DIRECTLY CONSTITUTIONAL STATUTORY INTERPRETATION

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The last half century of American statutory interpretation theory grew out of a U.S. Constitution that never prescribes how to read statutes. This has compelled the mistaken conclusion that constitutional law can have little to say about two of the most fundamental questions in statutory interpretation: whether courts should be able to treat interpretive methods as binding precedents, and whether interpretive methods need to reflect the customs and beliefs of "the people" to be democratically legitimate. But while the U.S. Constitution never directly prescribes how to read statutes, astoundingly twelve state constitutions do. Those state constitutions contain what I call "directly interpretive constitutional provisions"—constitutional provisions that on their own terms supply a mandatory method of statutory interpretation.

In this Article, I gather these overlooked and under-theorized provisions together for the first time, present original historical case studies on the surprising reasons they came into being, and offer the first sustained analysis of how they have been used in practice. In uncovering this neglected category of statutory interpretation law, this Article demonstrates how two critical assumptions of existing statutory interpretation theories derived from the U.S. Constitution—that interpretive methods are justifiable on democratic grounds merely if they reflect a proper balance of power between government institutions and that only weak and sub-constitutional sources of law are available to ground interpretive methodology as binding precedent—are poor fits for state-level statutory interpretation. By developing an alternative account of a directly democratic and constitutional foundation at the state level, this Article both introduces a new framework for understanding state statutory interpretation on its own terms and provides a counterpoint against which we can measure the relative democratic legitimacy and legality of federal statutory interpretation methodology.

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Most fundamentally, this Article contends that in most states the democratic and constitutional bases of statutory interpretation methods ultimately rest not on the institutional dialogue among courts, legislatures, and executives (as may be the case with federal constitutional law), but instead on popular sovereignty—on the public's ongoing formal participation through elections in directly approving, disapproving, or deferring to government on those methods. As this Article further argues, people have exercised their sovereignty in limited yet surprising ways that reveal what I call a "democratic division of interpretive labor"—a formally legitimized allocation of statutory interpretation functions between government and civil society.

These insights lend themselves to three practical upshots. First, courts applying these constitutional provisions should not treat the required methods as if they obeyed the same rules as judge-made canons of interpretation. Second, state constitutions' distinctive commitments to popular sovereignty and to limiting legislative plenary power provide new grounds for why statutory interpretation methodology should differ between the state and federal levels; meanwhile, the fact that only some states allow citizens to unilaterally amend their constitutions provides a new reason why statutory interpretation methodology should differ from state to state. Finally, the political infeasibility of constitutionally overriding a given interpretive method should be a factor against judicial entrenchment of that method as precedent.

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Introduction

The standard model of American statutory interpretation theory rests on a distorted framework of constitutional law. It revolves around one constitution—the U.S. Constitution—that never directly mentions statutory interpretation and that, as a result, can give rise to methods of statutory interpretation only *indirectly*.[1] The U.S. Constitution doesn't

[1] Three interlinked genres of indirect constitutional theories of statutory interpretation have structured the field of Legislation so far.

One genre focuses on the U.S. Constitution's grant of powers to different branches as the ultimate reference point. *See, e.g.*, John F. Manning, *Constitutional Structure and Statutory Formalism*, 66 U. Chi. L. Rev. 685, 690–91 (1999) [hereinafter Manning, *Constitutional Structure*] (characterizing statutory interpretation theory as rooted in the question of whether "federal courts themselves have inherent authority to adopt and apply . . . interpretive norms in the exercise of 'the judicial Power'"); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2120 (2016) (reviewing Robert A. Katzmann, Judging Statutes (2014)) ("When courts apply doctrines that allow them to rewrite the laws (in effect), they are encroaching on the legislature's Article I power."); *cf.* Ryan D. Doerfler & Samuel Moyn, *After Courts: Democratizing Statutory Law*, 123 Mich. L. Rev. 867, 907–14 (2025) (challenging the hegemony of Article III in statutory interpretation theory).

Another genre describes the U.S. Constitution as creating cross-institutional relationships that generate norms that must guide statutory interpretation. *See, e.g.*, Victoria F. Nourse, *The Constitution and Legislative History*, 17 U. Pa. J. Const. L. 313, 316–18 (2014) (defending the use of legislative history for statutory interpretation on structural constitutional grounds); Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 Harv. L. Rev. 593, 593–94 (1995) (arguing that a judicial interpreter "must adopt—at least implicitly—a theory about its own role by . . . taking an institutional stance in relation to the legislature"); Alexander Zhang, *Legislative Statutory Interpretation*, 99 N.Y.U. L. Rev., 950, 1023 (2024) (questioning the idea of strict separation

say that we should use particular rules of thumb to interpret legislation. It doesn't have clauses telling us to be "textualists."[2] It simply grants powers to government institutions,[3] designs relationships among branches,[4] and provides rights.[5] These provisions give rise to specific interpretive methods through layers of inference.[6]

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of powers as a basis for statutory interpretation theory). Insofar as statutory interpretation theories have arisen out of particular criteria of legal validity, see Nina Varsava, *Derivative Recognition and Intersystemic Interpretation*, 30 LEGAL THEORY 170, 184 (2024) (discussing "fictional intent" and "ordinary public meaning" as some of the "many conceivable criteria of validity"), and especially out of the U.S. Constitution's requirement that bills be passed by both houses of Congress and be presented to the President in order to become "law," *see* U.S. CONST. art. I, § 7, those theories have typically been subsumed under broader theories about institutional relationships, *see, e.g.*, John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 695 (1997) [hereinafter Manning, *Textualism*] (arguing that textualism "purports to operate as a nondelegation doctrine" partly because of textualism's tenet that "crediting *unenacted* expressions of legislative intent contravenes the constitutional requirement of bicameralism and presentment").

A final genre of constitutional theory posits that the U.S. Constitution may permit or encourage the pursuit of particular policy goals, which themselves may inform an interpreter's choice of statutory interpretation methods. *See, e.g.*, William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1019–36 (1989) (contending that "[p]ublic values developed from the Constitution have the greatest effect on statutory interpretation").

Even scholars most closely associated with centering constitutional law in statutory interpretation theories have focused on constitutional law's indirect role. *See* Manning, *Constitutional Structure*, *supra*, at 692–93 ("[N]o constitutional provision expressly speaks to statutory interpretation."); Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 839 (1991) ("[T]he requirement that methodological commitment be grounded in constitutional argument only moves the conversation back one more step. We must then argue about how to interpret the Constitution, or more broadly, how to understand the constitutional order.").

[2] *See* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 76 (2006) ("Our sketchy Constitution . . . cannot plausibly be read, on any interpretive approach, to dictate rules of statutory interpretation, either through express text or through structural inference."). Even proponents of textualist theories acknowledge as much. *See, e.g.*, Manning, *Constitutional Structure*, *supra* note 1, at 692–93 ("None of this is to suggest that inferences from constitutional structure will always provide clear answers to questions of interpretive design.").

[3] *See* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress . . . ."); *id.* art. II, § 1 ("The executive Power shall be vested in a President . . . ."); *id.* art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

[4] *See, e.g.*, *id.* art. I, § 7 (requiring bills to be "presented to the President" before they can become law); *id.* art. II, § 2 (requiring the President to receive the "Advice and Consent of the Senate" for certain appointments).

[5] *See, e.g.*, *id*. amend. V (providing a right to due process).

[6] *See* discussion *supra* note 1. *See generally* Glen Staszewski, *The Dumbing Down of Statutory Interpretation*, 95 B.U. L. REV. 209, 232–34 (2015) (describing forms of constitutional inference that are prominent in statutory interpretation scholarship). For example, although Article I doesn't explicitly prohibit judges from using legislative debates to interpret statutes, it imposes restrictions on lawmaking that, according to one theory, would be undermined if judges relied on legislative debates. *See* Manning, *Textualism*,

Efforts to make sense of the Constitution's silence have so preoccupied scholars hoping to ground statutory interpretation in an ultimate legal basis that a limited view of constitutional law's relevance has become taken for granted.[7] On this view, constitutional law has little to say about two fundamental issues in statutory interpretation. The first is the extent to which the democratic legitimacy of an interpretive method depends on how closely it reflects the actions, customs, and beliefs of the people—lest statutory interpretation lack a democratic basis.[8] As the logic goes, the Constitution represents the sovereign people's complete delegation of authority over statutory interpretation to government institutions,[9] so interpretive methods are democratically legitimate when they reflect a constitutionally faithful dialogue among government institutions[10]—not when they reflect the real-life beliefs

supra note 1, at 676 ("[A]uthoritative legislative history makes it far too attractive for legislators to bypass the constitutionally prescribed process of bicameralism and presentment.").

7 *See* discussion *infra* Section I.A.

8 On the "enduring problem of legitimacy in statutory interpretation," see Schacter, *supra* note 1, at 593; Karen M. Gebbia-Pinetti, *Statutory Interpretation, Democratic Legitimacy and Legal-System Values*, 21 Seton Hall Legis. J. 233, 256–315, 345 (1997) (examining the relationship between statutory interpretation and democratic legitimacy). Another way to understand the issue is in terms of the so-called "counter-majoritarian difficulty" that unelected federal judges have the power to undermine the will of majorities in society. *See* Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16–17 (1962). On the counter-majoritarian difficulty as applied to statutory interpretation, see Glen Staszewski, *Statutory Interpretation as Contestatory Democracy*, 55 Wm. & Mary L. Rev. 221, 225 (2013). These concerns have manifested through debates about specific kinds of interpretive methods that aim to capture "ordinary meaning." *See, e.g.*, Anya Bernstein, *Democratizing Interpretation*, 60 Wm. & Mary L. Rev. 435, 462–65 (2018) (distinguishing ordinary from statutory meaning); Alexander Zhang, *Externalist Statutory Interpretation*, 134 Yale L.J. 447, 524–29 (2024) ("[I]f one believes that 'ordinary meaning' refers to how an 'ordinary' person would interpret a statute, then the 'ordinary meaning' of a statute was often the same thing as the legislative intent behind that statute.").

9 *See, e.g.*, Philip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1 N.Y.U. J. Legis. & Pub. Pol'y 105, 155 (1997) (arguing that the Constitution's "recourse to the sovereignty of the people . . . nonetheless used a republican structure—one of representatives situated such that they might deliberate in the public interest—to effectuate the linkage between the Constitution and the people"); William N. Eskridge, Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. Rev. 1718, 1729–30 (2021) ("Dismissing the republican deliberations of the production economy [of statutes] and focusing only on the consumer or citizen viewpoint disrespects our constitutional roots and distorts our representative democracy.").

10 *See* James J. Brudney & Ethan J. Leib, *Statutory Interpretation as "Interbranch Dialogue"?*, 66 UCLA L. Rev. 346, 348 (2019) ("'[M]uch interpretive theory and doctrine' in the field of statutory interpretation is predicated on 'interpretive dialogue between courts and [the legislative branch].'") (second alteration in original); *id.* at 349 ("[D]ebate about interbranch dialogue is often preoccupied with the hoary 'countermajoritarian difficulty' that structures so much thinking about constitutional law.").

and choices of the majority of the people.[11] Closely related is a second issue: whether courts should be able to treat interpretive methods as binding precedents rather than merely as discretionary principles—lest statutory interpretation lack consensus and predictability.[12]

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[11] *See, e.g.*, Anya Bernstein & Glen Staszewski, *Judicial Populism*, 106 MINN. L. REV. 283, 291–93, 310–18 (2021) (criticizing methods of statutory interpretation that claim democratic legitimacy by professing to reflect the desires of "the people"). *But see* Alexander Zhang, *Fair Notice Is a Sociopolitical Choice*, 74 DUKE L.J. 1209, 1252–77 (2025) (describing laypeople's lived-experience preferences for fair notice of legislation); Zhang, *supra* note 8, at 454–56 (discussing the relevance of people's day-to-day choices). To the extent that judges have appealed to democracy as a justification for focusing on "ordinary meaning" in statutory interpretation cases, they have typically failed to tie that appeal to a constitutional basis even though those appeals assume a "normative view about our constitutional democracy." Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Progressive Textualism*, 110 GEO. L.J. 1437, 1453 (2022).

[12] Abbe Gluck has framed the fundamentality and centrality of this issue nicely: "[T]he absence of methodological stare decisis enables the interminable repetition of what are essentially the same methodological debates." Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1766 (2010) [hereinafter Gluck, *States*].

One set of stakes concerns rule-of-law benefits that may result if we treat interpretive methodology as law. On the supposed benefits, see Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1867 (2008) ("[G]iving stare decisis effect to doctrines of statutory interpretation reaps rule-of-law and coordination benefits that are unique to the statutory interpretation doctrine context."); Gluck, *States*, *supra* note 12, at 1848–61 (articulating several benefits to methodological consistency, including predictability and expressive benefits). For contrasting views, see Evan J. Criddle & Glen Staszewski, *Against Methodological Stare Decisis*, 102 GEO. L.J. 1573, 1575–76, 1590–95 (2014) (contending that "the value of extending stare decisis effect to interpretive methodology is unproven"); Ethan J. Leib & Michael Serota, *The Costs of Consensus in Statutory Interpretation*, 120 YALE L.J. ONLINE 47, 48 (2010), https://yalelawjournal.org/forum/the-costs-of-consensus-in-statutory-construction [https://perma.cc/RWH4-MCSS] (arguing that methodological consistency gives rise to significant costs, which detract from its normative desirability).

Another set of stakes is more practical: whether federal courts applying state law must apply the respective states' methods of interpretation under *Erie*, as well as whether states applying other states' laws must apply those other states' methods of interpretation. *See* Nina Varsava, *Stare Decisis and Intersystemic Adjudication*, 97 NOTRE DAME L. REV. 1207, 1207–08 (2022) (presenting a framework for assessing when interpretive methodologies are binding in intersystemic contexts); Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as 'Law' and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1901 (2011) [hereinafter Gluck, *Intersystemic*] (investigating why "federal courts do not seem to think of statutory interpretation methodology as 'law' in the first place, much less as law subject to *Erie*"); Zachary B. Pohlman, *State Statutory Interpretation and Horizontal Choice of Law*, 70 U. KAN. L. REV. 505, 505 (2022) ("[S]tates should subject their choice of statutory interpretation methodology to their own horizontal choice-of-law regimes.").

Debate also exists as to the facts on the ground—whether courts currently treat interpretive methods as law or not. *See* Aaron-Andrew P. Bruhl, *Eager to Follow: Methodological Precedent in Statutory Interpretation*, 99 N.C. L. REV. 101, 105–07 (2020). More recently, scholars have questioned the actual source of authority that allows interpretive methodology to become "law." *See* Tara Leigh Grove, *The Power to Impose Method*, 136 YALE L.J. (forthcoming 2026) (manuscript at 1) (on file with the New York

As the logic goes, we must look downstream of constitutional law, to sources like statutes and common law, for something legal to ground statutory interpretation methodology.[13] Alas, the Constitution is silent.

But while the U.S. Constitution never directly prescribes how to read statutes, astoundingly twelve state constitutions do.[14] These state constitutions contain what I call "directly interpretive constitutional provisions," which are constitutional provisions that *on their own terms* supply a mandatory method of statutory interpretation.[15] Florida's Constitution, for example, prohibits state courts from "defer[ring] to an administrative agency's interpretation."[16] Multiple state constitutions impose rules on how to construe statutes dealing with specific topics like taxation[17] and public access to records.[18] Missouri's Constitution, for example, stipulates that "all state and local laws . . . shall be construed in favor of the conduct of stem cell research and the provision of stem cell therapies and cures."[19] Such provisions arise out of distinctive features of state constitutions that scholars of statutory interpretation have largely neglected: State constitutions commit themselves to a strong concept of majority-based popular sovereignty,[20] serve as limitations

University Law Review) (arguing that "the [Supreme] Court has some, but only limited, constitutional authority to establish methodological precedents").

13 *See, e.g.*, Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2088 (2002) (discussing legislatively enacted rules of interpretation at the federal level); Gluck, *States*, *supra* note 12, at 1754 (discussing legislatively enacted rules of interpretation at the state level); Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2203–04 (2002) (same); Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation:* Erie *for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 757 (2013) [hereinafter Gluck, *Federal Common Law*] ("Exploring this possibility—that statutory interpretation methodology is some kind of judge-made law—allows for some significant doctrinal and theoretical interventions.").

14 *See* sources cited *infra* notes 120–41. In addition to these twelve constitutions, three others arguably also directly generate methods of statutory interpretation, as they require statutes to avoid the use of technical terms to the extent "practicable" and thus can be read as offering guidance on when to focus on a statute's "ordinary" instead of "technical" meaning. *See* IDAHO CONST. art. III, § 17 (West, Westlaw current through Chapter 10 of the Second Regular Session of the Sixty-eighth Idaho Legislature); HAW. CONST. art. XVI, § 13 (West, Westlaw through Act 89 of the 2026 Regular Session); IND. CONST. art. IV, § 20 (West, Westlaw through Mar. 15, 2026); *see also* discussion *infra* Section II.B.

15 For a more precise definition and taxonomy, see discussion *infra* Section II.A.

16 FLA. CONST. art. V, § 21 (West, Westlaw through Nov. 3, 2020, General Election).

17 VA. CONST. art. X, § 6(f) (West, Westlaw through the 2026 Regular Session).

18 CAL. CONST. art. I, § 3(b)(2) (West, Westlaw through Chapter 11 of 2026 Regular Session).

19 MO. CONST. art. III, § 38(d)(7) (Vernon, Westlaw through Nov. 5, 2024 General Election).

20 *See* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 881–89 (2021) (arguing that the "clearest and most longstanding commitment of state constitutions is to popular sovereignty" and that, "[t]o

on legislatures' plenary powers,[21] and are more easily and frequently amended.[22] In all states except Delaware voters must approve each constitutional change,[23] and indeed all existing directly interpretive constitutional provisions have been approved by voters.[24]

This Article gathers these overlooked and under-theorized provisions together for the first time,[25] presents original historical case studies on the surprising reasons they came into being, and offers the first sustained analysis of how they have been used in practice. In uncovering this neglected category of statutory interpretation *law*, this Article demonstrates how two critical assumptions of existing statutory interpretation theories—that interpretive methods are justifiable on democratic grounds merely if they reflect a proper balance of power between government institutions and that only weak and sub-constitutional sources of law can allow interpretive methods to become binding precedent—are poor fits for state-level statutory

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implement the commitment to popular sovereignty, state constitutions generally understand a majority to speak for the people").

[21] *See* G. Alan Tarr, Understanding State Constitutions 7–8, 16 (1998) (describing how state legislative powers are "considered to be plenary" and how, therefore, "the fundamental interpretive issue under state constitutions is the implied limitations (if any) on state legislative power").

[22] *See* John Dinan, State Constitutional Politics: Governing by Amendment in the American States 3 (2018); Tarr, *supra* note 21, at 17.

[23] Jessica Bulman-Pozen & Miriam Seifter, *The Right to Amend State Constitutions*, 133 Yale L.J.F. 191, 196 (2023).

[24] *See* discussion *infra* Section II.B.

[25] There is some scholarship that acknowledges the existence of individual directly interpretive constitutional provisions, but none of this scholarship aims to draw broader lessons about statutory interpretation, and all of this scholarship is isolated by doctrinal area. On local government home rule, see Note, *To Save a City: A Localist Canon of Construction*, 136 Harv. L. Rev. 1200, 1210 (2023); Roderick M. Hills, Jr., *Hydrofracking and Home Rule: Defending and Defining an Anti-Preemption Canon of Statutory Construction in New York*, 77 Alb. L. Rev. 647, 648, 653–58 (2014) (discussing the liberal construction of New York's Municipal Home Rule Law). For brief discussions of California's constitutional provision requiring statutes to be broadly construed in favor of people's right of access to public records, see Joseph R. Grodin, *Freedom of Expression Under the California Constitution*, 6 Cal. Legal Hist. 187, 219 n.151 (2011); Karen Petroski, *Lessons for Academic Freedom Law: The California Approach to University Autonomy and Accountability*, 32 J.C. & U.L. 149, 193–94, 203–04 (2005). On Florida's anti-deference constitutional provision, see, for example, Christopher J. Walker & Neena Menon, Chevron*'s 51 Imperfect Solutions*, 2024 Wis. L. Rev. 1585, 1588 n.17; Glen Staszewski, *Four Ways to Deconstruct Regulation and Undermine Democracy in the States*, 66 Wm. & Mary L. Rev. 1215, 1236–43 (2025); Clay Henderson, *The Greening of Florida's Constitution*, 49 Stetson L. Rev. 575, 615–16 (2020). On Maryland's single-title rule, see Carl N. Everstine, *Titles of Legislative Acts*, 9 Md. L. Rev. 197 (1948); M. Albert Figinski, *Maryland's Constitutional One-Subject Rule: Neither a Dead Letter Nor an Undue Restriction*, 27 U. Balt. L. Rev. 363, 363 n.1 (1998). On Virginia's rule regarding tax exemptions, see Matthew E. Morse, *A Case Study in the Interpretation and Construction of Virginia Tax Statutes: Does the Business License Tax Exemption in Section 58.1-3703 Still Apply to Motor Carriers?*, 30 Regent U.L. Rev. 173, 193–95 (2017).

interpretation. By developing an alternative account of a *directly* democratic and constitutional foundation at the state level, this Article both introduces a new framework for understanding state statutory interpretation on its own terms and provides a counterpoint against which we can measure the *relative* democratic legitimacy and legality of federal statutory interpretation methods.

Most fundamentally, this Article contends that in most states the democratic and constitutional bases of statutory interpretation methods ultimately rest not on the institutional dialogue among courts, legislatures, and executives (as may be the case with federal statutory interpretation), but instead on popular sovereignty—on the far-from-powerless public's *ongoing* formal participation through elections in directly approving, disapproving, or deferring to government on those methods.[26] When voters ratify directly interpretive constitutional provisions, they create a supremely authoritative and positively enacted law of statutory interpretation. The application of these provisions subordinates and transforms the functions of non-constitutionalized interpretive methods while converting the task of statutory interpretation into a task of *directly constitutional* construction.[27] When voters don't ratify such provisions, they retain their authority to have the final say—to intervene in and even override existing methods of statutory interpretation.

As this Article further contends, people have exercised their sovereignty in limited yet surprising ways that reveal what I call a "democratic division of interpretive labor"—a formally legitimized allocation of statutory interpretation functions between government and civil society.[28] This Article's case studies show that real-world political dynamics have channeled public intervention in specific ways and limited the kinds of interpretive methods that have been constitutionalized.[29] Due to formal constraints on constitutional amendment and the importance of interest group involvement, some kinds of interpretive rules, especially trans-substantive ones with abstract justifications, face more obstacles than others, namely interpretive methods that advance specific substantive policy goals.[30]

These insights—the democratic division of interpretive labor and the popular-sovereignty basis of statutory interpretation—lend themselves to three practical upshots.

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26 *See* discussion *infra* Section I.B, Part IV.
27 *See* discussion *infra* Section III.B.
28 *See* discussion *infra* Section IV.A.
29 *See* discussion *infra* Section IV.B.
30 *See* discussion *infra* Part II.

First, courts applying these constitutional provisions should not treat the required methods as if they obey the same rules as judge-made canons of interpretation, for judges are actually engaging in constitutional construction.

Second, the fact that state constitutions are distinctively committed to popular sovereignty and distinctively act as limitations on legislative power provides a new reason why statutory interpretation methodology should differ between the state and federal levels. In addition, the fact that only some states allow citizens to unilaterally amend their constitutions offers an additional ground for why methodology should vary from state to state.

Third, these insights provide a new normative reason for why courts shouldn't treat certain statutory interpretation methods as having precedential, law-like effect. As this Article argues, the judicial entrenchment of those statutory interpretation methods that take forms ill-suited for constitutional amendment processes (and thus take forms unlikely to be constitutionally overridden) would undermine the ultimate authority of the public to supervise and control statutory interpretation methodology.[31] And, I'll suggest, the only methods that clearly avoid this difficulty at the moment are substantive canons of statutory interpretation, whose policy-specific nature has proven capable of mobilizing proponents and voters.[32]

Part I of this Article lays the groundwork for these claims. Through a new critical intellectual history of the field of Legislation, it diagnoses how the gravitational pull of federal constitutional law has distorted the space of statutory interpretation theory.[33] It then contends that we need a clean slate for the states, one that does not take the U.S. Constitution as the starting point and instead emphasizes the fundamentally distinctive nature of popular sovereignty and amendment in state constitutions.[34]

Part II excavates what people have actually chosen on that slate: the provisions people have proposed and ratified, the processes of constitutional amendment that were used, and the political dynamics that were at play.[35] It draws on original historical evidence—political advertisements, letters to newspaper editors, constitutional convention debates, voter guides, and more—to offer thick descriptions of these choices.[36] And it reveals surprising motivations: attempts to

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31 *See* discussion *infra* Section IV.B.
32 *See id.*
33 *See* discussion *infra* Section I.A.
34 *See* discussion *infra* Section I.B.
35 *See* discussion *infra* Section II.B.
36 *See* discussion *infra* Section II.C.

solve societal collective-action problems, preempt state government from interference in local affairs, and constrain agencies and future legislatures.[37]

Through close readings of judicial opinions that apply these provisions, Part III reveals a deep tension caused by the conversion of statutory interpretation into directly constitutional law.[38] On the one hand, these provisions represent voter-approved restraints on government institutions and are the most supreme form of interpretive methodology as law. They can lead judges to avoid subjective interest-balancing tests, undermine the enforcement of legislative intent, and subordinate judge-made canons of interpretation.[39] On the other hand, the provisions themselves may require interpretation and so can leave wiggle room for judges to undermine voter preferences. Judges can, and have, avoided the application of these provisions by assuming that they are subordinate to judge-made canons of interpretation that limit their use.[40] Moving from an analytical to a normative register, Part III criticizes how judges have failed to justify these moves on constitutional grounds.

Part IV argues that, notwithstanding the wiggle room that judges may have, directly interpretive constitutional provisions reveal a democratic division of interpretive labor over which members of the public have final authority.[41] It explains how certain political dynamics and formal constraints have limited the kinds of divisions of interpretive labor that are politically feasible,[42] it explains the relationship between voter silence and the democratic legitimacy of a given statutory interpretation method, and it argues that these should influence which statutory interpretation methods we think deserve precedential effect.[43]

I
Constitutional Law's Blinding Horizon—and Beyond

The U.S. Constitution doesn't mention statutory interpretation. It does, however, contain provisions that scholars and judges have used to *infer* that certain methods and theories of statutory interpretation are permitted, prohibited, required, and preferable.[44] How did we get from

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37 *See id.*

38 *See* discussion *infra* Part III.

39 *See* discussion *infra* Section III.B.

40 *See* discussion *infra* Section III.A.

41 *See* discussion *infra* Section IV.A.

42 *See id.*

43 *See* discussion *infra* Section IV.B.

44 These include *institutional-power* provisions—found in Articles I, II, and III—which create and grant powers to each branch of the federal government. *See, e.g.*, Manning, *Textualism*, *supra* note 1, at 696 (discussing Article-I-based theories of statutory

these mute federal constitutional provisions to the elaborate theories of statutory interpretation that now dominate the field of Legislation? What have we lost simply by starting from those federal premises? If we instead foregrounded the fundamentally different natures of state constitutions, what new possibilities emerge?

The following answers to these questions provide a baseline for understanding the significance of the directly interpretive constitutional law that has manifested on the ground, which Parts II through IV will address.

A. Federal Constitutional Law's Stranglehold

Descending from the 1980s resurgence of theorization about statutory interpretation by professors-turned-federal-judges such as Guido Calabresi, Frank Easterbrook, and Antonin Scalia, the current iteration of the field of Legislation emerged from a preoccupation with how federal judges should interpret statutes.[45] Were federal judges supposed to be "strict constructionists" who had to assume that if Congress wanted a law to mean something then Congress would have said so explicitly?[46] Or were federal judges empowered to be collaborative partners of Congress, able to construe statutes according to the perceived goals of the statutes?[47] Theorists who asked such questions looked for guidance from linguistics,[48] political

interpretation); Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1, 4–6 (2004) (making claims about statutory interpretation theory based on Article II); William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990, 992 (2001) (making claims about statutory interpretation theory based on Article III). They include *structural-relationship* provisions, which position different branches as having certain roles in relationship with other branches, or which define the relationship between federal and state governments. *See* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 26–27 (2006) (describing textualism's basis in constitutional arguments about structure); Manning, *Constitutional Structure*, *supra* note 1, at 692–93 (discussing structural norms that ground statutory interpretation theory). They include *legal-validity* provisions, which lay out the conditions that must be met for something to be a valid "law." *See* Manning, *Textualism*, *supra* note 1, at 696–97 (discussing bicameralism and presentment requirements for legislation). And they include *individual-rights* provisions, such as provisions that provide people a right to due process. *See* Zhang, *supra* note 8, at 1212–15 (discussing due-process bases for statutory interpretation methods that invoke "fair notice").

45 *See* Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 245, 256 n.69 (1992).

46 *See* Richard A. Posner, *Statutory Interpretation–in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 821–22 (1983).

47 *See* William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 330–31 (1989).

48 *See, e.g.*, M.B.W. Sinclair, *Law and Language: The Role of Pragmatics in Statutory Interpretation*, 46 U. PITT. L. REV. 373 (1985) (drawing on the work of linguist H.P. Grice).

science,[49] and, ultimately, to the terse U.S. Constitution.[50] It was Article III of the U.S. Constitution, after all, that defined the powers of the federal judiciary.[51]

Indirect constitutional justifications therefore emerged at both the "weak judge" and "strong judge" ends of the spectrum. At the weak end, advocates of an approach that limited judges' task to determining the plain meanings of statutory texts (what we now broadly call "textualism") found constitutional grounding in structural ideas about separation of powers and in jurisprudential ideas about what makes a statute a binding *law*.[52] The early 1980s' field-revitalizing writings of Judge Frank Easterbrook laid the foundations for a theory of textualism based on a limited judicial power under the U.S. Constitution.[53] Justice Antonin Scalia soon argued that judges should look only at statutory text because, under Article I, only the texts of statutes passed both chambers of Congress and were presented to the President.[54] Later scholars, like John Manning, then went a step further and developed justifications rooted in the idea that the Constitution constrains which powers can be delegated.[55]

Meanwhile, at the strong-judge end of the spectrum, early scholars also looked to structural provisions of the U.S. Constitution. In the 1980s, several landmark works of scholarship explored the idea of a flexible judicial power to interpret and "update" statutes.[56] But that

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[49] *See* Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 424 (1988) (discussing the influence of public choice theory and Arrow's Paradox on statutory interpretation theory).

[50] *See* Jerry Mashaw, *As if Republican Interpretation*, 97 YALE L.J. 1685, 1686 (1988) ("Any theory of statutory interpretation is at base a theory about constitutional law.").

[51] *See* U.S. CONST. art. III.

[52] *See* Molot, *supra* note 44, at 58.

[53] *See, e.g.*, Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983); Frickey, *supra* note 45, at 252–54 (discussing the influence of Easterbrook).

[54] *See* Thompson v. Thompson, 484 U.S. 174, 192 (1988) (Scalia, J., concurring) (arguing that legislative history documents are "frail substitutes" for bicameralism and presentment); Begier v. IRS, 496 U.S. 53, 68 (1990) (Scalia, J., concurring) ("Congress conveys its directions through the Statutes at Large, not in excerpts from the Congressional Record . . . ."); *see also* Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 273 (2020) (describing this history).

[55] *See* Manning, *Textualism*, *supra* note 1, at 675. According to Manning, "textualism should be understood as a means of implementing a central and increasingly well-settled element of the separation of powers—the [Article I] prohibition against legislative self-delegation." *Id.* at 675. As the argument went, the U.S. Constitution prohibits Congress from delegating lawmaking power to a subset of itself such as a committee or individual lawmaker, and so we can't look at the work products and speech acts of those subsets when we interpret statutes (which the entire Congress enacted). *See id.* at 706–07.

[56] The tradition took inspiration first from the historicist concerns of Guido Calabresi's field-clearing *A Common Law for the Age of Statutes* in 1982, which asserted that courts can and should decide "when a retentionist or a revisionist bias is appropriately applied to an

raised the question: Where was the ultimate source of *law* that could authorize judges to take on such a role? The answer identified by early advocates such as William Eskridge, who in 1987 began championing a theory of interpreting statutes "in light of their present societal, political, and legal context,"[57] was Article III's provision for "judicial Power."[58]

By the turn of the twenty-first century, decades of attempts to declare a superior chain of inference from the U.S. Constitution had allowed the field of Legislation to flourish through the inevitable endlessness of that task. What was merely an ethereal intellectual tendency became concretely institutionalized as common sense through a growing recognition among law schools that we now live in an "age of statutes."[59] That recognition resulted in law schools requiring students to enroll in Legislation courses,[60] which reinscribed and perpetuated the dominant frame of constitutional thinking in an unintended way. Namely, it spawned a new market for course materials that teachers across the nation could easily use for their newly required courses. And we find in these casebooks a near-exclusive focus on federal statutory interpretation: federal appellate cases,[61] chapters about Congress

existing statutory . . . rule." GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 164 (1982); *see also* Frickey, *supra* note 45, at 256 n.69 (discussing Calabresi's influence). It took inspiration too from the pragmatic concerns of Richard Posner's *Statutory Interpretation–in the Classroom and in the Courtroom*, which described the task of judges as one of "imaginative reconstruction." Posner, *supra* note 46, at 817. And it took inspiration as well from the philosophical concerns of Ronald Dworkin's *Law's Empire* in 1986. RONALD DWORKIN, LAW'S EMPIRE (1986); *see, e.g.*, William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1549 (1987) (drawing on Dworkin).

57 Eskridge, *supra* note 56, at 1479.

58 *Id.* at 1499–500.

59 *See* Kevin M. Stack, *Lessons from the Turn of the Twentieth Century for First-Year Courses on Legislation and Regulation*, 65 J. LEGAL EDUC. 28, 28 (2015); James J. Brudney, *Legislation and Regulation in the Core Curriculum: A Virtue or a Necessity?*, 65 J. LEGAL EDUC. 3, 6 (2015); Ethan J. Leib, *Adding Legislation Courses to the First-Year Curriculum*, 58 J. LEGAL EDUC. 166, 174 (2008).

60 *See* John F. Manning & Matthew Stephenson, *Legislation & Regulation and Reform of the First Year*, 65 J. LEGAL EDUC. 45, 48 (2015) (describing Harvard's curricular reform committee's conclusion that "in a world in which much law takes the form of statutes and regulations rather than common law precedents, a course on Legislation and Regulation was imperative"); Abbe R. Gluck, *The Ripple Effect of "Leg-Reg" on the Study of Legislation & Administrative Law in the School Curriculum*, 65 J. LEGAL EDUC. 121, 122–23 (2015) (finding increasing numbers of schools requiring "leg-reg" classes to be taken).

61 *See, e.g.*, WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (3d ed. 2001); CALEB NELSON, STATUTORY INTERPRETATION (1st ed. 2011); JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION, CASES AND MATERIALS (1st ed. 2010). One notable partial exception is LINDA D. JELLUM & DAVID CHARLES HRICIK, MODERN STATUTORY INTERPRETATION: PROBLEMS, THEORIES, AND LAWYERING STRATEGIES, at v-xiii (2d ed. 2009), which contains a number of state court cases.

called "*The* Legislative Process,"[62] and appendices with titles like "The Supreme Court's Canons of Statutory Interpretation."[63]

It's no surprise, then, that the dominant constitutional frame has been taken for granted with only modest adjustments when it comes to statutory interpretation at the state level. According to a 2024 empirical study of more than 44,000 opinions by state courts of last resort, there have been "large gravitational shifts toward textualism"[64]—a theory of statutory interpretation that developed out of exclusively federal constitutional law.[65] And, in 2010, in one of the first sustained studies of state statutory interpretation, legal scholar Abbe Gluck found that several state courts of last resort "import without distinction federal-textualist institutional and constitutional arguments and expressly assume that the same justifications hold for the states as well."[66] That importation appears to happen because, as Gluck argues, "the most often noted differences between state and federal governments do not seem to be doing much work here."[67]

These "most often noted differences" are important ones. They include the "state court common law tradition, the fluid interbranch paradigm in state government, the democratic mandate of elected state court judges, and the political and administrative work that are integral parts of the state judge portfolio."[68] And scholars since the mid-2000s have made significant, albeit sporadic, advances in drawing out the implications of these differences.[69] According to Jeffrey Pojanowski, for example, the state courts' common-law powers "may permit courts to extend statutory rules and principles by analogy while prohibiting courts from narrowing the scope of statutes in the name of purpose or equity."[70] Meanwhile, Aaron-Andrew Bruhl and Ethan Leib contend that the fact state court judges are often elected means that there may be some circumstances in which state judges should think of themselves as active conduits of popular will and not as mere faithful agents of

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62 *E.g.*, John F. Manning & Matthew C. Stephenson, Legislation and Regulation, Cases and Materials 1 (5th ed. 2025) (emphasis added).

63 William N. Eskridge, Jr., James J. Brudney, Josh Chafetz, Philip P. Frickey & Elizabeth Garrett, Cases and Materials on Legislation: Statutes and the Creation of Public Policy 1211 (7th ed. 2025).

64 *See* Austin Peters, *Are They All Textualists Now?*, 118 Nw. U. L. Rev. 1201, 1201, 1266 (2024).

65 *See* Molot, *supra* note 44, at 26–27.

66 Gluck, *States*, *supra* note 12, at 1858.

67 *Id.* at 1859.

68 *Id.* at 1813.

69 *See id.*; *see also* sources cited *infra* notes 70–71.

70 Jeffrey A. Pojanowski, *Statutes in Common Law Courts*, 91 Tex. L. Rev. 479, 479 (2013).

legislatures.[71] *Judicial power* might mean something different in the states.[72]

But while these constitutional differences are important, they may not be the ones that ultimately matter. They may only appear this way because they're about the federal constitutional issues on which scholars have built their theories of statutory interpretation—issues about institutional power and structural relationships. In the next Section, I suggest that we ought to start with something else: popular sovereignty.

B. A Clean Slate for the States, Starting with Popular Sovereignty

Any theory of statutory interpretation at the state level must begin with an account of popular sovereignty, constitutional amendment, and plenary power. With the federal Constitution, it's understandable why someone might ignore these elements. The U.S. Constitution creates a scheme of governance in which the people's voices are highly mediated by government institutions with little room for direct public control.[73] Article V of the Constitution meanwhile creates avenues for constitutional amendment that are so restrictive—requiring widespread approval of legislative intermediaries—that the Constitution has rarely been amended.[74]

But the possibility and existence of directly interpretive provisions in state constitutions expose a dilemma. Directly interpretive provisions exist in the same ultimate sources of law—the same constitutional texts—as the type of indirect provisions (the Article Is and Article IIIs) that currently ground statutory interpretation theories. Moreover, directly interpretive provisions can contradict the interpretive methods that we infer from indirect provisions, forcing us to ask: Which type of constitutional provision powers the ship? And why?

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[71] *See* Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215, 1261 (2012).

[72] *See id.* at 1239–41.

[73] *See* Frickey, *supra* note 9, at 155.

[74] *See* Jill Lepore, *How Originalism Killed the Constitution*, ATLANTIC, (Sep. 10, 2025, at 13:28 ET), https://www.theatlantic.com/magazine/archive/2025/10/constitutional-originalism-amendment/683961 [https://perma.cc/XWM8-ZYCL] ("Between 1980 and 2020, members of Congress proposed more than 2,100 constitutional amendments. Congress, more divided with each passing year, approved none of them. In roughly that same stretch of time, state legislatures introduced almost 5,000 amendments and ratified nearly 4,000."); *see also* Richard Albert, *The World's Most Difficult Constitution to Amend?*, 110 CALIF. L. REV. 2005 (2022) (discussing the sources of the difficulty of amending the U.S. Constitution); JILL LEPORE, WE THE PEOPLE: A HISTORY OF THE U.S. CONSTITUTION 11 (2025) (providing numbers on the rarity of amendments).

One could even imagine a hypothetical world in which the entire universe of statutory interpretation methods is directly specified in constitutions. In that world, one must ask: Is there anything that the Article Is and Article IIIs of our constitutions require about statutory interpretation anymore? And if it was always possible to specify rules of interpretation through a directly interpretive constitutional provision, what were the indirect provisions actually doing in the first place? Put in practical terms: In our current world where there are very few directly interpretive provisions, do indirect constitutional provisions provide the ultimate source of legal authorization for statutory interpretation methodology, under which all directly interpretive provisions must be read narrowly so as not to conflict? Or are indirect constitutional provisions actually doing *almost nothing at all* since it's the province of directly interpretive provisions to carry that workload? Or is the truth somewhere in between?

This crisis of constitutional authority raised by directly interpretive provisions suggests a surprising possibility at the state level. The constitutional law of statutory interpretation we currently know—the indirect, mostly structural constitutional law of separation of powers, legislative supremacy, and so on—is not *inherently* the legal basis of statutory interpretation methodology in the states. That type of constitutional law can ground statutory interpretation methodology only contingently and only in relation to the presence or absence of directly interpretive constitutional provisions. Before we can elaborate the relevance and significance of this familiar constitutional law, we must first attend to the procedures of constitutional amendment that determine how readily and by what authority directly interpretive provisions are ratified—and thus that determine how much of the jurisprudential basis of statutory interpretation methodology needs to be supplied by structural constitutional law instead.

So where should we begin in the states? I suggest we start with popular sovereignty, for that is the ultimate source of authority for state constitutions. As Jessica Bulman-Pozen and Miriam Seifter have recently emphasized: "[P]opular sovereignty is the animating, fundamental principle of state constitutions. From the very beginning, these constitutions have proclaimed that all government power resides in the people, and they have regularly refined and expanded channels for unmediated expressions of popular sovereignty."[75] One will not find in the U.S. Constitution such strong declarations of popular sovereignty as one finds in the North Carolina Constitution, which asserts that

[75] Bulman-Pozen & Seifter, *supra* note 20, at 864.

"All political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only,"[76] and that "The people of this State have the inherent, sole, and exclusive right of regulating the internal government and police thereof."[77] As two leading scholars of state constitutions have summarized, state constitutions "owe their legal validity and political legitimacy to the state electorate, not to 'Framers' or state ratifying conventions, as with the federal Constitution."[78]

The strong commitment to popular sovereignty at the state level becomes a reality through formal avenues of constitutional change.[79] Every state allows its legislature to propose constitutional amendments; in every state except Delaware, however, voters of the public must approve each amendment.[80] It is also widely understood that every state allows its legislature to call a constitutional convention, and this decision usually must be approved by voters.[81] Crucially, twenty-four states allow members of the public to *unilaterally* change their constitutions—without the intervention or approval of any government entity.[82] In four of these states, citizens can unilaterally call constitutional conventions.[83] In sixteen of these states, citizens can unilaterally initiate and ratify constitutional amendments.[84] And in

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76 N.C. CONST. art. I, § 2.

77 *Id.* § 3.

78 ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, THE LAW OF AMERICAN STATE CONSTITUTIONS 44 (2d ed. 2023).

79 *See, e.g.*, Bulman-Pozen & Seifter, *supra* note 23, at 192 ("Together with other democratic rights that appear in state constitutions but not the federal charter . . . the right to amend recognizes the people's sovereignty as an active, ongoing commitment.").

80 *See id.* at 196.

81 *See* TARR, *supra* note 21, at 25 (discussing explicit constitutional provisions regarding convention procedures in forty-one states, and noting that "state legislatures have assumed the power to call conventions even in the absence of express constitutional authorization"); *id.* at 25 n.85 (noting that "some states do not require that convention calls be submitted for popular approval"); William Partlett, *The American Tradition of Constitutional Power*, 15 INT'L J. CONST. L. 955, 982 (2017) ("It is now settled law that the people have the inherent legal power to call a convention by ratifying a legislatively authorized ballot provision that calls a constitutional convention—even if the state constitution does not provide for this option.").

82 *See* sources cited *infra* notes 83–85.

83 In four states, voters can unilaterally call a constitutional convention at *any* time. These states are: Florida, Montana, North Dakota, and South Dakota. *See State Constitutional Conventions*, BALLOTPEDIA, https://ballotpedia.org/State_constitutional_conventions [https://perma.cc/P32B-ZBHW] (last visited May 25, 2026).

84 In sixteen states, voters alone can initiate and approve constitutional amendments without legislative interference. These states are: Arizona, Arkansas, California, Colorado, Florida, Illinois, Michigan, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, and South Dakota. *See Initiated Constitutional Amendment*, BALLOTPEDIA, https://ballotpedia.org/Initiated_constitutional_amendment [https://perma.cc/56VP-E7H5]

fourteen states, there are constitutional provisions that require voters to be asked at elections every certain number of years whether they want to have a constitutional convention.[85]

These channels have made state constitutions far more rooted in public will than the U.S. Constitution, whose amendment procedures fail to give the people a direct role in formal constitutional change.[86] Despite variation in amendment rates among states, the bottom line is that state constitutions are amended—and even fully replaced—more often than the U.S. Constitution.[87] There have been 144 distinct constitutions among the fifty states, with six states having had at least six different constitutions throughout their histories.[88] According to one estimate, state constitutions have together been amended over 7,500 times.[89]

These state constitutional amendments tend to behave in unique ways because of another distinctive feature: State constitutions serve as limitations of legislatures' plenary power, not as grants of power.[90] Under the federal Constitution, the federal government is only allowed to do what the Constitution positively allows it to do, and all other powers are reserved to the states.[91] Under state constitutions, state governments have plenary "police powers" to promote the people's welfare.[92] Thus, according to state constitutional law scholar G. Alan Tarr, "what appear as grants of power in state constitutions typically do not operate in that fashion."[93] Instead, those provisions "may be included

(last visited May 25, 2026). I don't include Massachusetts and Mississippi, which allow initiated constitutional amendments but require legislative approval. *Id.*

85 These states are: Alaska, Connecticut, Hawai'i, Illinois, Iowa, Maryland, Michigan, Missouri, Montana, New Hampshire, New York, Ohio, Oklahoma, and Rhode Island. *See Mandatory Vote About Holding a Statewide Constitutional Convention*, BALLOTPEDIA, https://ballotpedia.org/Mandatory_vote_about_holding_a_statewide_constitutional_convention [https://perma.cc/Q4HH-7U8R] (last visited May 25, 2026).

86 *See* U.S. CONST. art. V ("The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress . . . .").

87 *See* DINAN, *supra* note 22, at 2–3, 24.

88 *See id.* at 23–24 (identifying these states as Alabama, Florida, Virginia, South Carolina, Georgia, and Louisiana).

89 *See id.* at 23.

90 *See* TARR, *supra* note 21, at 7–8 (comparing constitutional interpretation of state and federal grants of power).

91 *See id.* at 7.

92 *See id.* at 7–8.

93 *Id.* at 8.

for emphasis," or "may direct state legislatures to exercise powers that they command," or may "serve to overrule judicial decisions limiting legislative power, to eliminate questions of authority where state power was doubtful, or to indicate exceptions to constitutional prohibitions on the legislature."[94]

Rather than cutting across areas of law, state constitutional amendments thus tend to entail more targeted, subject-specific interventions, causing state constitutions to sometimes look like omnibus statutes.[95] Yet it's precisely the status of constitutional law that motivates people to put these provisions in their constitutions. There's the symbolism of elevating something to constitutional stature,[96] which can help guard against underenforcement of the values and policies at stake.[97] Sometimes, there isn't enough support from legislators or governors for certain statutes, especially when powerful interest groups have exerted their influence,[98] leaving it up to the people to unilaterally go over the legislatures' heads by directly adding proposed legislation to election-day ballots—a mechanism known as the "initiative" in the states where it's allowed.[99] Other times, legislators might enact statutes that go against the majority of the people's wishes.[100] While the people could simply use the initiative to propose and enact *statutes* that address these issues, many states allow legislatures to modify and even repeal those voter-approved ballot measures.[101] By contrast, amendments to constitutions can only be modified through subsequent constitutional amendments—which, again, require voter approval in all states except Delaware.[102]

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94 *Id.*

95 *See* DINAN, *supra* note 22, at 38, 73–75, 111, 153–55, 187–90, 235–37 (detailing usage of amendments for shifts in institutional authority, updating rights, responding to court decisions, and constraining, authorizing, and enacting policy choices).

96 *See id.* at 39 ("A final benefit of passing amendments . . . is to register and signal in a public fashion the importance of the changes . . . .").

97 On underenforcement, see Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978) (drawing attention to the separation between the scope of constitutional norms and the degree to which they are judicially enforceable).

98 *See* DINAN, *supra* note 22, at 236–37.

99 *See id.* at 16, 39, 75, 189, 235.

100 *See id.* at 154 (explaining that "[p]olicy-constraining amendments are seen as necessary in some cases because legislators are particularly susceptible to the influence of powerful groups").

101 *See generally* Kathleen Ferraiolo, *The Intersection of Direct Democracy and Representative Government: State Legislators' Response to Ballot Measures*, 55 POLITY 248 (2023) (examining specific issues where legislators have interfered with the results of direct democracy); DINAN, *supra* note 22, at 39.

102 *See* DINAN, *supra* note 22, at 13.

Constitutionalization therefore protects policies and rights from legislative modification.[103]

But even legislatively referred amendments—despite the involvement of legislatures—aim to achieve many of the same goals. Legislatures might approve constitutional amendments that they think *future* legislatures would oppose. Moreover, there may be constitutional doubts about legislatures' powers to do certain things, and legislatures can cast away that doubt through constitutional amendments. Voters and legislatures thus may try to constitutionalize certain policies and rights to preempt or to override *courts*,[104] a path often seen as more strategic and effective than attempting to elect different judges.[105] Constitutional amendments alone can provide targeted stability and legitimacy.[106]

There are few better places to witness such constitutional doubts than in the rules of statutory interpretation that *legislatures* have enacted via statute—which all fifty state legislatures have done.[107] The question of whether legislatures are even allowed to impose these rules via statute has been the subject of much scholarly debate,[108] and state courts have often answered "no" on the ground that it violates separation of powers.[109] Constitutional amendment offers a way to get around these constitutional doubts. Strikingly, though, this potential motivation for ratifying directly interpretive provisions has *not* driven the proposal and ratification of these provisions. As the next Part illustrates, the ratification of directly interpretive provisions has been the result of several other subtler, more surprising motivations—with just as surprising consequences.

II
The People's Choices

Every directly interpretive constitutional provision in existence today was approved by voters of the public.[110] And each proposed provision that has made it onto a ballot since the start of the

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103 *See id.* at 39, 75.

104 *See id.* at 75, 110–12, 189–90.

105 *See id.* at 112 (favoring adopting an amendment rather than electing judges because of relative ease and precision of adopting amendment).

106 *See id.* at 274–79 (examining how the virtues of stability and legitimacy are carried out via state constitutional amendment processes).

107 *See* Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 Geo. L.J. 341, 344, 411–31 (2010).

108 *See* Gluck, *States*, *supra* note 12, at 1769 n.67 (surveying views on the issue).

109 *See id.* at 1786 (discussing judicial workarounds to codified interpretive rules, judges' unwillingness to relinquish authority, and power conflicts in the legislatures and courts).

110 *See infra* notes 120–41 and accompanying text.

twenty-first century has been approved by voters—none have failed at the polls.[111] But in the grand scheme of things, there have been vanishingly few efforts to ratify directly interpretive constitutional provisions. Out of the thousands of all state constitutional amendments that have been ratified, only twelve of them are directly interpretive provisions.[112]

Yet as this Part shows, by paying close attention to the relatively few provisions that do exist we can learn quite a bit about the kinds of motivations that drive voters and proponents, the kinds of obstacles that proponents face, the kinds of interests and consequences that are at stake, and the dynamics that can be involved in ratification campaigns.

Section II.A lays out all the different forms that directly interpretive provisions could take—what the people could have chosen.[113] Section II.B compiles, categorizes, and draws out common themes and features of all the directly interpretive constitutional provisions that currently do exist.[114] Section II.C then presents a series of historical case studies that reveal how and why the people chose what they did.[115]

A. What the People Could Have Chosen

Directly interpretive constitutional provisions can be as varied and idiosyncratic as state constitutions themselves. Remember that we're dealing with a genre of law—state constitutions—that can provide people with a "right to save and exchange seeds,"[116] and that can direct legislatures to "provide for the promotion of catfish."[117] Still, five main

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111 To draw this conclusion, I searched the National Conference of State Legislatures Ballot Measures Database for every constitutional amendment since the year 2000 that has failed a vote. I then located the full text of the proposed amendment and read the amendment to see if it contained a directly interpretive constitutional provision. *See Statewide Ballot Measures Database*, NAT'L COUNCIL STATE LEGISLATURES, https://www.ncsl.org/elections-and-campaigns/statewide-ballot-measures-database [https://perma.cc/6LCT-NB3S] (click "NCSL Ballot Measures Database"; in the box "Statutory/Constitutional Amendment" select "Amendment"; in the box "Status" select "Fail," and in the box "Year" select all years from "2000" upward).

112 *See infra* notes 120–41 and accompanying text.

113 *See* discussion *infra* Section II.A.

114 *See* discussion *infra* Section II.B.

115 *See* discussion *infra* Section II.C.

116 ME. CONST. art. I, § 25.

117 ALA. CONST. art. IV, § 93.01. To be sure, some have recently argued that the right to amend state constitutions is limited in important ways. *See generally* Jonathan L. Marshfield, *Forgotten Limits on the Power to Amend State Constitutions*, 114 Nw. U. L. REV. 65, 74 (2019) ("Only the people in their sovereign capacity have the inherent authority to create or destroy

dimensions define how directly interpretive constitutional provisions can differ in function:

1. *Which Interpreter?* A directly interpretive constitutional provision can specify which interpreter is within its scope. It may be directed exclusively toward judges, or to executives, or to agencies, or to legislatures. It may also not specify anyone, instead remaining broadly applicable to any interpreter.

2. *Which Statute?* A directly interpretive constitutional provision can specify which statutes are within its reach. At the narrowest, it might apply to one specific statute. More broadly, it might specify a category of statutes. And at its broadest, it might specify that all statutes are covered by its rule, or it may imply that such a reach exists by failing to specify any statute.

The middle area contains further nuance. A directly interpretive constitutional provision might specify a category of statutes based on the substance of the statutes; it might be applicable based on a statute's general subject matter, a statute's effect, or whether a statute contains a certain provision such as a private cause of action. It could also specify which statutes are within its scope based on the *intended audiences* of the statute—the general public, certain licensees, government officials, and so on. It could specify statutes based on the *form* of statutes. For example, the provision might apply when a statute has a title or body exceeding a certain number of words. Finally, it might specify statutes based on the *procedural history* of the statute—for instance, if a statute was vetoed by a governor whose veto was then overridden by a legislature.

3. *At What Level of Generality Is the Rule?* Directly interpretive constitutional provisions can impose rules of varying degrees of generality. At the most specific end of the spectrum, such provisions might impose specific interpretations or constructions of statutes. More broadly, a directly interpretive constitutional provision can mandate or permit the use of certain tools of interpretation and evidence of meaning. For example, it might require or permit the use of legislative debates in interpreting statutes. It might impose certain linguistic canons of interpretation. At a higher level of generality, a provision might impose certain substantive canons of interpretation that serve as either tiebreakers in cases of interpretive difficulty or that serve as front-end thumbs on the scale that tilt the entire process of interpretation in a specific direction. And at the most general end of the spectrum, a directly interpretive constitutional provision might impose a vague

government, and the constitutional convention is the only state institution with the implied authorization to exercise that authority on behalf of the people.").

general theory of interpretation like purposivism or textualism. A directly interpretive constitutional provision might also impose rules *about* these rules—it might impose metarules of interpretation.

4. *How Determinate Is the Imposition?* The exact rule that a directly interpretive constitutional provision imposes may affect how sufficient the rule is for determining an answer to a legal issue. For example, if a constitutional provision imposes a specific interpretation of a statute, the application of that interpretation is nearly unavoidable and outcome determinative. By contrast, if a constitution requires the use of dictionaries to interpret statutes, that still may not determine the outcome of the issue since dictionaries can conflict with each other.

5. *What Enforcement Mechanism?* Although interpreters may (and typically do) feel bound by constitutional provisions, there is always a chance that an interpreter decides to go rogue.[118] A directly interpretive constitutional provision might specify a certain enforcement mechanism to guard against this scenario. It might permit people of the general public to file complaints or sue, it may permit attorneys general to intervene, it may specify certain sanctions for officials' refusal to comply, and so on.

B. What the People Have Actually Chosen

Amid this vast terrain of possibilities, the directly interpretive constitutional provisions that exist have taken the following four forms: (1) provisions that impose substantive canons on all interpreters for statutes that fit within certain subject-area categories, (2) provisions that impose on all interpreters rules about what evidence may or may not be used when interpreting all statutes, (3) provisions that impose rules on legislatures as to the permissible *form* of legislation, and (4) provisions that prohibit certain interpreters from deferring to certain other interpreters.

The first category, involving substantive canons, encompasses a wide variety of subject areas, but the bulk of it concerns statutes that provide powers to local governments.[119] These local-government-friendly provisions generally look like this one from New Jersey: "The

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[118] *See, e.g.*, Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 687–88 (2018) (discussing disobedience by government officials and agencies).

[119] I'm excluding South Dakota's constitutional provision that "Powers and functions of home rule units shall be construed liberally." S.D. CONST. art. IX, § 2. This is because South Dakota is a home rule state, the provision here doesn't specify that it applies to state legislation, and there's no state case that cites this clause to construe a statute accordingly. For the same reasons, I also am not including New York's constitutional provision that

provisions of this Constitution and of any law concerning municipal corporations formed for local government, or concerning counties, shall be liberally construed in their favor."[120] And these provisions have been ratified in New Jersey (1947),[121] Kansas (1960),[122] Michigan (1963),[123] Illinois (1970),[124] Montana (1972),[125] South Carolina (1972),[126] and Wyoming (1972).[127] Four of these came about by constitutional convention,[128] and the other three by legislative referendum.[129]

"Rights, powers, privileges and immunities granted to local governments by this article shall be liberally construed." N.Y. CONST. art. IX, § 3(c).

120 N.J. CONST. art. IV, § 7, para. 11.

121 *Id.*

122 KAN. CONST. art. XII, § 5(d) ("Powers and authority granted cities pursuant to this section shall be liberally construed for the purpose of giving to cities the largest measure of self-government."); *see also* State *ex rel.* Kline v. Unified Bd. of Comm'rs, 85 P.3d 1237, 1243 (Kan. 2004) ("Barring the exercise of cities' home rule because the statute at issue happened to have been stated in terms of the exemption rather than the prohibition does not appear to be in keeping with the mandate of Article 12, § 5(d) of the Kansas Constitution.").

123 MICH. CONST. art. VII, § 34 ("The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor.").

124 ILL. CONST. art. VII, § 6(m) ("Powers and functions of home rule units shall be construed liberally."). Despite the provision's failure to specify that this interpretive rule applies to legislation, and despite Illinois's being a home rule state, I include Illinois here because the state may still preempt local powers by statute, and courts have applied this provision to such statutes. *See, e.g.*, Lintzeris v. City of Chicago, 216 N.E.3d 151, 161 (Ill. 2023) ("Given the plain language of the statute and considering that the powers and functions of home rule units are to be construed liberally (Ill. Const. 1970, art. VII, § 6(m)), we hold that section 11-208.7, when viewed in consideration of the rest of chapter 11, does not preclude the City from imposing an administrative penalty.").

125 MONT. CONST. art. XI, § 4(2) ("The powers of incorporated cities and towns and counties shall be liberally construed."). Despite the provision's failure to specify that this interpretive rule applies to legislation, I include Montana here because the state may still preempt local powers by statute. *See* State *ex rel.* Swart v. Molitor, 621 P.2d 1100, 1102–03 (Mont. 1981). Moreover, courts have applied this provision to such statutes. *See* Lake v. Lake Cty., 759 P.2d 161, 165 (Mont. 1988).

126 S.C. CONST. art. VIII, § 17 ("The provisions of this Constitution and all laws concerning local government shall be liberally construed in their favor.").

127 WYO. CONST. art. XIII, § 1(d) ("The powers and authority granted to cities and towns, pursuant to this section, shall be liberally construed for the purpose of giving the largest measure of self-government to cities and towns."). Despite the provision's failure to specify that this interpretive rule applies to legislation, I include Wyoming here because it is not a full home rule state, instead requiring legislative authorization of certain local government powers, notwithstanding the constitutional provision. *See* Coulter v. Rawlins, 662 P.2d 888, 895–96 (Wyo. 1983) ("[W]e see the home-rule amendment as having minimal impact . . . here. . . . [B]ecause . . . this case involves an area of municipal power that remains subject to express legislative control.").

128 These states are New Jersey, Michigan, Illinois, and Montana. *See* DINAN, *supra* note 22, at 25–26 (listing when the most recent constitutions took effect).

129 These states are Kansas, South Carolina, and Wyoming. *See* Act of Mar. 23, 1959, ch. 182, § 1, 1959 Kan. Sess. Laws 403, 405; Act of July 7, 1972, no. 1631, § 1, 1972 S.C. Acts 3184, 3188; Act of Feb. 18, 1971, § 1, 1971 Wyo. Sess. Laws 715, 716.

Constitutional provisions impose substantive canons on other kinds of statutes too, and these provisions include the following in order from oldest to newest:

> **1952 Oregon (by initiative) - provision allowing certain liquor licenses:** "Legislation relating to this matter shall operate uniformly throughout the state and all individuals shall be treated equally; and all provisions shall be liberally construed for the accomplishment of these purposes."[130]
>
> **1971 Virginia (by constitutional convention) - provision allowing certain tax exemptions:** "Exemptions of property from taxation as established or authorized hereby shall be strictly construed; provided, however, that all property exempt from taxation on the effective date of this section shall continue to be exempt until otherwise provided by the General Assembly as herein set forth."[131]
>
> **1972 Georgia (by legislative referendum) - provision providing for certain state financing:** "[A]ny law now or hereafter enacted by the General Assembly in furtherance of their provisions shall be liberally construed to effect such purpose."[132]
>
> **2004 California (by legislative referendum) - provision expanding the public's right to access government information:** "A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access."[133]
>
> **2006 Missouri (by initiative) - provision regulating stem cell research:** "The provisions of this section and of all state and local laws, regulations, rules, charters, ordinances, and other governmental actions shall be construed in favor of the conduct of stem cell research and the provision of stem cell therapies and cures."[134]

Although topic-specific substantive canons have comprised the majority of directly interpretive constitutional provisions, there have been a few directly interpretive constitutional provisions that are not limited to a single domain. Maryland's Constitution contains a provision that prohibits laws from being "construed by reason of [their] title[s], to grant powers, or confer rights which are not expressly contained in the bod[ies] of the Act[s]."[135] In 2018, Florida voters approved an

130 Or. Const. art. I, § 39(2).
131 Va. Const. art. X, § 6(f).
132 Ga. Const. art. VII, § 4, para. IX.
133 Cal. Const. art. I, § 3(b)(2).
134 Mo. Const. art. III, § 38(d)(7).
135 Md. Const. art. III, § 29.

amendment to the state constitution so that it would include a provision stating: "In interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency's interpretation of such statute or rule, and must instead interpret such statute or rule de novo."[136]

Finally, the constitutions of Indiana (1851),[137] Oregon (1857),[138] Idaho (1890),[139] and Hawai'i (1978)[140] all contain variations of the following ordinary-meaning rule first embraced by Indiana in 1851: "Every act and joint resolution shall be plainly worded, avoiding, as far as practicable, the use of technical terms."[141] On their surfaces these provisions don't instruct statutory interpreters to read legislation with any particular method. But, one could argue, they compel a certain interpretive approach. Many judicial canons of statutory interpretation exist because they presume that legislatures act in certain ways.[142] The "consistent usage canon," for example, assumes that when a legislature uses a word in multiple places in a statute, the word has the same meaning everywhere.[143] The constitutional provision in question here similarly creates—in fact *constitutionalizes*—a presumption of how legislatures draft statutes. One could then reason that, as a result, statutory interpreters should presume that all words in statutes have a nontechnical meaning unless a uniquely technical word was used.

All told, we can see some common themes despite how few provisions there are. First, directly interpretive constitutional provisions are often limited to statutes on specific subjects. Second, these provisions have almost never specified which interpreters they apply to. Third, these provisions impose methods of statutory interpretation at a middle level of generality. None of them involve rules about the usability of extrinsic evidence such as legislative history, nor do any of them mandate broad interpretive theories like textualism. Moreover, none of them specify any hierarchy of types of evidence for statutory

136 FLA. CONST. art. V, § 21.

137 IND. CONST. art. IV, § 20 ("Every act and joint resolution shall be plainly worded, avoiding, as far as practicable, the use of technical terms.").

138 OR. CONST. art. IV, § 21 ("Every act, and joint resolution shall be plainly worded, avoiding as far as practicable the use of technical terms.").

139 IDAHO CONST. art. III, § 17 ("Every act or joint resolution shall be plainly worded, avoiding as far as practicable the use of technical terms.").

140 HAW. CONST. art. XVI, § 13 ("Insofar as practicable, all governmental writing meant for the public, in whatever language, should be plainly worded, avoiding the use of technical terms.").

141 IND. CONST. art. IV, § 20.

142 *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 905, 914 (2013) (describing interpretive canons as grounded in assumptions about how Congress drafts statutes and delegates authority).

143 *See id.* at 937.

meaning. As the following case studies suggest, and as Part IV further elaborates, these tendencies reflect real-world political dynamics of amending state constitutions.

C. How and Why the People Chose Them

Each of the following three case studies reveals a different democratic dynamic and purpose for directly interpretive constitutional provisions.

The first case study, Oregon's 1952 citizen initiative allowing the sale of liquor by the glass (instead of by the bottle), shows how directly interpretive constitutional provisions can arise out of grassroots organized advocacy, help secure collective public approval for broad policies, and divert the influence of opposing interest groups away from the back-end process of policy implementation.[144] The directly interpretive provision here made it safe for the constitutional amendment to merely consist of a broad policy idea that voters could readily agree on—allowing the sale of liquor by the glass—while punting the exact details of the policy (which might be harder for voters to agree on) to a legislature constrained in what it could do as a result of the directly interpretive provision.[145]

The second case study, New Jersey's 1947 constitutional convention that led to an amendment requiring statutes about local government to be construed in favor of local government power, shows how citizens can democratically authorize a division of interpretive labor and use directly interpretive constitutional provisions to police the boundaries of levels of government.[146] The constitutional amendment in question brought power closer to the people via their local governments, yet ironically it was drafted by specially elected delegates who were almost entirely all lawyers and state legislators.[147] This reveals how, even when the people reserve the right to approve of and reject statutory interpretation methodology, they may also prefer to defer to experts in designing that methodology.[148]

The third case study, California's 2004 legislative referendum on a public right of access to government meetings and records, reveals how directly interpretive provisions can be used not only to guide judges and legislatures but also to supervise municipal and administrative statutory interpretation in the shadows of courts.[149] The campaign and its

144 *See* discussion *infra* Section II.C.1.
145 *See* discussion *infra* Section II.C.1.
146 *See* discussion *infra* Section II.C.2.
147 *See* discussion *infra* Section II.C.2.
148 *See* discussion *infra* Section II.C.2.
149 *See* discussion *infra* Section II.C.3.

aftermath provide a counterpoint to cynicism about direct democracy's vulnerability to interest-group influence, and they also provide an answer to skeptics who might worry that statutory interpretation methodology isn't salient to voters since directly interpretive provisions are typically bundled with other policy provisions.[150] Virtually no money was spent on either side of the issue, there was little bundling of provisions, the directly interpretive provision was typically singled out in public discourse, and voters approved the measure by a wide margin of eighty-three percent to seventeen percent.[151]

1. Front-End Collective Action Against Back-End Lobbying: Oregon's Liquor-by-the-Glass Initiative

You couldn't just buy a martini at an Oregon restaurant in 1951. And no amount of hollering about the Twenty-First Amendment of the U.S. Constitution would have done you any good.[152] Only days after the amendment was ratified, the state passed a law that made a new government commission the only entity in the state that was allowed to sell hard liquor.[153] If you wanted a drink, you had to go to a state-run liquor store before 8 PM, buy an entire bottle of gin or vodka, bring it to the restaurant, and then, in the words of one former liquor inspector who enforced that law, "have it checked in by the bartender, who would label the bottle, pour drinks from that bottle for the customer, and charge a service fee of 25 to 35 cents per drink for ice and mixes."[154]

By the time Cecil W. Jones challenged this maze of restrictions in 1952 as chairman of the grassroots "Buy Less Than the Bottle Committee,"[155] he had already learned how to cut through the thicket of state politics as a union organizer. He was a former yacht steward and hotel cook,[156] but by the early 1940s he had become a leader of the Cooks and Assistants No. 207 unit of the American Federation of Labor[157] and had become active in a union alliance called the Central Labor Council of Portland, where he found himself in meetings with representatives from unions ranging from Retail Grocery Clerks

150 *See* discussion *infra* Section II.C.3.

151 *See* discussion *infra* Section II.C.3.

152 *See* U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI (ending Prohibition).

153 *See* Oregon Liquor Control Act, ch. 17, § 13, 1933 Or. Laws Spec. Sess. 38, 45; Proclamation No. 2065, 48 Stat. 1720 (Dec. 5, 1933) (declaring the Twenty-First Amendment ratified).

154 Warren Niete & Rob Donnelly, *Enforcing Oregon's State Alcohol Monopoly: Recollections from the 1950s*, 115 OR. HIST. Q. 90, 94 (2014).

155 *See Glass Liquor Sale Proposed*, OREGONIAN (Portland), Apr. 2, 1952, at 1.

156 *See* Bill Ashfield, *Meet the Man . . . .*, OR. LAB. PRESS (Portland), June 8, 1951, at 1.

157 *See Jones Wins Election*, OR. DAILY J. (Portland), Feb. 21, 1941, at 40.

No. 1092 to Casket Workers No. 1777.[158] A different alliance of which Jones was a member—the Oregon State Alliance of Hotel, Restaurant and Beverage Workers—was already passing resolutions against the state's restrictive liquor law by 1940.[159] It was through these networks that Jones could find a vice chairman and secretary-treasurer for his Buy Less Than the Bottle Committee in Paul Walsh and Tom Fenolio[160]—both bartenders and members of the Bartenders, Card and Pool Room Workers No. 496 union.[161]

These weren't lawyers, but they knew how the law affected them. And they were learning through their union participation that they could bring a change. Cecil Jones had become president of the Central Labor Council by 1951, and with an all-important state and national election on the horizon in 1952, the Council launched a campaign for a ballot measure that would repeal the state's cigarette tax.[162] Jones went to the state capitol to learn about the procedures for ballot measures,[163] and within a month, he was realizing that the task was easier than he thought, one day obtaining sixty petition signatures within two hours.[164] "The names are not hard to get," he told the Council.[165] Meanwhile, Tom Fenolio was holding conversations within the Council about the state's liquor laws.[166] By the end of the year, he had helped convince the Council to ask the Portland city council to reconsider rules it had proposed about keeping liquor outlets away from schools.[167] It was here that Council members got a firsthand view of the relevance of statutory interpretation. According to one reporter, Fenolio told the Council that the term "'school' if interpreted to mean technical and

158 *See Central Labor Council Minutes*, OR. LAB. PRESS (Portland), June 11, 1937, at 4 (describing attendees of Labor Council's meeting).

159 *See State Labor Laws Sought by Alliance*, EVENING HERALD (Klamath Falls, Or.), June 17, 1940, at 8 (describing how three resolutions dealing with proposed state legislation were adopted, including provisions for licensing retail liquor dealers).

160 *See Pickets Quit Coffee Shop*, OREGONIAN (Portland), Mar. 31, 1949, at 15; *Cafe Contract Extended Year*, OREGONIAN (Portland), Mar. 25, 1950, at 7; *Glass Liquor Sale Proposed*, *supra* note 155, at 1.

161 *See Cafe Contract Extended Year*, *supra* note 160, at 7 (noting Fenolio was a bartender); OREGON STATE FEDERATION OF LABOR: PROCEEDINGS 7 (1948) (noting Walsh and Fenolio were bartenders); *Bartenders Elect Tom Fenolio as Business Representative*, OR. LAB. PRESS (Portland), Dec. 24, 1937, at 3 (listing union name for Fenolio); *Union Taverns Listed for Your Patronage*, OR. LAB. PRESS (Portland), Mar. 2, 1951, at 6 (listing Walsh as business agent of the union).

162 *See Labor Body Challenges Cigaret Tax*, OREGONIAN (Portland), May 8, 1951, at 1.

163 *See id.*

164 *See Musicians Union Tells of Membership Gains*, OR. DAILY J. (Portland), June 12, 1951, at 5.

165 *Id.*

166 *See Alcoholic Beverage Views Exchanged*, OR. LAB. PRESS (Portland), Apr. 6, 1951, at 4.

167 *See Hearing Sought on Liquor Ban*, OR. DAILY J. (Portland), Dec. 5, 1951, at 6.

other schools would result . . . in closure of night clubs and taverns in the downtown area."[168]

So when the Buy Less Than the Bottle Committee submitted a petition in April of 1952 to enshrine "liquor by the glass" in state law, its members and supporters were ready.[169] With legislative experience now under his belt, Cecil Jones went to work, bringing his unions together to circulate petitions for the initiative,[170] before finally getting more than enough signatures that summer.[171] Unlike a similar "liquor by the glass" ballot measure from 1948, which failed by a vote of 273,621 to 210,108,[172] this proposal aimed to put "liquor by the glass" in the Oregon Constitution and not just in a state statute.[173] Instead of itself imposing new detailed regulations about how to administer a "liquor by the glass" system,[174] the proposal left it to the legislature to pass a law doing so.[175] And crucially, the new proposal included a section that said: "Legislation relating to this matter shall operate uniformly throughout the state . . . and all provisions shall be liberally construed for the accomplishment of these purposes."[176] The directly interpretive provision would ensure that the details enacted by the legislature would be construed to align with the amendment, and this safeguard made it less important to have all those details specified in the constitutional amendment itself. Public debate over the policy could focus on the general idea of allowing liquor to be sold by the glass rather than on the specific details of implementing that idea. There were fewer surfaces to attack.

Although much of the ensuing debate among church leaders,[177] restaurant owners,[178] temperance groups,[179] and others unsurprisingly

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168 *Id.*

169 *See Glass Liquor Sale Proposed*, *supra* note 155, at 1.

170 *See* Walter Mattila, *Labor Convention Would Restore Portland, Salem, Eugene Rent Curb*, Or. Daily J. (Portland), June 18, 1952, at 3.

171 *See Liquor-by-Drink Petition Filed for Oregon Vote*, News-Rev. (Roseburg, Or.), July 5, 1952, at 12.

172 *See Liquor-by-Glass Again Sought via Initiative*, News-Rev. (Roseburg, Or.), Apr. 2, 1952, at 1.

173 *See Liquor-by-Drink Petition Filed for Oregon Vote*, *supra* note 171, at 12.

174 *See* A Pamphlet Containing Initiative Measure No. 169, Initiative Measure No. 171, Initiative Measure No. 172, Initiative to the Legislature No. 13, Constitutional Amendments 8–13 (Earl Coe ed., 1948) (describing ballot measure calling for regulation and control of the sale of liquor).

175 *See* State of Oregon Official Voters' Pamphlet for the Regular General Election November 4, 1952, at 65 (Earl T. Newbry ed., 1952).

176 *Id.* at 65.

177 *See The Churches of Salem Say Come and Worship Tomorrow! Go and Vote on Tuesday!*, Statesman J. (Salem, Or.), Nov. 1, 1952, at 5 (mobilizing voters against the "liquor by the glass" ballot measure).

178 *See* Mervin Shoemaker, *Rum-by-Drink Plan Favored*, Oregonian (Portland), Aug. 8, 1952, at 11 (citing a poll of restaurant owners favoring legalizing the sale of "liquor by the drink").

179 *See WCTU Aid Given Mayor*, Oregonian (Portland), Sep. 19, 1952, at 3M.

focused on the general merits of allowing "liquor by the glass," the importance of the directly interpretive constitutional provision was undeniable. One church reverend argued to readers of the newspaper *The Oregonian* that the "requirement in this proposed amendment that liquor-by-the-drink permission must be liberally construed, means that any question of propriety, liberality or policy in granting a license for a certain spot must be construed in favor of the applicant."[180] The newspaper itself repeated these claims in "The Cons" list of its voter guide on the measure.[181] And as more newspapers published their own guides to the ballot measure, they also pointed out the relevance of the directly interpretive provision: "To write a requirement into the constitution that liquor-by-the-drink permission must be 'liberally construed' will antagonize some voters," wrote several newspapers.[182] In practical terms, as the executive director of the Oregon Temperance League argued, the "construed liberally" clause specifically "may result in a sharp increase in the number of bars."[183]

It wasn't until after the election, when 369,127 voters approved the ballot measure over the opposition of 285,446 voters,[184] that the unique benefits of having a directly interpretive constitutional provision could be seen. There had been much debate about whether the *constitution* was really the right place for a measure like this.[185] As one newspaper argued in an article titled *Cluttered Constitution!*, "it seems to us poor policy for so many special-interest forces to be trying to wedge their proposals into the Oregon state constitution."[186] The drink-by-the-glass measure, it claimed, "should be submitted as a statute" since the state's existing liquor law was a statute and not a constitutional amendment.[187] But as the newspaper rightly identified, it was "obvious" why proponents were trying to amend the constitution: "[T]he legislature cannot change the dotting of an 'i' or the crossing of a 't.'"[188] Moreover, because the constitutional amendment left it up to Oregon's legislature to do the hard work of hammering out the details, opposing interest groups could

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180 M.A. Marcy, *Liquor by the Drink Opposed*, Oregonian (Portland), Oct. 4, 1952, at 8.

181 *See Liquor by the Drink: Voter's Choice*, Oregonian (Portland), Oct. 9, 1952, at 4.

182 *E.g.*, *Oregon Voters Will Vote 'Yes' and 'No' on 18 Different Referendums*, Myrtle Point Herald (Myrtle Point, Or.), Oct. 9, 1952, at 1, 10.

183 *Liquor by Drink Vote Pleases Hotels, Clubs*, Or. Daily J. (Portland), Nov. 6, 1952, at 2.

184 *See Is the* Working Man *Entitled to Liquor by the Glass?*, Oregonian (Portland), Jan. 29, 1953, at 15.

185 *See, e.g.*, *Liquor Bill in Disfavor*, Oregonian (Portland), Oct. 25, 1952, at 7 ("Two ministers . . . . declared that the constitution is no place for such a liquor ruling.").

186 *Cluttered Constitution!*, Or. Daily J. (Portland), Apr. 27, 1952, at E1.

187 *Id.*

188 *Id.*

try to influence that lawmaking process. As one commentator argued, "[w]e may be sure that opponents, even though beaten at the polls, will still try to get in a few licks. They will endeavor to make the regulations as restrictive as possible."[189]

And already in January of 1953, state lawmakers were trying to get around the people's approval of liquor-by-the-drink. "I am not in favor of any law which is extremely liberal," said the chairman of the House of Representatives' committee on alcohol.[190] By February, one lawmaker was noting that there were now three proposals for liquor-by-the-drink bills, "which range from strict [control] to a very liberal interpretation."[191] He continued, "[m]ost of us still feel that strict control is desirable and this will probably be the result."[192]

But the ratification of the directly interpretive constitutional provision could help guard against these attempted legislative workarounds. As one writer explained, the directly interpretive provision would give "quite a leverage against limiting licenses to a few upper crust clubs and restaurants."[193] Advocates of liquor-by-the-glass invoked the directly interpretive constitutional provision—and especially its democratic pedigree—to make claims about how the legislature should do its business. "If the legislature is to be guided by the dictate of the electorate," argued the secretary-manager of the Oregon Licensed Beverage Association, "it can scarcely specify a set of restrictions and limitations contrary to the terms contained in the ballot description."[194] He continued, "Oregon has voted for liquor by the drink and for a liberal interpretation of liquor by the drink. Any legislative interpretation which is less than 'liberal' would seem to invite a court challenge on grounds of constitutionality."[195] And in criticizing a newspaper's advocacy for a strict liquor-by-the-drink law, the Association rebuked: "Never forget, the 369,127 people who voted 328 X YES voted for a 'uniform' and 'liberal' law—as stated on the ballot. How can the legislature fail to interpret that vote as anything less than a mandate from the people?"[196]

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189 Charles V. Stanton, *Oregon Has New Laws*, NEWS-REV. (Roseburg, Or.), Dec. 5, 1952, at 4.

190 *A Law That Must Be Tightly Written*, OR. DAILY J. (Portland), Jan. 13, 1953, at 14.

191 Bob Root, *Legislative Letter*, MEDFORD MAIL TRIB. (Medford, Or.), Feb. 2, 1953, at 6.

192 *Id.*

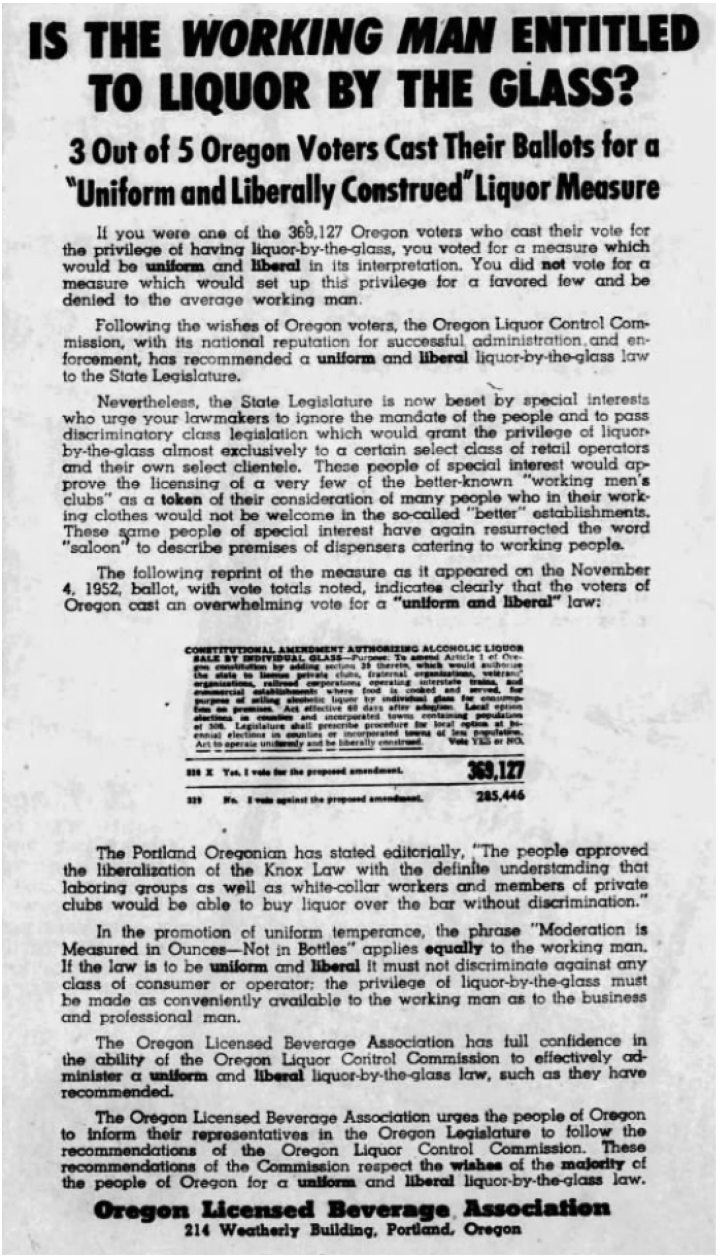
193 Charles A. Sprague, *It Seems to Me*, OR. STATESMAN (Salem), Jan. 4, 1953, at 1, 4.

194 Gene W. Rossman, *'Liberal' in Law*, OREGONIAN (Portland), Dec. 21, 1952, at 33.

195 *Id.*

196 Al R. Harris, *The People Speak: Questions Our Advice*, OR. DAILY J. (Portland), Jan. 24, 1953, at 6.

The Association even drew on the directly interpretive provision to appeal directly to the public, as can be seen in the following newspaper advertisement[197]:



IS THE *WORKING MAN* ENTITLED TO LIQUOR BY THE GLASS?

3 Out of 5 Oregon Voters Cast Their Ballots for a "Uniform and Liberally Construed" Liquor Measure

If you were one of the 369,127 Oregon voters who cast their vote for the privilege of having liquor-by-the-glass, you voted for a measure which would be **uniform** and **liberal** in its interpretation. You did **not** vote for a measure which would set up this privilege for a favored few and be denied to the average working man.

Following the wishes of Oregon voters, the Oregon Liquor Control Commission, with its national reputation for successful administration and enforcement, has recommended a **uniform** and **liberal** liquor-by-the-glass law to the State Legislature.

Nevertheless, the State Legislature is now beset by special interests who urge your lawmakers to ignore the mandate of the people and to pass discriminatory class legislation which would grant the privilege of liquor-by-the-glass almost exclusively to a certain select class of retail operators and their own select clientele. These people of special interest would approve the licensing of a very few of the better-known "working men's clubs" as a **token** of their consideration of many people who in their working clothes would not be welcome in the so-called "better" establishments. These same people of special interest have again resurrected the word "saloon" to describe premises of dispensers catering to working people.

The following reprint of the measure as it appeared on the November 4, 1952, ballot, with vote totals noted, indicates clearly that the voters of Oregon cast an **overwhelming** vote for a **"uniform and liberal"** law:

CONSTITUTIONAL AMENDMENT AUTHORIZING ALCOHOLIC LIQUOR SALE BY INDIVIDUAL GLASS—Purpose: To amend Article 1 of Oregon constitution by adding section 39 thereto, which would authorize the state to license private clubs, fraternal organizations, veterans' organizations, railroad corporations operating interstate trains, and commercial establishments where food is cooked and served, for purpose of selling alcoholic liquor by individual glass for consumption on premises. Act effective 60 days after adoption. Local option elections in counties and incorporated towns containing populations of 300. Legislature shall prescribe procedure for local option at biennial elections in counties or incorporated towns of less population. Act to operate uniformly and be liberally construed. Vote YES or NO.

310 X	Yes. I vote for the proposed amendment.	**369,127**
311	No. I vote against the proposed amendment.	285,446

The Portland Oregonian has stated editorially, "The people approved the liberalization of the Knox Law with the definite understanding that laboring groups as well as white-collar workers and members of private clubs would be able to buy liquor over the bar without discrimination."

In the promotion of uniform temperance, the phrase "Moderation is Measured in Ounces—Not in Bottles" applies **equally** to the working man. If the law is to be **uniform** and **liberal** it must not discriminate against any class of consumer or operator; the privilege of liquor-by-the-glass must be made as conveniently available to the working man as to the business and professional man.

The Oregon Licensed Beverage Association has full confidence in the ability of the Oregon Liquor Control Commission to effectively administer a **uniform** and **liberal** liquor-by-the-glass law, such as they have recommended.

The Oregon Licensed Beverage Association urges the people of Oregon to inform their representatives in the Oregon Legislature to follow the recommendations of the Oregon Liquor Control Commission. These recommendations of the Commission respect the **wishes** of the **majority** of the people of Oregon for a **uniform** and **liberal** liquor-by-the-glass law.

Oregon Licensed Beverage Association
214 Weatherly Building, Portland, Oregon

197 *Is the* Working Man *Entitled to Liquor by the Glass?*, *supra* note 184, at 15.

Repeatedly invoking the "liberal" construction rule with bolded font, the Association reminded readers that it was the "wishes of the majority of the people of Oregon" to have a "uniform and liberal liquor-by-the-glass law."[198]

But while arguments about Oregon's directly interpretive provision appealed to the people's direct mandate, not all directly interpretive provisions have such a pedigree or purpose. As the next case study illustrates, sometimes members of the public make a democratic choice to defer—without completely delegating—their voice over statutory interpretation to people with more legal and legislative training.

2. Preempting the State: The Home Rule Amendments

"I seek to strike out Paragraph 11 only because I think it is so revolutionary in its present form that it will create much doubt and confusion as to just what it means,"[199] complained Dominic Cavicchia to his fellow delegates at the New Jersey Constitutional Convention of 1947, urging them to read the paragraph for themselves:

> The provisions of this Constitution and of any law concerning municipal corporations formed for local government, or concerning counties, *shall be liberally construed in their favor*. The powers of counties and such municipal corporations *shall include not only those granted in express terms but also those of necessary or fair implication, or incident to the powers expressly conferred, or essential thereto*, and not inconsistent with or prohibited by this Constitution or by law.[200]

Cavicchia didn't object to the idea that local governments should have autonomy from states.[201] But he worried that the proposed constitutional provision "would open the door to such an extent that each municipality would be able to decide for itself what is reasonably convenient."[202]

That was an interesting thing for him to say considering that he had been part of the eleven-member committee that had drafted it.[203] In February of that year, the New Jersey state legislature had enacted a statute that asked members of the public to vote in June on whether to have a constitutional convention and, if so, who should be the

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198 *Id.*

199 1 STATE OF NEW JERSEY CONSTITUTIONAL CONVENTION OF 1947, at 400 (1947) [hereinafter NJ CONVENTION I].

200 *Id.* (emphasis added).

201 *See id.*

202 *See id.* at 400–01.

203 *See* 2 STATE OF NEW JERSEY CONSTITUTIONAL CONVENTION OF 1947, at 1062 (1947) [hereinafter NJ CONVENTION II].

delegates.[204] In order to make it onto the ballot, would-be delegates had to submit petitions containing at least 300 signatures from certain counties and at least 100 signatures from the other counties.[205] After enough voters agreed to a convention and chose their delegates, the elected delegates quickly convened and formed committees to divvy up the work.[206] Among them was "The Committee on the Legislative," on which Cavicchia sat.[207] Out of the eleven members on the committee, all but two had backgrounds as attorneys, and all but one were current or former members of the state legislature.[208] The committee's formation had formal democratic roots, and the committee itself invited further democratic participation from the public. It held three "well attended" public hearings for feedback that summer.[209] And before the final public hearing, it published a draft of its proposed constitutional amendments.[210]

When the committee submitted its work product to the constitutional convention, it explained that the purpose of the paragraph that Cavicchia took issue with was to "grant to counties and municipalities far greater latitude than they now enjoy in the performance of their local functions."[211] And when committee chairman Edward O'Mara rose to respond to Cavicchia, O'Mara explained that "[p]ractically every civic organization that has been concerned with the revision of the Constitution has urged that a larger grant of home rule be made to municipalities."[212] The directly interpretive constitutional provision was critical to giving some teeth to that larger grant of home rule. The existing legal rule, O'Mara explained, was that "a municipality depends upon the grant of power from the Legislature, and that grant of power, the courts have said, is strictly construed."[213] By contrast, "[t]he purpose of this amendment . . . is that that rule of construction should be reversed."[214] Even though the amendment also stated that municipalities and counties would have powers "reasonably convenient for

204 Act of Feb. 17, 1947, ch. 8, § 5, 1947 N.J. Laws 24, 26.

205 *Id.* § 6, 1947 N.J. Laws 24, 26–27.

206 *See* NJ CONVENTION II, *supra* note 203, at 984–87 (listing rules for the various committees).

207 *Id.* at 1062.

208 *Id.* at 1062 (listing members); *see id.* at 949 (Percy Camp); *id.* at 950 (Dominic Cavicchia); *id.* at 958 (Myra C. Hacker); *id.* at 961 (Christian Jorgensen); *id.* at 962 (Wesley Lance); *id.* at 963 (Leon Leonard and Arthur W. Lewis); *id.* at 968 (John L. Morissey); *id.* at 969 (Edward O'Mara); *id.* at 972 (Haydn Proctor); *id.* at 974–75 (Olive C. Sanford).

209 *See id.* at 1069.

210 *See id.*

211 *Id.* at 1075–76.

212 NJ CONVENTION I, *supra* note 199, at 401.

213 *Id.*

214 *Id.*

the execution of" their enumerated and implied powers, the rule of liberal construction was what made those provisions work.[215] After all, O'Mara explained, "the question of what is reasonably convenient . . . would be subject to judicial construction and review."[216]

Cavicchia's proposal to cut the provision failed by a vote of fifty-one to nineteen,[217] but one delegate wanted to try again.[218] That delegate, not an attorney,[219] found the language of the proposed amendment too ambiguous.[220] "Advocates of home rule," after all, had already "gained great ground in the draft as proposed by the committee."[221] So he offered a more surgical solution that only emphasized the importance of the directly interpretive provision. If he had his way, everything in the paragraph *except* the directly interpretive constitutional provision would be cut.[222] His attempt also lost by a vote of thirty-eight to thirty-six.[223] In the end, the constitutional convention approved the original language,[224] and so did voters of the public.[225]

The next year, the state legislature invoked the directly interpretive constitutional provision as a reason to create a new state commission on municipal government.[226] The commission's task was to study local government laws and suggest improvements,[227] and in its preliminary report it stated that the paragraph containing the directly interpretive provision was among one of two sections of the constitution that "controlled the Commission from the beginning of its work."[228] As the commission noted in its report, that paragraph's recognition of local governments' "essential" powers "still leaves the matter of construing municipal powers to the courts."[229] This only made the directly interpretive provision all the more important.

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215 *Id.* at 402.
216 *Id.*
217 *Id.* at 402–03.
218 *See id.* at 449.
219 *See* NJ CONVENTION II, *supra* note 203, at 971 (providing a biography of Henry W. Peterson).
220 NJ CONVENTION I, *supra* note 199, at 449.
221 *Id.*
222 *See id.*
223 *See id.* at 450.
224 *See id.* at 763–64 (approving Committee Proposal No. 2-1).
225 N.J. DEP'T OF STATE, RESULT OF THE GENERAL ELECTION HELD NOVEMBER 4TH, 1947 (1947).
226 N.J. Res. 1, 172d Leg., 1948 N.J. Laws 1923, 1923.
227 *Id.* § 4, at 1924.
228 PRELIMINARY STATEMENT OF THE COMMISSION ON MUNICIPAL GOVERNMENT: LOCAL SELF-GOVERNMENT IN NEW JERSEY: A PROPOSED OPTIONAL CHARTER PLAN 4 (1948) (emphasis omitted).
229 *Id.*

While New Jersey led the way in including this directly interpretive constitutional provision, six states followed within the next three decades.[230] In Michigan, Illinois, and Montana, these provisions arose from constitutional conventions—members of the public deferred largely to experts to draft their rules of statutory interpretation.[231] In Kansas, South Carolina, and Wyoming, these provisions originated from legislatures who then submitted them to the people for a vote.[232] In each case, there was a division of interpretive labor.

Sometimes, though, a particular division of interpretive labor can become unacceptable to voters. The next case study illustrates how directly interpretive constitutional provisions can allow voters to rebalance that division.

3. Supervision of Agency and Municipal Statutory Interpretation: California's Public-Access Referendum

California's Proposition 59 in 2004 was such a slam dunk that the only written argument against it in the state voter guide could be summarized by the argument's confession that "Proposition 59 may be better than nothing, but it does not go far enough"[233]—a confession written by an "opponent" who told the *Sacramento Bee* before the election, "I wouldn't say I'm an opponent."[234] There had been organized interest groups involved, but not a single dollar had been raised on either side for Proposition 59 in an election that saw almost $200 million raised for the state's other ballot measures.[235] Each house of the California legislature had approved the proposition by a unanimous vote before sending it to voters,[236] and when the November election arrived, 9,334,852 Californians voted in favor—a margin of 83 to 17.[237] As one newspaper joked, "Name anyone or anything listed

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230 *See* discussion *supra* Section II.B.

231 *See generally* DINAN, *supra* note 22, at 25–26 tbl. 1.3 (listing when the most recent constitutions took effect).

232 *See* Act of Mar. 23, 1959, ch. 182, §§ 1–2, 1959 Kan. Sess. Laws 403, 405; Act of July 7, 1972, no. 1631, §§ 1–2, 1972 S.C. Acts 3184, 3188; Act of Feb. 18, 1971, § 1, 1971 Wyo. Sess. Laws 715, 716.

233 Gary B. Wesley, *ARGUMENT Against Proposition 59*, *in* KEVIN SHELLEY, CALIFORNIA SECRETARY OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, NOVEMBER 2, 2004, at 15 (2004).

234 John Hill, *Right to Know Would Be Law Under Prop. 59*, SACRAMENTO BEE, Oct. 14, 2004, at A5.

235 *See Proposition Fundraising*, CAL. VOTER FOUND. ARCHIVE (Jan. 27, 2006), https://archive.calvoter.org/voter/elections/2004/props/fundsummary.html [https://perma.cc/D3EC-FK7G].

236 SHELLEY, *supra* note 233, at 12.

237 *See* KEVIN SHELLEY, STATEMENT OF VOTE, NOVEMBER 2, 2004, at 39 (2004), https://elections.cdn.sos.ca.gov/sov/2004-general/sov_2004_entire.pdf [https://perma.cc/GQS7-5WZW].

on the ballot that would get 83 percent of the vote. Free ice cream? Tax credits for breathing? No, but we'll keep an eye out for those."[238]

At the center of it all was Terry Francke, a former newspaper editor who decided to go to law school and then became an attorney for the California First Amendment Coalition[239]—an alliance of media outlets, civic organizations, and free speech advocates.[240] By the late twentieth century, California already had an array of statutes that allowed members of the public to access both government documents and meetings.[241] Francke helped add to this array by writing the first draft of a statutory amendment that in 1994 significantly expanded the public's access to local government meetings.[242] As he and the Coalition turned their sights to the state constitution, they found allies in organizations like the League of Women Voters of California and the California Newspaper Publishers Association.[243]

Of all the possible avenues for amending the constitution, proponents chose the path of a legislative referendum. According to one account at the time, the "alternative would have been an expensive and time consuming initiative measure by public petition,"[244] and the proponents didn't have that to spare. "If someone would give us some money, we'd do some advertising," said the general counsel of the California Newspaper Publishers Association. "We just don't have any budget."[245] The downside of a legislative referendum, though, was that the proposal would need to clear the legislature. And in the end, after spending several years in the legislative pipeline where interest groups voiced concerns about privacy and the release of trade secrets, compromises had to be made to secure legislative approval.[246] Among them: The *legislature's* records would be exempt.[247]

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238 *A Vote for Our Right to Know*, Desert Dispatch (Barstow, Cal.), Nov. 10, 2004, at 4.

239 *See SDSPJ to Honor Longtime First Amendment Fighter Terry Francke on March 27*, San Diego Soc'y Pro. Journalists (Mar. 15, 2013), https://spjsandiego.org/2013/03/15/sdspj-to-honor-longtime-first-amendment-fighter-terry-francke [https://perma.cc/DR6S-HCCG].

240 *See* Ronnie Cohen, *The Right to Know; Coalition Forces Government to be Open in Its Dealings*, Pac. Sun (Mill Valley, Cal.), Mar. 2, 2005.

241 *See, e.g.*, Act of July 2, 1953, ch. 1588, 1952 Cal. Stat. 3269; Act of Sep. 2, 1967, ch. 1656, § 122, 1967 Cal. Stat. 4015, 4026; Act of Aug. 29, 1968, ch. 1473, 1968 Cal. Stat. 2943, 2946 (expanding public oversight over government).

242 *See NEWS Briefs*, Random Lengths (San Pedro, Cal.), Sep. 1, 2006, at 2; John W. Witt, Report to the Honorable Mayor and City Council (1994).

243 *See Proposition 59, 60, 62*, Bakersfield Californian, Sep. 30, 2004, at A3.

244 *You Can Help Put Brakes on Government Secrecy, Coverup*, Chino Champion, Sep. 4, 2004, at B4.

245 Hill, *supra* note 234, at A8.

246 *See id.*; *A Big Push for Open Government*, Santa Cruz Sentinel, Sep. 15, 2004, at A11.

247 *See* Hill, *supra* note 234, at A8; *A Big Push for Open Government*, *supra* note 246, at A11.

The directly interpretive constitutional provision was therefore not so much a tool to check the legislature in the way that many state constitutional amendments are. In fact, just a year after the provision was passed, a legislative committee refused to disclose certain information about a legislative aide, prompting Terry Francke to concede, "The only solution may be a citizen initiative."[248] The true value of Proposition 59 was that it would check *other* government institutions.

Most obviously, it was a tool to intervene in statutory interpretation in the courts. One of the primary motivations for Proposition 59 was a widely shared sense that courts had misinterpreted the state's public-access statutes. When the *Marysville Appeal-Democrat* offered its endorsement, it succinctly explained that Prop. 59 would "make stronger the rights already guaranteed by existing statutes. The problem has been that government bodies and the courts have been interpreting these statutes too narrowly."[249] Part of the problem, according to the *San Francisco Chronicle*, was that "[c]urrent laws have been construed by courts to mean that anyone requesting information has to prove why it should be public."[250] And as a journalist for the *Barstow Press Dispatch* explained, Proposition 59 "seeks to sweep away years of adverse court decisions that have little by little eroded the public's right to know what their government is doing and why."[251] One such decision was a 1991 California Supreme Court decision that blocked the release of the governor's calendar information.[252] Even though Prop. 59 wouldn't explicitly overturn that precedent, according to the *Sacramento Bee* it would "call for restrictions on public access to be interpreted narrowly and be justified by specific findings."[253]

Courts were simply the tip of the iceberg. The ultimate targets of the directly interpretive provision were municipalities and government agencies. They were the ones actually on the frontlines, receiving and denying public requests for records.[254] And according to the *Santa Cruz*

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248 Vic Pollard, *Legislators Able to Dodge Disclosure*, BAKERSFIELD CALIFORNIAN, Dec. 1, 2005, at B4.

249 *Our Views on the Ballot Propositions*, MARYSVILLE APPEAL-DEMOCRAT, Oct. 24, 2004, at B7.

250 Mark Martin, *Plan Would Aid Access to Public Records*, S.F. CHRON., Oct. 13, 2004, at B3.

251 Daniel Weintraub, *Time to Produce the Goods*, BARSTOW PRESS DISPATCH, Nov. 14, 2004, at B5.

252 *See* Dan Smith, *Group Asks for Governor's Calendar*, SACRAMENTO BEE, Nov. 6, 2004, at A3 (describing how the California Supreme Court held that "former Gov. George Deukmejian's calendar was part of the 'deliberative process' of government and therefore exempt from public-records laws"); Times Mirror Co. v. Superior Ct., 813 P.2d 240, 251 (Cal. 1991).

253 Hill, *supra* note 234, at A8.

254 *See* Jim Wasserman, *Proposition 59 Seeks Stronger Constitution for Open Records*, SANTA CRUZ SENTINEL, Sep. 26, 2004, at A2.

Sentinel, "[p]ublic access laws have been routinely ignored by local governments for many years."[255] The California First Amendment Coalition claimed that local governments had "used closed sessions to direct staff not to provide information to one of their elected members" and to "act on matters not listed on the agenda."[256] Cities sometimes cited court decisions when refusing to approve requests for records from members of the public.[257] Meanwhile, government agencies were acting similarly. After journalists from the *Contra Costa Times* went undercover and asked eighty-six government agencies for public records in July of 2004, the journalists reported that they were met by "suspicion, defensiveness, intimidation, needless delays, incompetence and ignorance."[258]

Supporters of Proposition 59 ultimately hoped that the directly interpretive provision would change this state of affairs in agencies and cities. One desired change was a cultural shift brought about by upstream changes in judicial statutory interpretation. Proponents hoped that Proposition 59 would lead to a "series of favorable court rulings" that would "prod a gradual, but lasting attitude change and more cooperation at government agencies."[259] In the words of the California Newspaper Publishers Association general counsel, the goal of Proposition 59 was to "change the culture of government so [public officials] understand that their role is to get the information out, rather than enforce secrecy."[260]

Proponents also hoped for changes to statutory interpretation done by agencies and municipalities themselves. As one newspaper weighed in, existing public access laws were "too-often misinterpreted and ignored by government agencies."[261] Proposition 59 imposed a rule on how these agencies were to interpret the respective statutes. According to the *Chino Champion*, Proposition 59 imposed a rule of statutory interpretation that was "important, because too many agencies and their attorneys had been taking the other point of view, narrowly interpreting the rules of access and broadly interpreting the

255 *A Big Push for Open Government*, *supra* note 246, at A11.

256 *Vote 'Yes' on Proposition 59*, Lodi News Sentinel, Oct. 26, 2004, at 4.

257 *See* Wasserman, *supra* note 254, at A2 (referring to the City of Oakland citing a court decision as justification for refusing to provide the names and salaries of employees earning annual salaries over $100,000).

258 Hill, *supra* note 234, at A8; *see also* Wasserman, *supra* note 254, at A2 (reporting additional examples of the same phenomenon).

259 Wasserman, *supra* note 254, at A2.

260 Ginger Moorhouse, *Protect Your Right to Know*, Bakersfield Californian, Oct. 10, 2004, at B11.

261 *A Vote for Our Right to Know*, *supra* note 238, at 4.

exceptions."[262] Seen this way, Proposition 59 was an exertion of popular sovereignty over delegated statutory interpretation authority. As the *Chino Champion* asserted, Proposition 59 "states that the people do not yield their sovereignty to the agencies that serve them."[263]

When voters saw arguments like these in the newspapers and the official state voter guide, it was unmistakable that Proposition 59's real teeth was in its directly interpretive provision. The proposed constitutional amendment would have added six paragraph-long subsections to the state constitution, but four of these were merely caveats, and the remaining two consisted of a declaration of the right to access and the directly interpretive provision.[264] Because of how essential and unavoidable the directly interpretive provision was—how little "bundling" there was—unofficial voter guides in newspapers almost uniformly pointed out the relevance of the directly interpretive provision.[265] And voters approved it.[266]

The fight had only begun, though. City councils quickly began reviewing their policies on making documents available to the public.[267] County courts and district attorneys' offices began facing questions about the releasability of certain police records.[268] And as battles like these trickled into courts, judges drew on the directly interpretive constitutional provision for guidance. In the process, it became clear that provisions like these could transform statutory interpretation into something else: constitutional interpretation.

III
Statutory Interpretation When the Constitution Speaks

The assumption that constitutional law can provide only an indirect basis for statutory interpretation has led scholars to search elsewhere, in downstream sources like statutes and common law, for something to ground statutory interpretation methodology.[269] The dominant

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262 *Closed Doors Opened*, Chino Champion, Dec. 4, 2004, at B6.

263 *Id.*

264 Shelley, *supra* note 233, at 81.

265 *See, e.g.*, *Ballot Proposition Pros and Cons*, Union (Grass Valley, Cal.), Oct. 1, 2004, at A5; *Proposition 59, 60, 62*, *supra* note 243, at A3.

266 *See* Shelley, *supra* note 237, at 39.

267 *See* Michael Waterson, *Prop. 59's Impact Being Scrutinized*, Martinez News-Gazette, Nov. 6, 2004, at 3.

268 *See Kern Censorship Is Wrong*, Bakersfield Californian, Mar. 22, 2005, at B6.

269 *See, e.g.*, Rosenkranz, *supra* note 13 (discussing legislatively enacted rules of interpretation at the federal level); Gluck, *States*, *supra* note 12 (discussing legislatively enacted rules of interpretation at the state level); Elhauge, *supra* note 13 (same); Gluck, *Federal Common Law*, *supra* note 13, at 757 ("Exploring this possibility . . . that statutory interpretation methodology is some kind of judge-made law.").

view can be summarized by the following assertion: "If a [state] statutory interpretation methodology really were 'law' in a positivist sense, then it could come about in two ways—either by legislative enactment or by state common law."[270] This binaristic framing turns the question of authority over statutory interpretation methodology into one that ultimately depends on the proper allocation of power among institutions—namely courts and legislatures.[271] Meanwhile, the posture of "looking down" rather than "looking up, to rules of ever-higher legal authority,"[272] has required scholars to analogize statutory interpretation to subordinate-to-constitutional forms of law whose force in real-world practice has been shown to be weak,[273] and whose validity in theory often ironically depends on the resolution of higher-order constitutional questions.[274] As scholars have argued, if statutory interpretation methods are a form of common law, then legislatures can override those methods by statute.[275] And yet, as other important scholarship has shown, judges in several states routinely ignore legislatively enacted rules of statutory interpretation on the basis that those rules unconstitutionally intrude on "judicial power."[276] At this

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270 Pohlman, *supra* note 12, at 537.

271 As important scholarship has shown, every state has enacted and codified rules of statutory interpretation by passing statutes that say as much. *See* Scott, *supra* note 107. Yet as other important scholarship has shown, many "canons" of statutory interpretation remain unwritten. *See, e.g.*, Gluck, *Federal Common Law*, *supra* note 13, at 755 ("[M]odern federal statutory interpretation is a field dominated by judicially created legal presumptions."); William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1084 (2017) (discussing the unwritten law of interpretation). Some scholars have described these unwritten rules as judge-made common law—rules that are within judges' powers to craft on their own. *See* Gluck, *Federal Common Law*, *supra* note 13, at 755. Others have characterized them as "general law"—"legal rules not dictated by any particular jurisdiction, but whose content 'emerges from patterns followed in many different jurisdictions.'" Baude & Sachs, *supra*, at 1137 n.340 (quoting Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 503 (2006)). On this view, certain rules of statutory interpretation are "part of a common legal tradition" that judges can't simply revise (in the way they might for common-law rules) to make legislation work better. Baude & Sachs, *supra*, at 1137. Whichever side one takes, though, the debate takes place at the same level: Authority over statutory interpretation is an intramural, republican battle between courts and legislatures.

272 Baude & Sachs, *supra* note 271, at 1097.

273 *See* Gluck, *States*, *supra* note 12, at 1824–27 (explaining how state courts often ignore legislatively enacted rules of interpretation).

274 *See, e.g.*, Rosenkranz, *supra* note 13, at 2092–102 (assessing the constitutional basis of federal legislatively enacted rules of statutory interpretation); Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARV. L. REV. 515, 558–77 (2023) (discussing federal constitutional justifications for substantive canons).

275 *See* Gluck, *States*, *supra* note 12, at 1828 ("Legislative acts, after all, can override common law decisions.").

276 *See id.* at 1756.

rate, the legal status of statutory interpretation methodology can only be described as uncertain.[277]

Directly interpretive constitutional provisions, however, present the archetypal form of interpretive methodology as law. Unlike judge-made canons of interpretation, these provisions are positively enacted (rather than made up in court cases) and generally do not depend on individual judges' idiosyncratic beliefs about specific canons.[278] Unlike statutes that enact rules of interpretation, state constitutions are a supreme source of law, ratified by public voters instead of just legislatures,[279] and treated as mandatory by judicial interpreters.[280] By embodying the *strongest* form of interpretive methodology as law, these constitutional provisions establish the yardstick against which all other conceptions of interpretive methodology as law should be measured.

How strong exactly is this "strongest form of interpretive methodology as law"? Put another way: How much wiggle room do these voter-approved methods leave for legislatures and judges? Section III.A describes how the distinctive nature of these provisions can constrain—and has constrained—the influence of *both* courts and legislatures in statutory interpretation. They can create off-ramps for statutory interpreters who might otherwise engage in subjective

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277 To be sure, some have recognized that certain rules of statutory interpretation have a constitutional character if they help implement constitutional values. *See* Gluck, *Federal Common Law*, *supra* note 13, at 757–58, 766–67; Eskridge, *supra* note 1, at 1019–36; *see also* Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 3 (1975) (describing the existence of a "constitutional common law"); Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 8 (2004) (arguing for a "functional taxonomy" of "judge-created constitutional doctrine"). For example, some have claimed that the rule of lenity has roots in constitutional guarantees of due process. *See* John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 406 n.26 (2010). But scholars defending views like this have done so by taking the terse U.S. Constitution as their sole reference point, and of course it takes layers of inference to derive any specific methods of statutory interpretation from the U.S. Constitution. *See* discussion *supra* Section I.A. This has led critics to respond that it is "not entirely clear how one would decide which specific canons are sufficiently linked to the Constitution to merit inclusion." Gluck, *Federal Common Law*, *supra* note 13, at 767.

278 *See* discussion *supra* Section II.B.

279 Delaware is the exception, as it does not permit the public to vote on constitutional amendments proposed by the legislature nor does it allow the public on its own to initiate and approve of constitutional amendments. *See* Allie Boldt, DIRECT DEMOCRACY IN THE STATES: A 50-STATE SURVEY OF THE JOURNEY TO THE BALLOT 4 (Nov. 2023), https://statedemocracy.law.wisc.edu/wp-content/uploads/sites/1683/2023/11/Direct-Democracy-In-the-States-Full-Report.pdf [https://perma.cc/KK7C-9VSJ]. To be sure, in many states it's always possible for the public to initiate and approve of *statutes* that enact rules of statutory interpretation. To the best of my knowledge, though, no such citizen-initiated statutes exist. Moreover, in some states, legislatures may modify statutes that arose from initiatives. *See Legislative Alterations of Ballot Initiatives*, BALLOTPEDIA, https://ballotpedia.org/Legislative_alterations_of_ballot_initiatives [https://perma.cc/6H58-8UJV] (last visited May 31, 2026).

280 *See* discussion *infra* Sections III.A–B.

interest-balancing tests. They can also expand the instances in which the canon of constitutional avoidance is applicable and can narrow the instances in which the finding of "legislative intent" is an appropriate goal for statutory interpretation.[281] Meanwhile, directly interpretive constitutional provisions can functionally subordinate and even negate certain judge-made canons of interpretation.

Yet despite their demonstrated potential for allowing voters to commandeer statutory interpretation, these provisions contain an inherent vulnerability: They too must be interpreted by someone. This interpretive task is simpler and more constrained than, say, the task of inferentially deriving textualism from Article I of the U.S. Constitution,[282] but the task still exists. And given that these provisions represent the strongest and highest-order form of interpretive methodology as law, they therefore uniquely expose how statutory interpretation must always entail some amount of deference from the people to official interpreters.

This doesn't mean unlimited deference. Section III.B describes, diagnoses, and criticizes three specific ways in which government statutory interpreters have exploited that vulnerability and misunderstood the nature—and therefore the scope—of that deference. First, interpreters must determine whether to use the constitutionalized methods at the start or at the end of the process of interpretation—a decision that can determine the outcome of a case. But interpreters have failed to recognize that this decision may have already been made by voters. Second, interpreters have at times assumed, without adequate justification, that constitutionalized methods should be avoided if they produce results that the interpreters—but perhaps not the voters who approved those methods—consider absurd. And third, interpreters have at times asserted, again without adequate justification, that statutes must first be deemed ambiguous before constitutionalized interpretive methods can be used. Absent adequate *constitutional* justification—and there may indeed be some such justification that has yet to be elaborated[283]—it is simply not in judges' discretion to impose a judge-made absurdity canon, ambiguity threshold, or sequencing rule on a voter-approved interpretive method.

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281 *See* discussion *infra* Section III.A.

282 *See* Manning, *Textualism*, *supra* note 1, at 695.

283 For example, it's possible to argue that voters intended constitutionalized methods to be treated just like regular judge-made canons. (Thanks to Nathaniel Donahue for suggesting this point.) But thus far, no court has even come close to making any argument in such a constitutional register, and no existing provisions provide obvious textual support for that particular argument.

A. Voter-Approved Restraints on Statutory Interpreters

Directly interpretive constitutional provisions can serve as restraints on subjective determinations by institutional statutory interpreters. They can preempt the use of interest-balancing tests, increase the use of the canon of constitutional avoidance, limit the desirability of searching for legislative intent, and generate an unwritten constitutional law of statutory interpretation that crowds out judge-made canons of interpretation.

1. Fewer Judicial Interest-Balancing Tests

Constitutional provisions that require statutes to be interpreted in ways that further certain domain-specific policies (such as freedom of speech, economic equality, and so on) can lead interpreters to sidestep difficult and subjective legal tests that weigh different interests to reach a conclusion.

As scholars have long observed, legal analysis that turns on the weighing of opposing parties' interests against each other invites unprincipled reasoning and raises questions about the legitimacy of judicial decisionmaking.[284] These concerns arise in statutory interpretation too. So-called substantive canons of statutory interpretation can tip the balance of interests in a particular direction, allowing courts to choose an interpretation of a statute that favors the interests or values protected by the substantive canon in question.[285] And while an interpreter can claim that they are just neutrally following the canon, an interpreter first has to make the decision to apply that substantive canon at all.[286] Because there is always a subjective choice in whether to apply a judge-made substantive canon, it is easy to take for granted that the use of substantive canons always requires some amount of interest-balancing; by using such a canon, an interpreter has already made a subjective choice that the canon should apply.

But directly interpretive constitutional provisions that mandate the use of substantive canons instead *remove* the interest-balancing from the equation. In 2013, for example, a California court of appeals declined to balance interests when it was asked to determine whether emails from consultants hired by a state agency constituted "other factual information" that had been "submitted to the agency"

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[284] *See* Patrick M. McFadden, *The Balancing Test*, 29 B.C. L. Rev. 585, 636, 643–46 (1987).

[285] *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 117–19 (2010).

[286] *See* Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. Chi. L. Rev. 825, 847–64 (2017) (discussing the Roberts Court's infrequent use of substantive canons).

under California's administrative procedure act[287] (and thus whether the emails had to be published as part of the record of an agency's rulemaking).[288] The court explained that it would look beyond the statute's text to consider "public policies implicated by the disclosure of material received by agencies from consultants."[289] But although the court "recognize[d] the tension between the benefits of disclosure and the benefits of confidentiality," the court concluded that it need not—and could not—be the one to balance those two interests.[290] Rather, the court explained, what "might have been a difficult task had the California voters not addressed the issue" suddenly became a simple task: "The conflict between the public policies is resolved by applying the constitutional directive favoring public access to information."[291] Thus, the court concluded, solely because of that constitutional provision, the statute "mean[t] that emails from [outside] consultants to [the agency] were 'submitted to the agency.'"[292]

California's Supreme Court also gestured toward embracing this avoidant move in 2017 when it was asked to determine whether police data from automated license plate readers were exempt from public disclosure because of the California Public Records Act's exemption for "[r]ecords of . . . investigations conducted by . . . any state or local police agency."[293] After first determining that dictionary definitions of the word "investigate" didn't compel any particular outcome, the court looked to a prior case on that exemption in which the court "discussed the risk that [the litigant's] proposed [exemption-narrowing] interpretation [of the exemption] might pose to law enforcement."[294] The court distinguished that case on the ground that collection of bulk license plate data was less likely to "compromise current or future law enforcement,"[295] and it asserted that the exemption "should be

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287 CAL. GOV'T CODE § 11347.3(a) (West 2025) ("Every agency shall maintain a file of each rulemaking that shall be deemed to be the record for that rulemaking proceeding. . . . [T]he agency shall make the file available to the public for inspection and copying during regular business hours.").

288 POET, LLC v. Cal. Air Res. Bd., 160 Cal. Rptr. 3d 69, 117–18 (Ct. App. 2013) ("Plaintiffs contend that the four e-mails should have been included in the rulemaking file because, among other things, they contain 'data and other factual information' that was 'submitted to the agency in connection with the adoption . . . of the regulation.'").

289 *Id.* at 118–19.

290 *Id.* at 119.

291 *Id.*

292 *Id.*

293 ACLU Found. of S. Cal. v. Superior Court, 400 P.3d 432, 434 (Cal. 2017); CAL. GOV'T CODE § 6254(f) (West 2021).

294 *ACLU Found. of S. Cal.*, 400 P.3d at 437.

295 *Id.* at 438.

interpreted in light of modern technological realities."[296] But despite these descriptions and arguments about the interests at stake, the court ultimately asserted that "[p]erhaps the most critical point . . . is . . . : Our Constitution requires that CPRA exemptions be narrowly construed."[297]

As these two cases illustrate, the turn away from interest-balancing tests and toward directly interpretive constitutional provisions reflects a substitution of a constitutional rule for a judicial standard. Rather than attempting to find the tricky balance between the "public's interest in disclosure and the individual's interest in personal privacy," as the California Supreme Court attempted to do in a 2007 case involving the interpretation of a public disclosure exemption,[298] an interpreter could instead follow the approach of one of the dissenting justices in that case: "I would simply follow the mandate of the initiative the voters passed in 2004 amending the California Constitution to, among other things, direct courts to construe narrowly any statute limiting the people's right of access to public records."[299] Doing so would require judges to release their hands from a task seen as belonging to courts, but perhaps this was what voters wanted.

The elevation of substantive canons to constitutional status is important for reasons beyond their potential effect on minimizing the relevance of judicial interest-balancing tests. Whereas textualists often bristle at substantive canons because they introduce nontextual reasons for choosing one interpretation over another,[300] other textualists have claimed that substantive canons may permissibly allow interpreters to "depart from the best interpretation of a statute in favor of one that is less plausible yet still bearable" if the canon promotes a constitutional value.[301] In the federal context, then-Professor Amy Coney Barrett has suggested two factors to determine what counts as a constitutional value here: "the canon must be connected to a reasonably specific constitutional value" and "the canon must actually promote the value."[302] In that regard, she has argued that "constitutionally inspired canons do not disturb the results of the legislative process in pursuit of an undifferentiated notion of fairness."[303] But this theory of statutory interpretation leaves no room

296 *Id.* at 437.
297 *Id.* at 438.
298 Int'l Fed'n of Pro. & Tech. Eng'rs, Local 21 v. Super. Ct., 165 P.3d 488, 493 (Cal. 2007).
299 *Id.* at 506 (Kennard, J., dissenting).
300 *See* Eidelson & Stephenson, *supra* note 274, at 519 (quoting textualists' hesitancy about substantive canons).
301 Barrett, *supra* note 285, at 163–64.
302 *Id.* at 178.
303 *Id.* at 168.

for explicitly constitutionalized substantive canons ratified by ordinary people who have anti-legislative motivations.

Directly interpretive constitutional provisions require us to rethink the applicability of these theories at the state level. State constitutions contain explicitly constitutionalized canons in connection with the values in question. And whereas there is a relatively small set of constitutionally derived values from the U.S. Constitution, there can be a massive range of constitutionally derived values from state constitutions. Directly interpretive constitutional provisions therefore point us to an expanded set of instances in which interpreters may use substantive canons to go beyond the most natural readings of statutory texts. Those instances of expansive interpretation cut against Barrett's assertion that "constitutionally inspired canons do not disturb the results of the legislative process in pursuit of an undifferentiated notion of fairness."[304] As shown in earlier pages, some state constitutional provisions are ratified precisely to disturb the results of the legislative process in pursuit of values and policy interests that legislatures are unable or unwilling to support.[305]

2. Limitations on the Enforcement of Legislative Intent

Because state constitutions both limit and mandate specific usages of legislative power, directly interpretive constitutional provisions have consequences for how we think about legislative intent and the canon of constitutional avoidance. Voters have at times ratified directly interpretive constitutional provisions to limit the range of possible legislative intentions for statutes that can be given force. This anti-legislative dynamic in turn can expand the number of scenarios in which the canon of constitutional avoidance applies.

While the earlier case studies illuminated some examples of this anti-legislative motivation, the dynamics can also be seen clearly when judges have confronted constitutional provisions requiring legislatures to avoid the use of technical terms in statutes. In such cases, judges have used those provisions as a basis for interpreting statutory terms according to their ordinary meanings rather than according to the terms' more specialized, technical, or industry-specific meanings. An Indiana court of appeals invoked such a basis when deciding whether a jury instruction should have included definitions of certain words within the jury instruction.[306] In excusing the failure to include those

304 *Id.* at 168.
305 *See* discussion *supra* Sections II.C.1, II.C.3.
306 Johnson v. State, 426 N.E.2d 91 (Ind. Ct. App. 1981).

definitions, the court explained that the statutory definitions of the terms at issue were simply codifications of the ordinary meanings of those terms and so did not require explicit definitions.[307] And to justify this explanation, the court "emphasized that statutes should be drafted in language that is readily comprehensible to persons unversed in the law" given the Indiana Constitution's provision that "[e]very act and joint resolution shall be plainly worded, avoiding, as far as practicable, the use of technical terms."[308]

Although this constitutional provision was not itself an interpretive rule per se, the court understood the provision to have the effect of a directly interpretive rule. As it explained, the "legislature undoubtedly had . . . Article 4, § 20, of the Indiana Constitution in mind when it enacted the statutory definitions of the degree of culpability" and thus the "legislature merely codified the ordinary meanings of those words."[309] Absent an indication by the legislature that a statute should be interpreted according to something other than ordinary meaning, the court assumed, interpreters should default to the use of ordinary meaning because of a presumption that the legislature drafted with the constitutional provision in mind.

Was this presumption justified? After all, empirical evidence might show that legislators or statutory drafters didn't know about the constitutional provision requiring statutes to be written with plain words and with as few technical terms as possible.[310] But as a formal matter, the constitutionalization of the rule shifted the proper justification that an interpreter must turn to from an empirical one to a legal one. It created a *legal* presumption that piggybacked on another canon of interpretation that judges frequently use: the canon of constitutional avoidance.[311]

According to the canon of constitutional avoidance, interpreters should construe statutes in ways that would prevent the statutes either from raising potential constitutional problems or from being actually

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307 *See id.* at 99–100.

308 *Id.* at 100.

309 *Id.* at 101.

310 At least in the federal context, drafters are often unaware of canons of interpretation that judges use. *See, e.g.*, Gluck & Bressman, *supra* note 142 (testing whether congressional staffers know about certain canons of interpretation). That said, as Aaron-Andrew Bruhl has argued, "the closer relationship between state judges and state legislators (as compared to their federal counterparts) and the fact that some states have clearly articulated and distinctive methods . . . make it more realistic for state legislators to understand and legislate against the background of state interpretive methods." Aaron-Andrew P. Bruhl, *Interpreting State Statutes in Federal Court*, 98 NOTRE DAME L. REV. 61, 99 n.148 (2022).

311 *See* Anita S. Krishnakumar, *Passive Avoidance*, 71 STAN. L. REV. 513, 522–24 (2019) (describing modern forms of the avoidance canon).

unconstitutional (some theorists limit the canon to only instances of actual unconstitutionality).[312] And one often-invoked justification for this canon is that a legislature would never intend a statute to have unconstitutional effects since that would cause the statute to be struck down, destroying the legislature's work.[313] As Justice Scalia once explained, the constitutional avoidance canon is a "means of giving effect to congressional intent," as the canon "rest[s] on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts."[314]

Seen this way, even if it was not accurate to assume that a legislature enacted a statute intending the words to be construed based on their ordinary meaning unless the legislature said otherwise, construing the words based on their technical meaning would risk making the statute violate the constitution's limitation on *technical* words. To avoid that fatal conclusion, an interpreter might have to assume that the legislature intended the words of the statute to be construed based on their ordinary meaning.

This is precisely what was argued to the Idaho Supreme Court in a 2015 case on whether the company TracFone was a "wireless carrier" under a state statute.[315] The lower court had held that TracFone was not a "wireless carrier" because it did "not fit the definition of a 'special mobile radio system.'"[316] But as argued by the intervening parties on appeal, the "words should be given a generic meaning," such that the phrase "certain specialized mobile radio providers" would include "those mobile radio providers identified by the FCC in 47 C.F.R. § 20.18."[317] To explain this contention, the parties argued that—in the words of the Idaho Supreme Court—"the district court erred in holding that the phrase . . . was a technical term and that by so holding 'the District Court would have had no choice but to assume that the Legislature violated its constitutional directive'" requiring statutes to be plainly worded and "avoiding as far as practicable the use of technical terms."[318] Because this constitutional requirement existed, as the argument went, it created a directly interpretive rule that required interpreters to construe terms based on nontechnical meanings.

312 *See id.* at 523.

313 *See* Brian G. Slocum, *Rethinking the Canon of Constitutional Avoidance*, 23 U. PA. J. CONST. L. 593, 621 (2021).

314 Clark v. Martinez, 543 U.S. 371, 381–82 (2005).

315 TracFone Wireless, Inc. v. State, 351 P.3d 599 (Idaho 2015).

316 *Id.* at 605.

317 *Id.*

318 *Id.*

Although this argument didn't succeed in the end given the facts of the case,[319] it illuminated the potential relevance of directly interpretive constitutional provisions on specific tools of statutory interpretation that reflect or enforce certain institutional relationships among branches. When constitutions speak directly (and even slightly indirectly) about statutory interpretation, they generate raw material that can be used to justify claims about how to understand legislative intent and how to use tools like the canon of constitutional avoidance.

3. Collaterally Constitutionalized Canons

Directly interpretive constitutional provisions can also generate an *unwritten* constitutional law of statutory interpretation that can displace, justify, give content to, transform the function of, or constitutionally require the opposite of certain non-constitutionalized (or merely judge-made) methods of statutory interpretation. This Section documents that mechanism, illuminating a new kind of legal basis for unwritten rules of statutory interpretation methods that have so far been assumed to be capable of arising from only weak or amorphous legal sources created without direct public approval.[320]

For starters, directly interpretive constitutional provisions can provide justifications for, and content to, otherwise empty tools of statutory interpretation. In one case, a California court of appeal was asked to determine whether the private operator of an immigration detention center was covered by a statute that extended the California Public Records Act (CPRA) to "[a]ny facility that detains a noncitizen pursuant to a contract with a city," even though only the owner of the facility—which had hired the private operator—was a party to the contract with the city.[321] The court concluded that, based on the language of the statute, the CPRA did in fact cover the operator.[322] The court then went on to explain that its construction was also supported by the "absurdity canon," as the losing litigant's "proposed interpretation

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319 *Id.* at 607.

320 The "weak or amorphous legal sources" I have in mind are, specifically, common law made by judges, rules of interpretation enacted by legislatures, and a "general law" that arises from perceptions of what judges have tended to do across jurisdictions. *See* Rosenkranz, *supra* note 13, at 2086–90 (discussing legislatively enacted rules); Gluck, *States*, *supra* note 12, at 1755–56 (discussing legislatively enacted rules); Gluck, *Intersystemic*, *supra* note 12, at 1912–15 (discussing judicial creation of common law); Gluck, *Federal Common Law*, *supra* note 13 (discussing common law); Baude & Sachs, *supra* note 271, at 1137–38 (elaborating "general law" as a basis for interpretation methods); *cf.* Nelson, *supra* note 271, at 505 (describing the sources of "general law").

321 Von Herrmann v. Superior Court, 290 Cal. Rptr. 3d 597, 599 (Ct. App. 2022) (quoting CAL. CIV. CODE § 1670.9 (West 2023)).

322 *Id.* at 604.

would lead to the absurd result of allowing a direct contracting party to shield an immigration detention facility from CPRA scrutiny merely by inserting a contractual intermediary between the contracting party and the local government agency."[323] And in justifying its use of the absurdity canon, the court relied solely on the state constitution's directly interpretive provision, which required statutes to "be *broadly* construed if [they] further[] the people's right of access," in order to conclude that the "Legislature could not have intended that a statute enacted to enhance transparency could be so easily frustrated."[324] The constitutional provision filled in the *content* of an otherwise empty absurdity canon that would have been based solely on an interpreter's personal feelings about what counted as absurd.

Directly interpretive constitutional rules can also displace non-constitutionalized rules when they're in conflict. That can be seen in a 2017 California Supreme Court case called *City of San Jose v. Superior Court*, in which a directly interpretive constitutional provision negated a linguistic judge-made canon known as the "inclusio unius" canon.[325] The question in that case was whether a city employee's emails and texts about public business, sent from a personal account, constituted "writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics" and thus were a "public record" subject to disclosure under the CPRA.[326] To determine the meaning of the phrase "prepared, owned, used, or retained by any state or local agency," the court relied on the constitutional provision.[327] The City had argued that the CPRA's definition of "local agency," which listed a number of illustrative entities, failed to "specifically include individual government officials or staff members, whereas individuals *are* specifically mentioned in CPRA's definition of '*state agency*.'"[328] In other words, the City relied on the inclusio unius canon of statutory interpretation: When a legislature goes through the trouble of listing examples of things inside a category, anything not listed is excluded from that category.[329] The court refused to apply this canon, however, because the "City's narrow reading of CPRA's local agency definition [was] inconsistent with the constitutional directive of broad

323 *Id.* at 605.
324 *Id.* (quoting Cal. Const. art. 1, § 3(b)(2)).
325 City of San Jose v. Superior Court, 389 P.3d 848, 855 (Cal. 2017).
326 *Id.* at 851–53.
327 *Id.* at 855.
328 *Id.*
329 *See* Gluck & Bressman, *supra* note 142, at 930.

interpretation."[330] Under a broad construction, the court explained, a "'local agency' . . . include[d] not just the discrete governmental entities listed . . . but also the individual officials and staff members who conduct the agencies' affairs."[331]

Directly interpretive constitutional provisions can also preserve, but *functionally* subordinate, non-constitutionalized canons when the two can be harmonized. When, for example, a California court of appeal tried to determine the meaning of the word "information" by looking at its broad dictionary definitions, the court concluded that the word "should be given its ordinary meaning" because "[w]e will not adopt a definition that narrows the disclosure of information to the public because such an interpretation would be contrary to the constitutional directive favoring public access to information."[332] Rather than beginning with the default judge-made assumption that a statute's terms should be given ordinary meaning,[333] the court displaced that assumption with a constitutionalized default assumption: A statute's terms should be given the meaning most aligned with the directly interpretive constitutional rule, regardless of whether that meant the ordinary meaning or a meaning more specialized.[334] But while this essentially created an unwritten constitutional rule against putting ordinary meaning first when the directly interpretive rule applied, the concept of ordinary meaning survived by becoming transformed into a *subordinate* reason to prefer one meaning over another. It could no longer be that concluding that one interpretation fits a term's ordinary meaning could alone determine the outcome of a case; now ordinary meaning had coherence as a legal concept only in relation to a higher-authority, directly interpretive rule.

B. Statutory Interpretation as Constitutional Interpretation

But even rules of interpretation can themselves need interpretation. As scholars have shown within other interpretive contexts, when legislatures enact statutes that impose interpretive rules, interpreters have to determine if those rules even apply to the case at hand—a process that some have called a "step zero" of interpretation.[335]

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330 *City of San Jose*, 389 P.3d at 855.

331 *Id.*

332 POET, LLC v. Cal. Air Res. Bd., 160 Cal. Rptr. 3d 69, 119 (Ct. App. 2013).

333 *See, e.g.*, Centerpoint Builders GP, LLC v. Trussway, Ltd., 496 S.W.3d 33, 36 (Tex. 2016) ("In construing the Act, as with any statute, we start with the 'ordinary meaning of the statutory text.'" (quoting *In re* Ford Motor Co., 442 S.W.3d 265, 271 (Tex. 2014)).

334 *POET, LLC*, 160 Cal. Rptr. 3d at 119.

335 Andrew Tutt, *Interpretation Step Zero: A Limit on Methodology as "Law,"* 122 YALE L.J. 2055, 2057, 2064–66 (2013).

And even if the rules apply, interpreters then have to determine *how* to apply those rules.

Given their unique constitutional status, directly interpretive constitutional provisions require similar determinations but in a fundamentally different register. They transform the task of statutory interpretation into one of constitutional interpretation, and in doing so they expand the number of statutory interpretation methods that can be deemed as having a constitutional basis. But as the following Section shows, courts have failed to recognize this fundamental transformation in three ways that have shaped the outcomes of cases.

1. Sequencing Rules

In any given case, a question may arise about whether a directly interpretive constitutional provision on its own is enough to resolve a statutory interpretation issue. And the answer to that question can be shaped by whether one starts with the directly interpretive constitutional provision or instead ends with it. As scholars have shown about two judge-made canons of interpretation—the rule of lenity and the canon of constitutional avoidance—the relative prioritization of a given statutory interpretation method can determine a case's outcome.[336]

When it comes to directly interpretive constitutional provisions, though, the question of prioritization is a question of constitutional construction. The supreme authority of constitutional law means that when a directly interpretive constitutional provision says, "start with this rule" or "only use this rule at the end if you can't figure the meaning out by other methods," a legislature can't simply override that rule with a statute. Nor can a judge simply disregard that command to conclude that a contrary judge-made principle takes precedence. Any modification must be done by a constitutional amendment.

The problem, of course, is that no currently existing directly interpretive constitutional provision is explicit about where it should be positioned in the process of statutory interpretation. There's no "start with this rule" clause to be found. Yet because the rule of prioritization must be *constitutional* in nature—otherwise legislatures and judges could simply override the constitution by fiat—an interpreter must construe an *unwritten* constitutional rule. Here, statutory interpreters

336 *See* Shon Hopwood, *Restoring the Historical Rule of Lenity as a Canon*, 95 N.Y.U. L. Rev. 918, 945–48 (2020); Anthony Vitarelli, *Constitutional Avoidance Step Zero*, 119 Yale L.J. 837, 839–42 (2010) (demonstrating that varying applications of constitutional avoidance can yield different results); Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 Mich. L. Rev. 1275, 1281–88 (2016) (arguing that constitutional avoidance is employed in various forms which can produce different interpretive outcomes).

can't simply assume that the constitutional provision generates a canon of interpretation that should be treated exactly like, and can be modified or disposed of exactly like, judge-made canons of interpretation.[337] After all, whereas judges are principally the ones who generate common-law-like methods of statutory interpretation (and so can modify those methods accordingly),[338] the *people* are involved in creating directly interpretive constitutional provisions.[339] Judges must instead rely on *constitutional* reasons to make sense of what directly interpretive constitutional provisions say and don't say.

But judges have at times failed to recognize the distinctive transformation that directly interpretive constitutional provisions bring about. In simply assuming that these provisions obey the dynamics that judges have caused common-law-like methods of statutory interpretation to obey, judges have made implicit, unconscious constitutional determinations under the guise of common law reasoning. And the real-world stakes of these constitutional determinations can be seen in the varying outcomes of the cases involved.

When placed at the front end of statutory interpretation, directly interpretive constitutional rules can be sufficient to determine the meaning of a statute no matter what other support exists for other plausible interpretations. For example, a constitutional rule that imposes a specific interpretation of a specific statute may easily settle a legal claim seeking an alternative interpretation clearly prohibited by the constitutional rule. But even constitutional provisions that impose more general rules—such as general substantive canons—can alone determine outcomes. For example, the Supreme Court of Virginia has explained in a case about taxation that "[w]hile [the taxed entity's] interpretation might arguably be reasonable, if there is another reasonable interpretation . . . then [the taxed entity's] interpretation must lose. This follows because under our present Constitution . . . '[e]xemption of property from taxation . . . shall be strictly construed.'"[340]

However, judges have sometimes started with other tools of statutory interpretation and relegated directly interpretive constitutional provisions to the back end of the process. Sometimes, the directly interpretive provisions are still outcome determinative. When one court in Virginia evaluated a property tax exemption by looking at

337 Indeed, it's not obvious that constitutionalized substantive canons should be treated as "closure rules," which some scholars have defined as rules that "tell us how to proceed in cases of uncertainty." Baude & Sachs, *supra* note 271, at 1111.

338 Gluck, *Federal Common Law*, *supra* note 13, at 755.

339 *See* discussion *supra* Part II.

340 Westminster-Canterbury of Hampton Rds., Inc. v. City of Virginia Beach, 385 S.E.2d 561, 565 (Va. 1989).

treatise definitions and canons like noscitur a sociis and ejusdem generis, for example, it ultimately concluded that "[e]ach of these factors alone does not defeat [the party's] claim for an exemption" but that, "in their totality, it appears [the party] is not sufficiently similar to [an exempt institution] to qualify . . . under a strict construction of the term."[341] If the directly interpretive provision had not existed, the court explained, then the party would have been eligible for a tax exemption.[342]

More often, though, statutory interpreters have invoked directly interpretive constitutional provisions merely to confirm conclusions they made by first using other tools of statutory interpretation.[343] When the Supreme Court of Wyoming decided in 1981 whether a certain ordinance was a "law," for example, it pointed to two reasons for its analysis—first, the word was used "unambiguously" in the respective statute, and second, the "strained interpretation for which the appellants contend would not be consistent with a liberal interpretation of the powers and authority granted to cities and towns" by the state's constitutional amendment for home rule.[344] Or, to quote the Supreme Court of California when it interpreted a state bar rule, "*If there were some doubt* about whether rule 4.4 prohibits public access . . . , we nevertheless must interpret the rule in light of [the directly interpretive constitutional provision]."[345]

These attempts to have it both ways reveal a crisis in judicial reasoning—one enabled by the dominance of the common law model of thinking about statutory interpretation, and an anxiety of what to do when confronted with a *constitutional* rule of statutory interpretation. After all, if an interpretation is supported by a directly interpretive constitutional provision, why isn't that enough? Rather than confronting that question and answering it on constitutional grounds, judges have instead mistakenly treated constitutionally required methods of interpretation as if they were exactly like *judge-made* canons of interpretation. And by doing so, judges have found two other mechanisms for avoiding the application of those constitutionalized methods: ambiguity thresholds and the absurdity canon.

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341 Close Up Found. v. Arlington Cnty. Bd. of Supervisors, 39 Va. Cir. 490, 499 (1996).

342 *Id.* at 502 ("Under a liberal interpretation of the statutes in question, this court would undoubtedly find that Close Up is eligible for at least one of the claimed exemptions.").

343 *See, e.g.*, Sander v. State Bar of Cal., 314 P.3d 488, 496–97 (Cal. 2013) (starting with the "most reasonable construction" before asserting that, "[i]f there were some doubt," the directly interpretive constitutional provision cleared that doubt); Overstock.com, Inc. v. Goldman Sachs Grp., Inc., 180 Cal. Rptr. 3d 234, 254–55 (Ct. App. 2014) (same); Cmty. Action Agency of Butte Cnty. v. Superior Court, 294 Cal. Rptr. 3d 586, 597–98 (Ct. App. 2022) (same); Va. Dep't of Tax'n v. Wellmore Coal Corp., 320 S.E.2d 509, 511 (Va. 1984) (same); Hosp. Ass'n v. Cnty. of Charleston, 464 S.E.2d 113, 118 (S.C. 1995) (same).

344 Police Protective Ass'n v. City of Rock Springs, 631 P.2d 433, 435 (Wyo. 1981).

345 *Sander*, 314 P.3d at 497 (emphasis added).

2. *Ambiguity Thresholds*

Without adequate constitutional justification, courts have avoided directly interpretive constitutional provisions by gating them behind a test of statutory ambiguity. Surprisingly, both courts applying textualist approaches and courts applying purposivist approaches have imposed this gate, albeit in different ways.

The textualist variant has involved applying directly interpretive constitutional provisions only if the "plain meaning" of a statute is not apparent.[346] In the words of one Virginia court that refused to let the state's directly interpretive constitutional provision dictate the outcome of a case, "the meaning and intent of the statutes is clear enough for a ruling."[347] Or as one California court of appeal explained in 2024 about California's public-access provision, "[t]hat provision has no application here because it comes into play only 'when a court is confronted with resolving a statutory ambiguity.' (*Poet, LLC v. State Air Resources Bd.* (2013) 218 Cal.App.4th 681, 750 [160 Cal. Rptr. 3d 69].) It gives us 'no power to disregard the plain language of [a] statute.' (*Alvarez v. Superior Court* (2007) 154 Cal.App.4th 642, 657 [64 Cal. Reptr. 3d 854].) Nor would we, as a court of law, consider doing so."[348]

But the closer that one examines such statements about plain meaning coming first, the more that one might start to wonder: What's the legal basis of imposing this prerequisite? The first case cited by that California court—*Poet*—contained merely a description of the constitutional provision and then the conclusory statement: "Therefore, when a court is confronted with resolving a statutory ambiguity related to the public's access to information, the California Constitution requires the court to construe the ambiguity to promote the disclosure of information to the public."[349] But where did we get the idea that ambiguity was *necessary*? The second case cited by that California court—*Alvarez*—similarly included only a conclusory statement about plain meaning without any justification: "To the extent [the provision] requires us to liberally construe [the statute] . . . we have no power to disregard the plain language of the statute."[350] But *why*

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346 *See, e.g.*, Alvarez v. Superior Court, 64 Cal. Rptr. 3d 854, 866 (Ct. App. 2007) ("[W]e have no power to disregard the plain language of the statute . . . ."); Cisco Sys., Inc. v. Thorsen, 68 Va. Cir. 385, 392 (2005) ("The Court finds this argument repetitive and wholly unpersuasive in view of the plain-meaning requirement.").

347 Old Time Gospel Hour, Inc. v. City of Lynchburg, 8 Va. Cir. 73, 83 (1983) ("While the question of construction is an issue in this case, in my opinion, it is not a dispositive issue since the meaning and intent of the statutes is clear enough for a ruling.").

348 Burton v. Campbell, 327 Cal. Rptr. 3d 440, 450 n.8 (Ct. App. 2024).

349 POET, LLC v. Cal. Air Res. Bd., 160 Cal. Rptr. 3d 69, 117 (Ct. App. 2013).

350 *Alvarez*, 64 Cal. Rptr. 3d at 866.

doesn't the court have power? The California court's final assertion also rests on a puzzling assumption: "Nor would we, as a court of law, consider [disregarding the plain language]."[351] Again, one must ask, what is the basis of this lack of power, as a court of law, to construe the constitutional provision broadly enough to permit or even require judges to set aside the plain meaning of a statute in favor of the policy required by the constitutional provision?

The test of ambiguity certainly isn't one that's obviously required by the state constitutions in question, and in fact it may not even be permitted. After all, nothing in the texts of the directly interpretive constitutional provisions says that the statutes in question should be liberally or strictly construed only if the statutes are ambiguous. They simply mandate a liberal or strict construction. Nor is it obvious that the drafters or public approvers of the constitutional provisions intended for those provisions to be gated behind a test of statutory ambiguity.

Purposivist examples of this gatekeeping dynamic reflect even greater restrictiveness, as they impose a second gate of ambiguity that can be resorted to even after a statute's plain meaning has been determined to be too uncertain: ambiguity as to *legislative intent*. Thus, when the Supreme Court of California in 2013 determined that the statutory term "computer mapping systems" was linguistically ambiguous, it was only after looking at the statute's context (which it deemed supportive of one interpretation) and legislative history (which it deemed inconclusive) that the court finally considered the directly interpretive constitutional provision.[352] "Any remaining doubt about the proper interpretation," the court explained, was "dispelled by the interpretive rule in . . . the California Constitution."[353] Yet as earlier Sections have shown, voters at times ratify directly interpretive constitutional provisions to constrain and undermine legislative intent.[354]

If the permissibility of using these constitutionalized substantive canons of interpretation shouldn't necessarily depend on a statute first being found to be ambiguous, what might be the alternative? One plausible, but unlikely, possibility is that voters ratified these directly interpretive constitutional provisions because they wanted cases about the statutes to always be resolved in one side's favor. Oregon's 1951 constitutional amendment, for example, led people to claim that "any question of propriety, liberality or policy in granting a license for a

351 *Burton*, 327 Cal. Rptr. 3d at 450 n.8.
352 Sierra Club v. Superior Court, 302 P.3d 1026, 1032–38 (Cal. 2013).
353 *Id.* at 1038.
354 *See* discussion *supra* Sections II.C.1, II.C.3.

certain spot must be construed in favor of the applicant."[355] But this raises problems beyond the issue of deciphering voters' intentions. It can lock in unanticipated outcomes and undermine potentially inalienable constitutional rights,[356] raising deeper questions about whether there's such a thing as an *unconstitutional* constitutional amendment in the United States.[357]

Luckily, there are fewer troubling possibilities. Substantive canons of statutory interpretation can perform functions beyond brute-force tiebreaking. They can serve as "rules that tie the extent of [a legislature's] power to the clarity with which that power is exercised," or, in other words, they can limit the reach of statutes to only those situations that the statutes have clearly (or clearly enough) said that they apply to.[358] Alternatively, the constitutionalized substantive canons could simply set default rules or presumptions of how statutes should be interpreted "that can be rebutted by statutory language, legislative history, and overall purpose."[359] And these two possibilities can coexist and interact: Directly constitutionalized statutory interpretation methods can raise the bar for how clear a statute needs to be in order for a presumption in favor of one interpretation to be rebutted.[360] Framed differently, constitutionalized substantive canons may shift the burden of proof from one party to another, and indeed this is partly what the California public-access provision was ratified to accomplish.[361]

3. Who Decides What's an "Absurd" Interpretation?

It is precisely through assumptions about legislative intent that courts typically justify their determinations about when an interpretation is "absurd" and therefore incorrect. As one scholar has described the

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355 Marcy, *supra* note 180, at 8.

356 *See, e.g.*, TEX. CONST. art. I, § 29 ("[W]e declare that every thing in this 'Bill of Rights' is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto, or to the following provisions, shall be void.").

357 Thanks to Bill Eskridge for this suggestion. *See* Yaniv Roznai, *Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea*, 61 AM. J. COMPAR. L. 657, 657 (2013).

358 Thanks to Brian Slocum for this suggestion. Eidelson & Stephenson, *supra* note 274, at 561.

359 William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 597 (1992).

360 *See id.* (discussing clear statement rules).

361 *See* Mike Machado, Jacqueline Jacobberger & Peter Scheer, *ARGUMENT in Favor of Proposition 59*, *in* KEVIN SHELLEY, CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION 14, 14 (2004), https://vig.cdn.sos.ca.gov/2004/general/english.pdf [https://perma.cc/SF2F-AXUX] (arguing that the ballot measure would "put the burden on the government to show there is a real and legitimate need for secrecy before it denies you information").

absurdity canon, "standard interpretive doctrine . . . defines an 'absurd result' as an outcome so contrary to perceived social values that Congress could not have 'intended' it."[362] But whereas voters can ratify directly interpretive constitutional provisions to guide the content of legislative intentions—even to constrain and limit which legislative intentions can be enforced—courts might undermine that supervisory role by instead prioritizing legislative supremacy over popular sovereignty.

A paradigmatic example is the 2016 California Supreme Court case *Ardon v. City of Los Angeles*. As the court explained, California's constitutional provision—which requires statutes to be construed broadly if they further people's right to access—"does not require the courts to resolve every conceivable textual ambiguity in favor of greater access, no matter how implausible that result in light of all the relevant indicia of statutory meaning."[363] Instead, the court continued, "[i]n this case, consideration of the statutory text, context, purpose, and history leaves us with no genuine doubt but that the Legislature did not intend for the Public Records Act's protections to be forfeited through simple inadvertence."[364] And yet, *the people* might have intended for the statute to be construed that way without thinking that it was absurd to do so. The court ignored this possibility, instead fixating on what the legislature might have intended notwithstanding the fact that a constitutional provision could supersede and even prohibit that legislative intention from being enforced.[365]

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These portraits point us to three important conclusions. First, as the examples make clear, even when voters decide to specify methods of interpretation in their constitutions, there may still be room for discretion by official interpreters. But second, when interpreters apply or don't apply these provisions, they are engaging in a *constitutional* task—not run-of-the-mill statutory interpretation. Third, however, judges have sometimes failed to realize this fact, which has led them to mistakenly assume that directly interpretive constitutional provisions are identical in nature to—and obey the same rules as—judge-made canons of statutory interpretation. And this has emboldened judges to override directly interpretive constitutional provisions without sufficient reasoning or legal authority.

362 John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2390 (2003).
363 366 P.3d 996, 1004 (Cal. 2016).
364 *Id.*
365 *Id.*

In reality, of course, there are relatively few directly interpretive constitutional provisions. What, then, is the relevance of popular will when constitutions *don't* speak? The next Part develops an answer.

IV
The Democratic Division of Interpretive Labor

Directly interpretive constitutional provisions expose how final authority over state statutory interpretation methodology always rests with members of the public. Of course, one might object that people have rarely asserted their authority over statutory interpretation in such a way, which might seem to produce an outcome consistent with the standard view that government institutions have an inherent constitutional authority to design statutory interpretation methodology. But even in instances of constitutional silence, the authority that government institutions claim to have over statutory interpretation is contingent on a public's ongoing expression or reservation of its sovereignty through formal procedures of constitutional amendment.

Directly interpretive constitutional provisions thus reveal what I call a "democratic division of interpretive labor"—a formally legitimized separation of functions in statutory interpretation between the people and their governments. They allow members of the public to formally express their authority over—and to provide explicit democratic mandate to—certain methods of statutory interpretation while deferring to government institutions on other, unspecified methods of statutory interpretation.

The idea of a democratic division of interpretive labor adds political and methodological dimensions to a linguistics concept called "division of linguistic labor."[366] As legal scholars Kevin Tobia, Brian Slocum, and Victoria Nourse have explained, the concept of division of linguistic labor refers to the idea that "'making meaning' is divided among the population, and the meaning of technical terms falls within the ambits of experts . . . . Moreover, people understand this division and defer to experts about the meaning of technical terms."[367] As Slocum, Tobia, and Nourse have shown through empirical studies, there's evidence that laypeople "understand some terms in legal texts to communicate

366 *See* Hilary Putnam, *The Meaning of "Meaning,"* 7 Minn. Stud. Phil. Sci. 131, 146 (1975) (arguing that "[e]very linguistic community . . . possesses at least some terms whose associated 'criteria' are known only to a subset of the speakers who acquire the terms, and whose use by the other speakers depends upon a structured cooperation between them and the speakers in the relevant subsets").

367 Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Ordinary Meaning and Ordinary People*, 171 U. Pa. L. Rev. 365, 373 (2023).

technical meanings and defer to expert legal authority about those meanings."[368] Directly interpretive constitutional provisions add to this idea by creating a formal political avenue for members of the public to express when they are and aren't deferring on issues of statutory interpretation *methodology* rather than simply semantic meaning.

As Section IV.A suggests, the lived realities of this democratic division of interpretive labor clarify in what instances—and for what reasons—it's appropriate for government institutions to invoke "what the people want" as a justification for interpretive methods.[369] Those instances and reasons depend in part on the formal procedures of amendment required in any given jurisdiction, especially whether citizens can unilaterally change their constitutions without legislative approval.[370]

As I'll argue in Section IV.B, these jurisdiction-specific nuances in the degrees of democratic mandate and constitutional amendability provide a new normative reason to be cautious about treating most methods of statutory interpretation as precedential law. My goal here is not to end the debate about methodological precedent but rather to reframe and move it forward—to introduce this normative reason, explain it, and justify it on its own terms. Specifically, the judicial and legislative *entrenchment* of interpretive methods in forms that are politically infeasible for constitutionalization would undermine the people's sovereign authority to supervise statutory interpretation.[371] Based on current realities, these methods include abstract theories of statutory interpretation like purposivism and textualism, as well as the trans-substantive use of discrete tools of interpretation.[372]

A. Popular Sovereignty and Interpretive Legitimacy

1. The Democratic Significance of Formal Constitutional Amendment

Directly interpretive constitutional provisions are so unique in how they endow statutory interpretation methods with democratic legitimacy because they require formal public approval and trump all other forms of law. This is so even despite the wide variety of "democratic deficits" in elections that scholars have identified. Those deficits include the possibilities that there may be low diffusion of

368 *Id.* at 414.
369 *See id.*; *infra* Section IV.A.
370 *See infra* Section IV.A.
371 *See infra* Section IV.B.
372 *See id.*

knowledge about down-ballot issues,[373] bundling of policy issues,[374] and interest group influence, all of which make it more difficult to determine what voters really thought they were voting on.[375] Unsurprisingly, campaigns for constitutional amendments can draw vast amounts of spending by interest groups, raising questions about whether the success of certain amendments should be attributed to money rather than popular will.[376]

Yet recent empirical research has suggested that votes on ballot measures often—if not usually—accurately reflect voters' ideological and policy interests, particularly for ballot measures that feel salient to voters. One study of "Californians making choices about 10 ballot propositions across four years" showed that "citizens' ideological positions accurately predict 80.28 percent of their choices"—an effect that increases when voters have "party cues and policy information" and that decreases when voters "overwhelmingly support" or "find confusing" the ballot measures in question.[377] As to information deficits, one recent study has found that, for constitutional amendments in Florida since 1994, there was a "statistically significant relationship between [newspaper] endorsements and percentage of 'no' votes," suggesting that there are existing forces that mitigate voters' lack of information about ballot measures.[378] And as to the bundling of multiple provisions within a single ballot measure, one recent experimental survey has found that "voters appear capable of processing complex multi-provisional ballot measures and evaluating them in line with their policy preferences," though this effect "consistently appears limited to

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373 *See, e.g.*, Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63 (1994) (discussing conditions under which information affects voter behavior on ballot initiatives).

374 *See, e.g.*, Bruhl & Leib, *supra* note 71, at 1235 (arguing that, in the context of elections for sub-federal judges, the "likelihood that an election has the focus to illuminate a hard question of statutory interpretation . . . is very small"). To be sure, ballot measures may offer a process to *unbundle* policy issues. *See* Timothy Besley & Stephen Coate, *Issue Unbundling via Citizens' Initiatives*, 3 Q.J. POL. SCI. 379, 390–93 (2008).

375 *See, e.g.*, Elizabeth Garrett, *Who Directs Direct Democracy?*, 4 U. CHI. L. SCH. ROUNDTABLE, 17 (1997) (discussing the influence of interest groups in direct democracy processes).

376 *See* John M. de Figueiredo, Chang Ho Ji & Thad Kousser, *Financing Direct Democracy: Revisiting the Research on Campaign Spending and Citizen Initiatives*, 27 J.L., ECON., & ORG. 485, 508 (2011) (concluding that "both support and opposition spending on initiatives exert strong and statistically significant effects on their chances of passage").

377 Cheryl Boudreau & Scott A. Mackenzie, *Ballot Box Representation: Spatial Voting and the Effects of Information in Direct Democracy Elections*, 47 POL. BEHAV. 711, 733 (2025).

378 Kevin Fahey, Carol S. Weissert & Matthew J. Uttermark, *Extra, Extra, (Don't) Roll-Off About It! Newspaper Endorsements for Ballot Measures*, 18 STATE POLS. & POL'Y Q. 93, 104 (2018).

salient or familiar policy issues."[379] By contrast, when complex ballot measures "lack[] salience and partisan cues," voters "disproportionately weight down their overall evaluations based on their least favorable component(s)."[380] These findings suggest that the failure to ratify directly interpretive constitutional provisions that were bundled with other provisions may not indicate public opposition to the directly interpretive provisions, and, conversely, the success of such directly interpretive constitutional provisions may partially be attributed to voters' conclusions that the interpretive provisions were not so worth rejecting that the entire ballot measure must be rejected.

Moreover, many of the democratic deficits identified by scholars may not be significant for certain directly interpretive constitutional provisions. For Missouri's 2006 stem cell provision, voter turnout was only 0.4% less than it was for that same election's U.S. Senate vote.[381] And while the campaign for that particular ballot measure involved tens of millions of dollars,[382] campaigns for other ballot initiatives such as California's access-to-government measure involved almost no campaign spending.[383] While many of the directly interpretive provisions were bundled with other proposed provisions, some like California's involved little bundling,[384] and others like Oregon's still generated public discussion over statutory interpretation.[385] In several instances, California and Oregon included, bundling was a feature and not a bug, since directly interpretive provisions could help make the bundled substantive provisions effective.[386]

Most importantly, the democratic deficits involved in direct citizen voting on constitutional amendments also plague elections of government officials—sometimes even more so. As Ethan Leib and Aaron-Andrew Bruhl have shown, judicial election campaigns rarely

379 Lucas Boschelli & Dino P. Christenson, All or Nothing: Voting on Multiple Provision Ballot Measures 10 (Mar. 3, 2026) (unpublished manuscript) (on file with author), https://preprints.apsanet.org/engage/apsa/article-details/69ab377f4770e67d92be18bc [https://perma.cc/PW4B-DZSW].

380 *Id.* at 8.

381 There were 2,128,459 votes cast regarding the Senate race, and 2,119,992 votes cast regarding the ballot measure. *See All Results Official Election Returns State of Missouri General Election - November 2006 - General Election*, Mo. Sec'y of State (Nov. 7, 2006), https://www.sos.mo.gov/CMSImages/ElectionResultsStatistics/AllRacesGeneralNovember2006.pdf [https://perma.cc/6PPE-UGKS].

382 *See Missouri's Senate, Stem Cell Races Broke Money Records*, St. Louis Pub. Radio (Dec. 7, 2006, at 10:54 CT), https://www.stlpr.org/other/2006-12-07/missouris-senate-stem-cell-races-broke-money-records [https://perma.cc/43SQ-QWEU].

383 *See Proposition Funding*, *supra* note 235 and accompanying text.

384 *See* discussion *supra* Section II.C.3.

385 *See* discussion *supra* Section II.C.2.

386 *See* discussion *supra* Sections II.C.1, II.C.3.

if ever highlight, let alone involve, methods of statutory interpretation as reasons to vote for particular candidates.[387] And, of course, even the election of a judge who promises to use a specific method of statutory interpretation neither guarantees nor legally obligates any follow-through from the judge.

Elections for lawmakers who can enact rules of statutory interpretation fare no better for the same reason. But in addition, elections for state political offices are usually "second-order elections" in which voters rely on *national*-level political party messaging and brands as shortcuts.[388] As some scholars have argued, state legislatures themselves may be antimajoritarian because of extensive gerrymandering.[389]

Democratic deficits in the ordinary lawmaking process persist even after lawmakers have been elected. Legislators may vote "yes" on bills that they never read, simply rubber-stamping bills handed to them by organized interest groups.[390] The policy choices of state legislatures also frequently diverge from the preferences of constituents.[391] Thus, even if legislatures codify rules of statutory interpretation, those rules may not reflect what a majority of voters want. And even in scenarios where a legislatively codified rule of statutory interpretation has high public visibility and even high public support, none of that may matter if courts can simply declare those rules unconstitutional—as some courts have done.[392] An amendment of a constitutional dimension is the ultimate way to legally safeguard an interpretive method that reflects the desires of citizens as reflected through a formal vote. Awareness of the need for this safeguard was, after all, partly what motivated voters of Oregon's liquor-by-the-drink rule and California's public-access rule.[393]

While formal public approval of a directly interpretive constitutional provision represents the public's exercise of authority over statutory interpretation through the grant of a democratic mandate, we can

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387 Bruhl & Leib, *supra* note 71, at 1235–36.

388 David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763, 765–68 (2017).

389 *See* Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733 (2021).

390 *See, e.g.*, ALEXANDER HERTEL-FERNANDEZ, STATE CAPTURE: HOW CONSERVATIVE ACTIVISTS, BIG BUSINESSES, AND WEALTHY DONORS RESHAPED THE AMERICAN STATES—AND THE NATION 81–82 (2019) (describing legislative reliance on a group called ALEC to digest bills).

391 *See* John G. Matsusaka, *Popular Control of Public Policy: A Quantitative Approach*, 5 Q. J. POL. SCI. 133, 135 (2010) (finding state policy decisions on ten "high-profile issues" to be congruent with public opinion only fifty-nine percent of the time).

392 Thanks to Aaron-Andrew Bruhl for suggesting I address this more explicitly. *See, e.g.*, Gluck, *States*, *supra* note 12, at 1788–90.

393 *See* discussion *supra* Sections II.C.1, II.C.3.

draw stronger conclusions about that mandate for some jurisdictions compared to others.

In a slim minority of states (twenty-four of fifty), citizens have explicit constitutional authority to call constitutional conventions without legislative approval and/or to directly initiate and ratify specific constitutional amendments without legislative approval.[394] Therefore, formally channeled popular will, by itself, can provide an ultimate basis for statutory interpretation methods. In those jurisdictions, it's reasonable to conclude that the absence of a directly interpretive constitutional provision means that the associated method of statutory interpretation lacks affirmative democratic mandate (even if it's democratically legitimate for other reasons), since it's always possible—even if not feasible—for those methods to be constitutionalized by the unilateral vote of the people.

In the remaining twenty-six states, constitutional amendments require legislative approval and sometimes do not even require public approval.[395] All twenty-six of these states allow legislatures to propose amendments—in all of these states except Delaware, these legislatively approved amendments are then submitted to citizen voters for their approval.[396] Two of these states' constitutions have provisions allowing citizens to initiate amendments,[397] but one of them—Massachusetts's—requires legislative approval for amendments,[398] while the other—Mississippi's—was deemed by that state's supreme court in 2021 to be nonfunctional in its current form.[399] The final method of constitutional amendment available in these twenty-six states is the constitutional convention, but the constitutions of nineteen of those states explicitly require the respective legislatures to authorize those constitutional conventions by either a majority or

394 *See supra* notes 83–85 and accompanying text. Once again, these states are: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Hawai'i, Illinois, Iowa, Maryland, Michigan, Missouri, Montana, Nebraska, Nevada, New Hampshire, New York, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, and South Dakota.

395 *See supra* note 394. These remaining twenty-six states are: Alabama, Delaware, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, New Jersey, New Mexico, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

396 Boldt, *supra* note 279, at 5, 57.

397 MASS. CONST. amend. art. XLVIII, cl. 1; MISS. CONST. art. 15, § 273(3).

398 MASS. CONST. amend. art. XLVIII, §§ 4–5, cl. 4; *see also* John Dinan, *Constitutional Amendment Processes in the 50 States*, ST. CT. REP. (July 24, 2023), https://statecourtreport.org/our-work/analysis-opinion/constitutional-amendment-processes-50-states [https://perma.cc/Y63U-4FQC] (discussing Massachusetts's legislative approval requirement).

399 *See* Butler v. Watson, 338 So. 3d 599, 615 (Miss. 2021); *see also* Boldt, *supra* note 279, at 112 (discussing *Butler*).

supermajority.[400] (Five of those states do not even require legislatures to submit the question of whether to hold a constitutional convention to citizen voters.)[401] And in the remaining seven states, where there are no explicit provisions relating to constitutional conventions at all,[402] the power to call a constitutional convention arguably requires legislative approval too.[403]

By contrast, for a slim majority of states (twenty-six of fifty), constitutional conventions and amendments require *legislative approval* in addition to public approval (or, in the case of Delaware, do not entail a public vote).[404] That extra layer adds a significant hurdle to constitutional amendment and allows provisions to be vetoed by someone other than the general public.[405] In addition, while the overwhelming majority of states require a mere simple majority to ratify constitutional amendments, others require up to two-thirds of votes to be in favor and/or up to a majority of *voters* (rather than votes on the specific ballot measure) to vote in favor.[406] As demonstrated by the California case study, the requirement of legislative approval can also lead proposed constitutional amendments to become modified in ways that members of the public may disagree with simply to make legislative approval easier.[407] These dynamics make it more difficult to draw firm conclusions about the public's desires simply by looking

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400 *See* JOHN DINAN & THE COUNCIL OF STATE GOV'TS, *Procedures for Calling Constitutional Conventions, Constitutional Provisions*, THE BOOK OF THE STATES (2023), https://bookofthestates.org/tables/2023-1-6 [https://perma.cc/D9JH-774G] (listing Alabama, Delaware, Georgia, Idaho, Kansas, Kentucky, Louisiana, Maine, Minnesota, New Mexico, North Carolina, South Carolina, Tennessee, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming as requiring legislative approval for conventions).

401 *See id.* (listing Georgia, Louisiana, Maine, South Carolina, and Virginia as lacking popular-vote requirements).

402 *See id.* (listing Indiana, Massachusetts, Mississippi, New Jersey, Pennsylvania, Texas, and Vermont as lacking provisions for conventions). Arkansas is also one such state, but Arkansan voters can unilaterally initiate and ratify specific amendments without a convention. *See* ARK. CONST. art. 5, § 1.

403 *See* Partlett, *supra* note 81, at 981–82.

404 *See Legislatively Referred Constitutional Amendment*, BALLOTPEDIA, https://ballotpedia.org/Legislatively_referred_constitutional_amendment [https://perma.cc/P9ZL-XS9U] (last visited May 25, 2026).

405 *See* Ryan Byrne, *States Requiring Legislative Approval of Constitutional Amendments over Two Sessions, Rather than One, Have Fewer Amendments on Average*, BALLOTPEDIA NEWS (Apr. 11, 2019, at 21:41 ET), https://news.ballotpedia.org/2019/04/11/states-requiring-legislative-approval-of-constitutional-amendments-over-two-sessions-rather-than-one-have-fewer-amendments-on-average [https://perma.cc/PPK2-8LJT] ("The two-session requirement means that a legislature can approve an amendment, and then, during the following session, reject the amendment or exclude [it] from a floor vote.").

406 *See* JEFFREY S. SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION 343 (2022).

407 *See* discussion *supra* Section II.C.3.

at the absence of directly interpretive provisions, for the absence could be the result of legislative disapproval despite public approval. Moreover, the constitutional amendments that are ratified are, because of their very nature, more likely to be the product of compromise between legislatures and members of the public, making it more difficult to determine what those members of the public would have wanted in the absence of the requirement for legislative approval.

While the permissibility of unilateral citizen constitutional amendment in each state bears on what inferences about legitimacy can be drawn from public *silence*, the actual procedure of amendment used for any given directly interpretive constitutional provision bears on what inferences can be drawn from public *action*. As a baseline, one recent experimental survey study has suggested that voters view state constitutional changes as more legitimate when citizens are asked to participate in ratification compared to when only legislatures are involved in the process.[408] This finding supports the idea that the participatory nature of ratifying directly interpretive constitutional amendments may lead those provisions to be perceived as more legitimate than legislatively codified rules of statutory interpretation. Strikingly, that same study found that "participants did not view citizen involvement in either the initiation stage or both stages of the amendment processes as any more legitimate than citizen involvement in the ratification stage or a legislature-only process," suggesting that voters may "prefer some evaluation by 'experts' such as legislators," even as voters perceive legislature-initiated—but citizen-ratified—measures as more legitimate than purely legislative measures.[409] This finding lends further support to the existence of a democratic division of interpretive labor—citizens may prefer a hybrid or even deferential process of legitimizing statutory interpretation methods rather than a purely populist or purely republican one.

Such deference can be exploited in antimajoritarian ways. Florida's ratification of its anti-*Chevron* constitutional amendment offers a cautionary (albeit anomalous) tale.[410] The state's constitution authorizes a unique additional pathway for constitutional amendments: Every twenty years, proposals for constitutional amendments can be directly submitted to the people by a "constitution revision commission" consisting of the state attorney general plus thirty-six people chosen

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408 Joseph Francesco Cozza, *Trust the Process: Citizen Participation and Procedural Legitimacy in Constitutional Change*, 36 J. ELECTIONS, PUB. OP. & PARTIES 177, 192 (2026).

409 *Id.* at 192–93.

410 Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024).

by the governor, by leaders of the state legislature, and by the state supreme court's chief justice.[411] However, of the thirty-seven members of the commission that submitted the anti-*Chevron* amendment to voters, at least thirty-one were Republican.[412] The provision was also bundled with pages of proposals focused on the rights of crime victims, which one scholar has argued "received the lion's share of the public's attention during the ballot campaign and was understandably quite popular with voters."[413] These features—hyperpartisanship and Frankensteinian bundling—dampen the democratic legitimacy of the anti-*Chevron* rule.

And yet voters were free to reject the cobbled-together provision at the polls if they wanted. For those who voted for the provision because they liked the crime victim provisions more than they hated the anti-*Chevron* rule, a vote in favor can best be understood as a decision to compromise. Just as legislators make compromises—a phenomenon that prevailing theories of statutory interpretation aim to respect[414]—so too can the people. That compromise might dampen the democratic legitimacy of the anti-*Chevron* rule if the compromise's benefits are too good to walk away from compared to the status quo. But the fact that public approval of the anti-*Chevron* rule represents a compromise doesn't in and of itself negate the rule's democratic legitimacy or make it pale in comparison to the democratic legitimacy of a purely judge-made anti-*Chevron* rule.

Where, then, does that leave us when it comes to the democratic basis of statutory interpretation methodology and the appropriateness of judicial appeals to "the people" when justifying methodological choices, especially since the public has largely been silent? The answer, again, depends on the state.

In states that allow voters to unilaterally amend constitutions, constitutionalized methods of statutory interpretation possess a unique form of democratic legitimacy tempered primarily by the real-world obstacles to majoritarianism in elections—obstacles that similarly if not more seriously impact elections of legislators and judges. Conversely,

411 FLA. CONST. art. XI, § 2(a).

412 Garin Flowers, *Who's Behind Florida's Constitution Revision Commission?*, WTSP (Sept. 25, 2017, at 23:29 ET), https://www.wtsp.com/article/news/politics/whos-behind-floridas-constitution-revision-commission/67-477559159 [https://perma.cc/RF3P-NYXB].

413 Staszewski, *supra* note 25, at 1220–21, 1240.

414 *Compare* Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 73, 119 (2012) (defending purposivist uses of legislative history when legislative history provides evidence of areas of compromise), *with* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 70 (2006) (arguing that textualism best respects legislative compromises).

when voters are silent about interpretive methods that can plausibly mobilize supporters, their silence can be read to reflect deference to government actors' choices about those methods. This doesn't mean that the government actors' choices—whether through judicial usage or legislative codification—have the *affirmative* approval of the people. In fact, those choices may even diverge from the preferences of a majority of voters.[415] Public silence and deference merely confer a thin form of democratic legitimacy to those methods, suggesting that judges are misguided if they base their methodological choices on assumptions about what the people *would* want if the people were to express themselves in the formal political ways that this Article has shown are actually possible in the real world. Far from respecting popular will and sovereignty, those judicial assumptions actually disrespect people's choices to stay silent.

As for states that require legislative approval of constitutional amendments, the extra requirement opens an additional can of potential deficits to the democratic legitimacy of constitutionalized methods of statutory interpretation. These deficits only multiply when the procedure used for the amendment involves a handpicked—and thus potentially hyperpartisan and antimajoritarian—commission such as was the case with Florida's anti-*Chevron* rule. The extra requirement of legislative (or commission) approval also makes it difficult to draw inferences from voters' silence. While voter silence may reflect deference and confer a thin form of democratic legitimacy, it may also reflect opposition that has been undesirably silenced by the legislature. In the latter case, the democratic legitimacy of a statutory interpretation method (that voters are silent on) cannot be derived by reference to what the people want, but must instead be derived from sources named by alternative theories of democracy, whether that source is some idea of morality or some notion of equality.

This legitimacy dilemma, then, raises the question of what the role of judges should be with respect to popular sovereignty in statutory interpretation—at least in states that require legislative approval of constitutional amendments. Should judges try to speak for the people since they can't authoritatively speak by themselves? In other words, should judges base their methodological choices on what they think that the people would want if the people could speak their preferred interpretive methods into constitutionalized existence? The answer is likely no, but for different reasons than in states where citizens

415 And in a hypothetical world where voters frequently and exhaustively constitutionalize methods of statutory interpretation, voter silence may in fact reflect *disapproval* of non-constitutionalized methods. Thanks to Maggie Lemos for suggesting I address this.

can unilaterally amend constitutions but choose to stay silent. Here, the potential costs are many: disrespect of people's freedom to vote out obstinate legislators, risks of entrenching mistakes about which interpretive methods are preferred by voters, risks of incorrectly determining how the public wishes to divide authority over statutory interpretation between themselves and their government officials, and errors in understanding which interpretive methods are salient to voters. As the next Section shows, real-world constraints have led only specific kinds of directly interpretive constitutional provisions to be ratified.

2. What Democratic Divisions Are Politically Feasible?

The political dynamics of state constitutional amendment make it significantly more feasible to ratify some directly interpretive constitutional provisions compared to others. What is evident despite the scarcity of directly interpretive constitutional provisions—indeed, because of the scarcity of provisions—is that the constitutionalization of statutory interpretation methodology is *political* for members of the public. Only methods of statutory interpretation that have clear substantive policy consequences may have any real chance of receiving the affirmative democratic mandate of the people via constitutional amendment. Trans-substantive methods of statutory interpretation, by contrast, face far more obstacles to constitutionalization.

Recent political science studies provide empirical support for these dynamics. One study, for example, suggests that "narrow referendum questions that lack clear ideological or informational cues overwhelm the limits of citizen competence, and are thus likely to result in unstable and unreliable decisions."[416] Proponents of state constitutional change need to overcome voter indifference and ignorance, and this is easier to do for proposals that are tied to certain policy outcomes. As political scientists have shown, low-information voters tend to take information shortcuts[417] are likely to be influenced by endorsements for ballot measures, and are more likely to know about endorsements and policy details for ballot measures that concern *moral* issues.[418] Meanwhile, other political scientists have shown that voters faced with uncertainty about the

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416 Joseph Francesco Cozza, Zachary Elkins & Alexander Hudson, *Reverse Mortgages and Aircraft Parts: The Arcane Referendum and the Limits of Citizen Competence*, 74 ELECTORAL STUDS. 1, 1 (2021).

417 *See* Lupia, *supra* note 373, at 63.

418 *See* Craig M. Burnett, *Information and Direct Democracy: What Voters Learn About Ballot Measures and How It Affects Their Votes*, 57 ELECTORAL STUDS. 223, 233 (2019).

consequences of ballot measures are more likely to reject those ballot measures.[419] And insofar as some kinds of statutory interpretation rules don't lend themselves to easy conclusions about how they would impact policy outcomes—such as a rule that requires dictionary usage in every case—voters may be more likely to reject ballot measures that impose such rules. By contrast, voters face less informational uncertainty when the "substance is less technical, there might be more people discussing the issue, the costs are more straightforward, and the beneficiaries are more clearly defined."[420] And insofar as some kinds of statutory interpretation rules fit that model—such as a rule that requires property tax exemptions to be construed liberally in favor of homeowners—voters may be more likely to approve those rules.

Meanwhile, the critical role of interest groups in the process of constitutional amendment suggests that it may be easier to constitutionalize methods of statutory interpretation that can rally interest group support. After all, interest groups can be essential to getting proposals for constitutional amendments onto the ballot in the first place. In states that allow citizens to initiate constitutional amendments, proponents must convince enough people to sign a petition in favor of the amendment before it can end up on the ballot—a hurdle that states have recently made even more onerous.[421] As scholars have shown, and as the Oregon case study validates, interest groups are essential to gathering these signatures and sometimes can even pay companies to collect signatures for them.[422] A second method of constitutional amendment—legislative referendum—can also be influenced by interest group activity. Since this method requires legislators to approve of the proposed constitutional amendment first, interest groups can exert their influence by lobbying those legislators.[423]

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419 *See* DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 162 (1984); SHAUN BOWLER & TODD DONOVAN, DEMANDING CHOICES: OPINION, VOTING, AND DIRECT DEMOCRACY 44–45 (2000) (analyzing how information costs affect voter behavior).

420 *See* BOWLER & DONOVAN, *supra* note 419, at 44.

421 Miriam Seifter, *State Institutions and Democratic Opportunity*, 72 DUKE L.J. 275, 311–18 (2022) (discussing certain states' requirements that the petitions conform to exacting formatting requirements or that signatories be geographically distributed across the state).

422 ELISABETH R. GERBER, THE POPULIST PARADOX: INTEREST GROUP INFLUENCE AND THE PROMISE OF DIRECT LEGISLATION 40, 64 (1999); *see* Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 424–26 (2003) (describing how the tactics deployed by signature-gathering firms mean that "sufficiently well-financed initiative proponents" can "qualify virtually any initiative measure for the ballot"); *supra* Section II.C.1 (discussing the Oregon case study).

423 *See* GERBER, *supra* note 422, at 45–46 (describing the formation of campaign committees and the institutional hurdles they encounter).

As for the final path to amendment—constitutional conventions—interest groups can play an important role too.[424]

Statutory interpretation rules that favor particular policy outcomes are the most natural fit for galvanizing interest group support. As several of the case studies have shown, specific substantive policy issues make statutory interpretation relevant and important to proponents and voters.[425] And when citizens discuss and vote on directly interpretive constitutional provisions, their reasons for support or opposition has typically come from their support for or opposition to the underlying policies at stake.[426] Put another way, whereas theorists of statutory interpretation justify general theories (like textualism and purposivism) and specific methods (like the use of dictionaries) based on abstract, trans-substantive normative values (like "the rule of law" or "predictability" or "separation of powers"),[427] voters so far have instead typically expressed their preferences for statutory interpretation based on substance-specific normative values (like "stem cell research tends to be good" and "property tax exemptions tend to be bad").[428] These normative values create real-world costs and benefits for interest groups to organize around. And as Thad Kousser and Mathew McCubbins have argued in the context of citizen initiatives, proposals "with concentrated benefits will be most likely to make it on the ballot, and those with diffuse costs, and thus lacking organized opposition, will be most likely to pass, all else constant."[429]

The unique political functions and constraints of constitutional amendment at the state level only create further bias for policy-focused interpretive methods. According to John Dinan, state constitutional amendments are perceived to have unique benefits such as "removing certain matters from legislative purview, securing passage of measures blocked in the legislature, enabling enactment of measures blocked

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424 John Dinan has argued that one of the "chief obstacles" to constitutional conventions is "resistance from the political party and allied groups that control the legislature, together with groups whose policy interests are constitutionally entrenched." John Dinan, *The Political Dynamics of Mandatory State Constitutional Convention Referendums: Lessons from the 2000s Regarding Obstacles and Pathways to Their Passage*, 71 MONT. L. REV. 395, 397 (2010).

425 *See* discussion *supra* Section II.C.

426 *See id.*

427 *See, e.g.*, Richard H. Fallon, Jr., *The Statutory Interpretation Muddle*, 114 NW. U. L. REV. 269, 312–13 (2019) (arguing that "courts should interpret disputable statutes with due appreciation of . . . such rule of law values as predictability and respect for settled expectations"); Manning, *Textualism*, *supra* note 1, at 707 (describing "the separation of powers rationale for textualism").

428 *See* discussion *supra* Sections II.B, II.C.

429 Thad Kousser & Mathew D. McCubbins, *Social Choice, Crypto-Initiatives, and Policymaking by Direct Democracy*, 78 S. CAL. L. REV. 949, 956–57 (2005).

by state courts, or safeguarding policy commitments against popular backsliding."[430] And as Dinan has shown, there has been a "dominant trend . . . toward more frequent passage of rights-related amendments" since the late 1990s.[431] The history of directly interpretive constitutional provisions reflects these features. In part because state constitutions serve as limitations on legislatures' plenary power, many of the directly interpretive constitutional provisions that currently exist clearly reflect a suspicion of state legislatures. The provisions requiring local government powers to be construed broadly helped protect local governments from state legislatures' attempts to limit those powers.[432] Oregon's liquor-by-the-glass initiative delegated to the legislature the task of crafting an implementing mechanism and yet attempted to constrain the legislature's freedom ex ante through a rule of statutory interpretation.[433] Arguments for California's access-to-government amendment focused on enshrining a right in the constitution to protect the right from future legislative cutbacks.[434] Even for Maryland's provision against allowing statutory titles to grant powers not provided for by the bodies of statutes, there's a lurking suspicion that legislatures might sneak in policies through the titles of statutes.[435]

Indeed, members of the public have typically asserted their authority to supervise methodology for specific policies and at a medium level of methodological generality—not over granular, technical tools like the canon of ejusdem generis, nor over highly abstract theories of interpretation like purposivism. This can be most clearly seen in the several constitutional provisions that require interpreters to construe statutes in favor of specific substantive policies but that allow interpreters to use any discrete tool of statutory interpretation in doing so. For example, Virginia's directly interpretive provision requiring property tax exemptions to be strictly construed could allow interpreters to use either the last antecedent rule (which says that a modifier applies only to the last item in a list of items) *or* its opposite, the series-qualifier canon (which says that a modifier applies to all items in a list of items),

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430 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, 160 (2014).

431 John Dinan, *State Constitutional Amendments and Individual Rights in the Twenty-First Century*, 76 ALB. L. REV. 2105, 2112 (2013).

432 *See* discussion *supra* Section II.C.2.

433 *See* discussion *supra* Section II.C.1.

434 *See* discussion *supra* Section II.C.3.

435 The provision appears in a section that imposes a variety of rules on how the legislature can and must write legislation. *See* MD. CONST. art. III, § 29. Constitutional rules like these were commonly proposed in the nineteenth century to limit legislative power. *See* Richard Briffault, *The Single-Subject Rule: A State Constitutional Dilemma*, 82 ALB. L. REV. 1629, 1632–33 (2019).

depending on the statute.[436] The application of that directly interpretive provision—let alone the choice between the last antecedent rule and the series-qualifier canon—does not require interpreters to embrace any particular abstract theory of statutory interpretation. Meanwhile, the various constitutional provisions requiring legislatures to avoid the use of technical terms at best create a default presumption about whether words are to be given ordinary or technical meanings. This default presumption neither mandates nor precludes the use of discrete tools of interpretation like the canon of noscitur a sociis, which involves reading terms based on the words that they're surrounded by.[437] Nor does it mandate or preclude the embrace of any general theory of statutory interpretation. The same can be said of Florida's provision prohibiting deference to agencies' interpretations of statutes, which leaves open how judges should interpret statutes.[438]

Not a single directly interpretive constitutional provision has imposed a method of interpretation that is at the core of any mainstream theory of statutory interpretation. For example, there's no constitutional provision anywhere that requires or permits interpreters to consult legislative committee reports or to construe statutes in light of their evident purposes (i.e., traditionally purposivist methods). Nor has there been any constitutional provision that requires or permits interpreters to use dictionaries or to start the process of interpretation by looking at statutes' plain meanings (i.e., traditionally textualist methods).

By ratifying directly interpretive constitutional provisions, voters are no longer simply specifying policy interests that their legislatures must take on as their own due to constitutional mandate. They are also ensuring that, even if a legislature enacts a statute that shallowly obeys but simultaneously resists or creates workarounds to the constitutionally mandated policy, the voters' policy preferences will prevail in the post-enactment process of statutory interpretation. To take California's access-to-government amendment as one example, California's legislature was still allowed to enact statutes that created myriad exceptions to the now-constitutionalized right of access to government information.[439] At a high level of generality, we can imagine a world in which the legislature's intent could be to create

436 *See* VA. CONST. art. X, § 6(f); Adam G. Crews, *The So-Called Series-Qualifier Canon*, 116 NW. U. L. REV. ONLINE 198, 208–09 (2021) (discussing the relationship between the last antecedent rule and the series-qualifier canon).

437 Anita S. Krishnakumar & Victoria F. Nourse, *The Canon Wars*, 97 TEX. L. REV. 163, 180 n.84 (2018) (defining noscitur a sociis).

438 *See* FLA. CONST. art. V, § 21.

439 *See* discussion *supra* Section II.C.3.

exceptions as far as possible. But the directly interpretive constitutional provision would push in the opposite direction by requiring those exceptions to be construed narrowly, preventing legislatures from having their intentions fully effectuated. These dynamics illustrate that directly interpretive constitutional provisions can at times reflect a popular *rejection* of the notion that statutory interpreters' ultimate task is to effectuate legislative intentions (whether by solely looking at statutory text, as textualists would have it, or by going beyond statutory text, as purposivists would have it). Directly interpretive constitutional provisions may even reflect a popular *affirmation* of a notion that statutory interpreters' ultimate task is to effectuate the constitutionalized will of the people *over* legislative intent—even to embrace *anti*-legislative intent as the thing that statutory interpreters should focus on.

All this suggests that only policy-tied methods of statutory interpretation, including legislature-constraining methods of statutory interpretation, may have any real chance of receiving the affirmative democratic mandate of the people via constitutional amendment.

B. A Public-Override Theory of Methodological Precedent

To recap: It's politically feasible for members of the public to exercise their authority over certain kinds of statutory interpretation methodology, and not for others. These exercises of authority take the form of constitutional amendments, which supersede all sub-constitutional sources of law. And currently, the sources of law that most directly ground judicial statutory interpretation methods are thought to be sub-constitutional in nature. Thus, we can say, it's politically feasible for members of the public to override government institutions' uses of some kinds of statutory interpretation methodology, and not others.

This discrepancy in the public's ability to override statutory interpretation methodology provides a new reason—to be weighed against opposing normative reasons like predictability—for why certain statutory interpretation methods should not be entrenched as judicial precedent.

As a purely descriptive matter, to be sure, courts could declare that certain interpretive methods are binding *law* that will govern all future cases until the public votes otherwise. And these provisional precedents would behave just like all our existing precedents that technically can be overridden through constitutional amendment. There are even defensible reasons for this practice of making methodological precedent in the meantime. As some scholars have argued, methodological

precedent could increase the predictability of law and allow regular people to plan their affairs with confidence.[440]

But these arguments both overstate the benefits of methodological precedent and take for granted that it is politically feasible for members of the public to override those precedents. As some have argued, "methodological decisions do not generally implicate reliance interests as strongly or directly as substantive legal decisions."[441] This is in part because methods of interpretation are often underdeterminative and require such sophisticated legal knowledge in their application that laypeople are unlikely to be able to reliably connect those methods to particular substantive outcomes: A precedent requiring courts to always start with dictionary definitions will not solve most cases.[442] Indeed, that is precisely why such methods face high hurdles to formal constitutionalization. It's why a different touted benefit of methodological precedent—that it gives people notice about their rights and duties—lacks much force. And it's also why it doesn't matter if the entrenchment of statutory interpretation methods as precedential could provide voters with a more concrete target. Voters must care enough to attack.

More importantly, the entrenchment of statutory interpretation methods as precedent has the potential to undermine the people's ultimate sovereign authority to direct statutory interpretation methodology. If a state court of last resort were to declare that all courts must interpret statutes first by starting with statutory text and textual canons, and then consult legislative history only if the first step fails to resolve statutory ambiguities, and finally to look at policy considerations if all else fails, a legislature could enact a statute rejecting this framework. In fact, this is exactly what happened when the Oregon Supreme Court announced such a framework in 1993, leading the state legislature to pass a statute against it in 2001 to increase the allowability of using legislative history—a measure that the supreme courts then finally embraced as judicial precedent in 2009.[443] As scholars have shown, however, there are live constitutional questions about whether courts

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440 *See, e.g.*, Gluck, *States*, *supra* note 12, at 1757 (arguing that "consistent methodological rules may make the interpretive process more predictable, performing a coordinating function for the many parties affected").

441 Criddle & Staszewski, *supra* note 12, at 1593.

442 *See, e.g.*, William N. Eskridge, Jr., Brian G. Slocum & Kevin Tobia, *Textualism's Defining Moment*, 123 COLUM. L. REV. 1611, 1644 (2023) (arguing that federal judges who use dictionaries "exercise considerable discretion because they make multiple choices unconstrained by metarules governing dictionary use").

443 *See* Abbe R. Gluck, *Statutory Interpretation Methodology as "Law": Oregon's Path-Breaking Interpretive Framework and Its Lessons for the Nation*, 47 WILLAMETTE L. REV. 539, 545, 551 n.42 (2011).

can even impose such frameworks of interpretation as precedent,[444] and whether legislatures can even enact legislation that limits judges from doing so.[445] And insofar as courts are prone to strike down legislatively enacted rules of statutory interpretation as unconstitutional intrusions on judicial power, only constitutional amendments can provide members of the public a way to make their preferences have effect. Yet the question of legislative history's usability is unlikely to reach a ballot or be approved as a constitutional amendment because of its trans-substantive nature. Enforcement of such a statutory interpretation rule as having precedential effect would thus entail a judicial usurpation of popular sovereignty, undermining that democratic basis of the legitimacy of judicial statutory interpretation.

What about the possibility that members of the public may have completely delegated away their control over most interpretive methods because they want to allow courts to craft methodological precedents that might increase the predictability and stability of law?[446] After all, directly interpretive constitutional provisions are rare. Why shouldn't we interpret the people's silence to reflect near-complete acquiescence to allowing courts to do whatever they want, including crafting methodological precedent? And besides, there are lots of arcane precedents in other realms of law that voters are unlikely to mobilize around. Should those doctrines' lack of potential for galvanizing coalitions mean that judges should refrain from entrenching those doctrines as precedent too? Doesn't that seem like a slippery slope?

As to the concerns over delegation and interpretive control, my starting premise is that, as a matter of political theory, the people cannot and should not be construed to have completely delegated their control over interpretive methodology—even though they can defer to others on those issues.[447] If courts were to entrench interpretive

444 *See* Grove, *supra* note 12 (arguing that the federal Constitution limits the Supreme Court's power to impose methodological stare decisis).

445 *See* Gluck, *States*, *supra* note 12, at 1785–97 (discussing Texas and Connecticut courts' respective reactions to legislated interpretive rules).

446 Thanks to John McGinnis for encouraging me to address this.

447 *See* THOMAS HOBBES, ON THE CITIZEN 100 (Richard Tuck & Michael Silverthorne eds. & trans., Cambridge Univ. Press 1998) ("[A] people which has committed power to a time-limited Monarch on the terms that it cannot meet again without his command, is radically dissolved, and its power rests with the person it has elected."); RICHARD TUCK, THE SLEEPING SOVEREIGN: THE INVENTION OF MODERN DEMOCRACY 266 (2016) ("All law has force by virtue of the will of the current sovereign."); *id.* at 281–82 (arguing that "the people under the American Constitution . . . are free (in some sense) to meet whenever they choose. . . . [T]he fact that the Constitution has not been amended or repealed by the *present* sovereign means that the present sovereign, with all its other beliefs and commitments, wishes the law to stand," but that this "means that the government, and especially the judiciary, must take what it knows about those beliefs and commitments into account when it interprets the law");

methodologies as precedent when there is no meaningful path for the public to override those precedents, they would in effect be attempting to alienate a sovereignty that cannot be alienated. To be fair, it's still completely possible for members of the public to defer to courts as to which interpretive methods to use *in a given case*, but this is different from authorizing the precedential entrenchment of those methods prospectively *across all cases*. With the former, because courts using interpretive methods in a given case are merely doing so to make a substantive interpretation—for example, whether Title VII covers sexual-orientation discrimination[448]—and because legislatures can always override those substantive interpretations through specific statutory overrides, there is still a viable democratic pathway for the people to channel their desires to override those court decisions. By contrast, with the latter, there is always a threat that courts can declare legislative overrides of judge-made interpretive methodology to be unconstitutional, so constitutional amendment becomes the only secure path for popular override. And because methodological precedents might constrain how state legislatures draft their statutes in the first place—they might draft statutes in ways that anticipate judges applying a methodological precedent—that entrenchment has the potential to undermine the democratic representativeness of republican institutions too.

As to the second set of concerns that this theory of public overrides may create a slippery slope: The basis for being more cautious of entrenching precedents does not apply beyond statutory interpretation methodology. For judicial precedents on whether arcane provisions of statutes mean certain things, legislatures can definitively override those precedents, as discussed just earlier. For judicial precedents on arcane issues of common law, it's widely accepted that legislation trumps common law.[449] And for judicial precedents on arcane issues of

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PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 185 (1999) ("[A] government will be democratic . . . to the extent that the people individually and collectively enjoy a permanent possibility of contesting what government decides."); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323, 1349 (2006) (arguing that "the roles of citizens and various officials are differentiated yet interdependent. Each has different forms of authority and owes others different forms of deference. . . . [and] assert independence from one another," and that "feedback mechanisms . . . anchor the legitimacy of government and identity of the polity under conditions of ongoing and unresolved normative conflict"). Insofar as one's interpretive methodology is what determines the content of law, it follows that control and contestability over the content of law require control and contestability over interpretive methodology.

448 *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (answering yes).

449 *See, e.g.*, Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 283 (1989) ("State courts have the authority to create common law doctrines . . . subject to legislative modification.").

constitutional law, those precedents are merely manifestations of judges' proper role—their constitutionally allocated role—of interpreting a constitutional text that voters have already approved. By contrast, when judges entrench arcane statutory interpretation methodologies as precedent, they aren't drawing on any input from the people and are foreclosing any response.

So, then, which forms of methodological precedent would be justified and unjustified under this theory of public overrides? The clearest candidates for receiving precedential effect are substantive canons of statutory interpretation. These canons are tied to specific substantive policies and don't mandate abstract theories or highly technical tools of statutory interpretation. Given the possibilities for members of the public to override these types of statutory interpretation rules, entrenchment of those rules through precedent poses lower risks to the authority of the public to supervise statutory interpretation. The precedential status of all other kinds of statutory interpretation methodology should be treated with suspicion. That includes the trans-substantive use of discrete statutory interpretation tools as well as abstract theories of statutory interpretation such as textualism and purposivism. Whereas scholars and jurists might care about promoting the underlying values of statutory interpretation tools and theories, voters might not.

Conclusion

What is statutory interpretation for?[450] Better yet, *who* is statutory interpretation for? Over the last five decades, the answers have taken the form of abstractions because of the narrow federal constitutional context that modern statutory interpretation theory emerged from. Statutory interpretation is for the rule of law, for judicial restraint, for interbranch dialogue, for good governance, for properly allocating institutional authority, for respecting structural constitutional law, for increasing the predictability and stability of law, for fair notice. Even as judges have burst onto the scene in recent years with assertions that statutes should be interpreted based on how laypeople would understand them, "the people" have remained an abstraction: a monolithic mass alienated from the political world that causes statutes to exist, incapable of voting for itself and desperately needing a judicial savior to give it breath—a subaltern that cannot speak.

450 Thanks to Bill Eskridge for framing this Article to me this way.

This Article exposes a new type of answer through its discovery of an unknown category of statutory interpretation law. Taking actual, real-life people seriously, the Article develops an account of popular sovereignty and its limits in statutory interpretation. This account reveals both citizen control and deference over statutory interpretation methodology—a democratic division of interpretive labor that both clarifies what circumstances make interpretive methods more or less democratically legitimate and exposes the contingency of structural constitutional law—as the ultimate legal basis for statutory interpretation methodology.