amendments to the Clean Air Act preempts state regulation of certain non-road engines and vehicles (*e.g.*, lawnmower, bulldozer, and locomotive engines).[77] In *Engine Manufacturers Association v. EPA*,[78] the court invalidated an EPA regulation that limited the preemptive force of section 209(e)(2) to "new" non-road engines instead of applying the section to *all* non-road engines. The court read the provision literally to apply to all such engines because of the absence of any statutory language limiting the provision's applicability to new engines. Judge Tatel's dissent contended that an interpretation of section 209(e)(2) that applied only to new non-road engines and vehicles better fit the statute's legislative history, purpose, and structure. He added that such a countertextual reading "is perfectly understandable given the haste in which Congress acted" when it amended the Clean Air Act.[79] In response, Judge Rogers stated that "[t]he haste and confusion attendant upon the passage of this massive bill do not license the court to rewrite it; rather, they are all the more reason for us to hew to the statutory text because there is no coherent alternative intention to be gleaned from the historical record."[80]

75. *See, e.g.*, United States v. Hurtado, 779 F.2d 1467, 1483 (11th Cir. 1985) (Clark, J., dissenting) (objecting to the majority's failure to heed the plain meaning of the Bail Reform Act of 1984, especially because the statute "was not hurriedly drafted, neither did it suffer from a lack of hearings and deliberate consideration by the House and Senate Judiciary Committees . . ."); Ramsey v. Tod, 69 S.W. 133, 135 (Tex. 1902) (refusing to read "purpose" to mean "purposes" in a corporate charter statute because the law was "thoroughly considered and carefully prepared by a person or persons learned in the law").

76. *See* United States v. Diaz, 712 F.2d 36 (2d Cir. 1983) (holding that a Puerto Rican court is not a court of a "State" or "of the United States" within the meaning of the "hastily enacted" 18 U.S.C. § 1202).

77. 42 U.S.C. § 7543(e)(2) (1994).

78. 88 F.3d 1075 (D.C. Cir. 1996).

79. *See id.* at 1104 (Tatel, J., dissenting).

80. *Id.* at 1092.

Judge Tatel's approach is more consistent with Professor Schacter's caution against a broad interpretation of ambiguous terms in an initiative.[81] Alas, the narrow reading of the statutory text endorsed by Schacter sometimes leads to a destination that she would be unlikely to endorse. The leading alternative to a textualist reading of a hastily enacted statute is to interpret such statutes broadly in order to accomplish their purposes. CERCLA[82]—the federal Superfund statute governing the cleanup of hazardous wastes—was hurriedly enacted by a lame duck Democratic Congress and signed by the lame duck President Carter after the November 1980 election, but before President Reagan and a Republican Senate took office in January 1981.[83] Ever since, the courts have complained about the statute's ambiguous language, its unhelpful legislative history, and the absence of other useful sources of legislative intent. Nonetheless, the courts have interpreted CERCLA broadly in an effort to further its remedial purposes.[84] The same approach of liberally construing hastily enacted statutes in order to best further their purposes can be found in other decisions.[85]

This is the precise opposite of what the analogy to direct democracy would suggest. Frickey's interpretive regime is designed to cabin the scope of measures enacted through direct democracy.[86] The application of that approach to statutes that were hastily enacted by the legislature would produce surprising results. Consider the retroactivity of CERCLA's liability provisions. The statute itself

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81. *See* Schacter, *supra* note 10, at 157.

82. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 § 101 et seq., as amended, 42 U.S.C. § 9601 et seq. (hereinafter "CERCLA").

83. For a discussion of CERCLA's history and the effect it has had on the statute's interpretation, *see* John Copeland Nagle, *CERCLA's Mistakes*, 38 WM. & MARY L. REV. 1405 (1997).

84. *See, e.g.*, Hanford Downwinders Coalition Inc. v. Dowdie, 71 F.3d 1469, 1480 (9th Cir. 1995); *see also* United States v. R.W. Meyer Inc., 889 F.2d 1497, 1503 (6th Cir. 1989).

85. *See, e.g.*, United States v. Mageean, 649 F. Supp. 820, 828 (D. Nev. 1986) (reading an amendment to RICO to further the congressional purposes of the statute instead of relying on a Senate report because the rushed passage of the amendment cast doubt upon the reliability of the legislative history), *aff'd*, 822 F.2d 62 (9th Cir. 1987); Barr Laboratories, Inc. v. Harris, 482 F. Supp. 1183, 1184-85 (D.D.C. 1980) (reading a provision of the Food, Drug and Cosmetic Act in light of its remedial purpose instead of following the literal meaning of the statute because Congress passed the provision in haste); *In re* Fischer, 72 B.R. 634, 635 (Bankr. D. Kan. 1987) (reading the 1986 Bankruptcy Act, "which was cobbled together and adopted in some haste as the Ninety-ninth Congress rushed to adjourn," to best further the statute's purposes).

86. *See* Frickey, *supra* note 1, at 511.

does not clearly state that the liability provisions apply to hazardous waste disposed before 1980. But the liability provisions make little sense unless they are interpreted to apply retroactively, and with one exception, courts have agreed that CERCLA does apply retroactively. That exception, however, refused to read CERCLA's liability provisions to apply retroactively because of the strong presumption against retroactivity recently announced by the Supreme Court.[87] Frickey endorses an even stricter application of the presumption against retroactivity for direct democracy.[88] If his rule were extended to hastily enacted statutes, it would provide a further argument against CERCLA's retroactivity.

Other cases have interpreted hastily enacted statutes more narrowly.[89] The direct democracy analogy supports these narrow interpretations. But this method has also been applied to hastily enacted statutes that many would want to read broadly. The premise that "statutes formulated in troubled times and enacted in haste are to be interpreted broadly only with caution"[90] is one which fits with the general approach to direct democracy advocated by

87. United States v. Olin Corp., 927 F. Supp. 1502 (S.D. Ala. 1996) (holding that CERCLA could not overcome the presumption against retroactivity stated in Landgraf v. USI Film Products, 511 U.S. 244 (1994), *rev'd*, 107 F.3d 1506 (11th Cir. 1997)).

88. *See* Frickey, *supra* note 1, at 522.

89. *See, e.g.*, Lynch v. Household Finance Corp., 405 U.S. 538, 548 (1972) (concluding that Congress did not intend to narrow the reach of a jurisdictional statute in a subsequent statute that was "rather hastily passed" with "very little discussion . . . before its enactment"); St. Joe Paper Co. v. Atlantic Coast Line R.R. Co., 347 U.S. 298, 306 (1954) (indicating that a bankruptcy statute could have implicitly empowered the Interstate Commerce Commission to consolidate railroads because it was "an emergency statute hurriedly enacted with scarcely any debate"); Fort Smith & W. R.R. Co., 253 U.S. 206, 208 (1920) (noting that the Adamson Law "was enacted in haste to meet an emergency, and the general language necessary to satisfy the demands of the men need not be taken to go further than the emergency required or to have been intended to make trouble rather than to allay it"); United States v. Pretlow, 779 F. Supp. 758, 764 (D.N.J. 1991) (refusing to read the appellate review provisions of the hastily enacted federal death penalty statute narrowly because a constitutional issue would result from doing so). Judge Posner has defended this approach:

> Statutes are drafted in haste and sometimes carelessly, by busy legislators concerned with a particular problem but also concerned not to draft their statute so narrowly that it opens gaping loopholes. When they use general language they create a potential for application to situations unforeseen by them and remote from their purposes, and then it is the task of courts by imaginative interpretation to keep the statute within reasonable bounds . . . .

McMunn v. Hertz Equip. Rental Corp., 791 F.2d 88, 93 (7th Cir. 1986).

90. Byrd v. Sexton, 277 F.2d 418, 427 (8th Cir. 1960).

Frickey, Schacter, and Eule.[91] Yet that statement comes from an appellate court opinion interpreting sections 1983 and 1985 of the post-Civil War civil rights acts. The opinion quotes statements to the same effect that appeared in a trilogy of Supreme Court decisions. The Court characterized the civil rights acts as "loosely and blindly drafted,"[92] the result of "[s]trong post-war feeling [which] caused inadequate deliberation and led to loose and careless phrasing of laws relating to the new political issues,"[93] and "passed by a partisan vote in a highly inflamed atmosphere."[94] And the appellate court opinion counseling that "statutes formulated in troubled times and enacted in haste are to be interpreted broadly only with caution" was not authored by someone hostile to civil rights: Harry Blackmun wrote those words while he served on the Eighth Circuit.[95]

These are the same kinds of failings that lead Frickey to propose a different interpretive regime for direct democracy. But the way in which Frickey (and Schacter) address direct democracy is almost the exact opposite of the way in which the courts have addressed hastily enacted statutes. Frickey's call for a narrow reading of direct democracy neglects the implications of the way in which many courts have read statutes that were hastily enacted by the legislature.

C. Reconciling Direct Democracy and Hastily Enacted Statutes

The similar concerns that animate the interpretation of direct democracy and certain hastily passed legislative enactments could justify the creation of interpretive rules that apply to both kinds of laws. Even the problem of defining "hastily enacted" statutes is not insuperable. Several categories are available to identify many such statutes by proxy. For example, statutes passed on the last day of the legislative session could be subject to special interpretive rules. Indeed, both Judge Easterbrook and Judge Posner have hinted that

91. *See* Frickey, *supra* note 1; Schacter, *supra* note 10; Eule, *supra* note 9.

92. Stefanelli v. Minard, 342 U.S. 117, 121 (1951).

93. United States v. Williams, 341 U.S. 70, 74 (1950).

94. Collins v. Hardyman, 341 U.S. 651, 657 (1951); *see also* Koch v. Zuieback, 194 F. Supp. 651, 657 (S.D. Cal. 1961), *aff'd* 316 F.2d 1 (9th Cir. 1963) ("The various provisions of the Civil Rights Act were adopted during the turbulent days of the Reconstruction Period, at which time their obviously loose and careless phraseology were scarcely considered by an inflamed and highly partisan legislature.").

95. *Byrd*, 277 F.2d at 427.

such statutes should be read differently from other statutes.[96] Similarly, statutes passed by lame duck legislatures could be subject to special interpretive rules. CERCLA is one such example.[97] So, too, is the immigration statute at issue in *Holy Trinity*, which was passed in the closing days of a lame duck congressional session.[98] Frickey's suggestion that the tension between direct democracy and the republican form of government clause justifies special interpretive rules could be echoed by the tension between lame duck statutes and the Twentieth Amendment.[99]

What those special interpretive rules might be remains unanswered by the cases involving hastily enacted statutes. Four very different approaches emerge as options. First, all statutes enacted by direct democracy and statutes hastily enacted by the legislature could be interpreted narrowly, so that they would apply in as few instances as possible. Frickey proposes this as his second general rule for direct democracy,[100] and Judge Blackmun's decision construing the Civil Rights Act follows the same track.[101]

Second, all such statutes could be interpreted broadly, in response to the urgency that provoked the legislature to act so quickly or that compelled the people to act for themselves. Toward this end, several courts have suggested that direct democracy may be entitled to even more deference than legislative enactments.[102]

Third, such statutes could be interpreted to fulfill their general purposes. A statute could be read at every turn to help solve the problem that the people or the legislature had in mind. The many CERCLA decisions mandating that the courts fulfill Congress' general objective to clean up hazardous waste exemplify this approach.[103]

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96. *See* Herrmann v. Cencom Cable Assocs., Inc., 978 F.2d 978, 980 (7th Cir. 1992) (Easterbrook, J.) (noting that Congress passed the Omnibus Budget Reconciliation Act of 1989 on the last day that it met that year); Friedrich v. City of Chicago, 888 F.2d 511, 514 (7th Cir. 1989) (Posner, J.) (noting that "the presence of haste here is suggested by the fact that [the Civil Rights Attorney's Fees Awards Act of 1976] was passed on the last day of the Ninety-Fourth Congress"), *vacated for further consideration*, 499 U.S. 933 (1991).

97. *See supra* note 83.

98. Holy Trinity Church v. United States, 143 U.S. 457 (1892).

99. *See* John Copeland Nagle, *A Twentieth Amendment Parable*, 72 N.Y.U. L. REV. 470 (1997).

100. Frickey, *supra* note 1, at Part I.

101. *See* Byrd v. Sexton, 277 F.2d 418, 427 (8th Cir. 1960).

102. Schacter, *supra* note 10, at 119 n.49 (citing cases indicating that direct democracy should be accorded great deference).

103. *See, e.g.*, Beazer East, Inc. v. MeadCorp., 34 F.3d 206, 213 (3d Cir. 1994) *cert. denied*, 514 U.S. 1065 (1995); Westfarm Assocs. Ltd. Partnership v. Washington

Fourth, such statutes could be interpreted according to their specific intent. The courts could try to figure out what the people or the legislature intended in this specific situation and construe the statute accordingly. This approach is most faithful to the originalist concept of legislative intent, but the problems of ascertaining such intent are compounded when the legislature has acted quickly or the people have acted via an initiative.

The two more individualized approaches are preferable to the broad general rules applicable to all statutes resulting from direct democracy or hasty legislative action. Unlike the first two general rules, the latter two more specific rules recognize that not all statutes produced by direct democracy are alike, nor are all hurried legislative enactments alike. Instead, the special interpretive challenges resulting from the ambiguous language often used in such statutes can be confronted by considering, on a case-by-case basis, the amount of deliberation each enactment received. For example, if the people or the legislature actually debated a constitutional issue prior to voting on an initiative or a statute, then reliance on the "doubts canon" is misplaced. Evidence of actual deliberation would undercut a presumption that the people or the legislature did not intend to raise a constitutional question.

The upshot is that there is no single rule for the interpretation of hastily enacted statutes. Nor, it appears, should there be. To require a narrow interpretation of civil rights statutes like sections 1983 and 1985, or environmental statutes like CERCLA, denies the legislature the fruits of legislation it managed to enact. To the extent such statutes raise constitutional concerns, the existing canons described by Frickey and discussed above offer ample opportunity to police the borderline between the hurried products of the legislature and the ultimate commands of the Constitution. The lack of deliberation may make such borderline judgments more likely, but the existing rules for governing that borderline promise to protect the legislature, the people, and the Constitution that governs them both.

Suburban Sanitary Comm'n, 66 F.3d 669, 679 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 1318 (1996).