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A COMMENT ON THE EVOLUTION OF DIRECT DEMOCRACY IN WESTERN STATE CONSTITUTIONS

PATRICK L. BAUDE*

The purpose of this comment is to add one fairly simple point to the current debate about the direct democracy measures of initiative and referendum. I do not hope here to engage in larger questions about the political legitimacy of direct democracy or to join in any efforts to defend the particular results of recent referenda. On the large questions of legitimacy, no one has written more profoundly than Julian Eule¹, except perhaps for the distinguished group of scholars who have contributed to the UCLA Law Review's forthcoming symposium: "The Voices of the People: Essays on Constitutional Democracy in Memory of Julian N. Eule."² As for the particular results of recent referenda in the United States, perhaps I should say that I personally support affirmative action, believe that discrimination based on sexual orientation is wrong and oppose hunting bears with dogs. But the point of this comment is to observe how the historical misidentification of direct democracy as the product of a single historical event (the closing of the frontier) rather than as a natural evolution of broader and older ideas has come to create a climate in which the products of direct democracy are constitutionally undervalued.

In making this point, I hope to cast light on two more general themes. The first theme is the importance of regionalism to a deeper understanding of state constitutional law. Articulate critics, most notably James Gardner³, have objected to the current spirit of state constitutional scholarship, arguing that serious constitutional law must be based on an underlying epic, a set of linked narratives and values, that give a constitution some life larger than that of an ordinary legal code. And few states, they argue, have such epics of their own—indeed, probably the only states with serious candidates for epic status would be the ones which were first nations in their own right: Texas, California and Hawaii.

But states are also parts of regions and, in many instances, those regions themselves have a distinctive shared history with linked narratives which in some important way set the region apart from the nation as a whole. These state constitutions can be fully understood only by placing them within their own web of connections to states founded on the same impulses. The saga of the American west is, at least in popular culture, a set of well-known narratives with their own literature, art, and even, perhaps especially, their own Hollywood medium. This legendary history has shaped a western perception of its constitutions as something different from those further east.⁴

One of my purposes, then, is to use the constitutional practices of referendum and initiative, a "western" tradition, as a way of illustrating the links between regional epic and concrete problems of constitutional interpretation.

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1. See Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503 (1990).
2. 45 UCLA L. Rev. (issue 6, forthcoming Aug. 1998). See UCLA Law Review, *Symposium* (visited March 17, 1998) <<http://www.law.ucla.edu/student/organizations/LawReview/sympos.htm>>.
3. See James A. Gardner, *What Is a State Constitution?*, 24 RUTGERS L.J. 1025 (1993).
4. See Patrick L. Baude, *Interstate Dialogue in State Constitutional Law*, 28 RUTGERS L.J. 835, 840-41 (1997).

The second larger theme of this comment is to show that the varying regional constitutional traditions are themselves an important part of American constitutional evolution as a whole. The constitutions of the eastern states, the original thirteen colonies more-or-less, are part cause and part effect of the federal constitution, embodying the political theories of the same historic period, similar ethnic and cultural influences, and a similar structural solution to similar problems.⁵ These constitutions are republican in nature, deliberative in theory, and dependent on the fundamental idea that government power should primarily be checked by the power of other branches of the government and confined by explicit statements of the rights of citizens as individuals. The initiative and referendum, familiar features of the western states, are based on a different model. The theory here is that governments are best restrained by direct action of the people, easily and repeatedly exercised—and that this collective public action is no less legitimate a source of human dignity than is the articulation of individual privileges in an explicit right.

My concern is that courts often fail to appreciate that the western regional practice is in its own way a serious form of American constitutionalism, based on deep values and meaningful narratives. In simplest terms, constitutional courts, both state and federal, are at risk of thinking that acts of the legislature reflect “deliberation” and are thus entitled to significant weight, while acts of referendum or initiative are products of crude and unreflective views and thus not entitled to deference or respect in subsequent judicial evaluations.

Referendum is the process of submitting the text of a proposed statute to the electorate for approval or rejection.⁶ Initiative, often coupled with referendum, allows a subgroup of the electorate itself to begin the process of referendum and to write the text of the proposed statute.⁷ To supporters, these devices allow for the people themselves to bypass the corruption or inertia of the elected members of the formal legislative assembly. To critics, these devices also bypass the deliberation and tempered judgment of the legislature.

Twenty-one state constitutions now provide for both referendum and initiative.⁸ Most of these states are in the west—Alaska, Arizona, California, Colorado, Idaho, Montana, Nevada, Oregon, Utah, Washington and Wyoming among them.⁹ Formal constitutional provisions to that effect were first adopted in South Dakota in 1898, then Utah in 1900, then Oregon in 1902.¹⁰ The dates and the geography overlap the populist movement in the American west. The populist party, formed in 1892, advocated measures intended to control government corruption by business interests

5. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* (1969).

6. See BLACK'S LAW DICTIONARY 1281 (6th ed. 1990).

7. See *id.* at 784.

8. See DAVID B. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* 38-40 (1984). The exact counting in any one year is complicated by several problems of classification. Probably the most meaningful number is twenty, the number of states which actually had ballot propositions in the November 1996 election. See B. Drummond Ayres Jr., *Voters Facing a Record Year for Initiatives*, *NEW YORK TIMES*, Oct 24, 1996, at A1.

9. See MAGLEBY, *supra* note 8, at 38-40. New Mexico's constitution provides for referendum but not initiative. See N.M. CONST. art IV, § 1.

10. See MAGLEBY, *supra* note 8, at 39.

through electoral means.¹¹ In addition to modern features like special prosecutors and campaign finance reform, the populist program included substantive measures like easy money, immigration reform, public ownership of the railroads and the progressive income tax. The populist movement is generally credited with political restructuring that reduced the power of elites, whether in politics (the direct primary) or in federal constitutional matters (the direct popular election of United States Senators established by the Seventeenth Amendment in 1913).¹² As the Populist movement was closely linked with the agricultural economic interests of the west, and as the referendum and initiative arose there as well, and in the same decade, it has seemed plausible to link these events as cause and effect. As a result, we have usually seen these devices as part of a populist revisioning of our constitutional traditions.

In addition, the fact that it was in 1894 that Frederick Jackson Turner published his great essay, *The Significance of the Frontier*,¹³ adds to our tendency to link these events. In his essay, Turner argued that the settlement of the frontier was the distinctive force in forging the American character.¹⁴ He attributed to the west a tradition of changeability and restlessness.¹⁵ As he explained the Populist "agitation" then stirring: "A primitive society [the west] can hardly be expected to show the intelligent appreciation of the complexity of business interests in a developed society."¹⁶ The Turner thesis invites us to see the referendum as something apart from our civilized constitutional world—note that he refers to the process of settlement as "the disintegrating forces of civilization."¹⁷

Morton Horowitz has traced the particular importance of Turner's frontier thesis to the idea of American democracy: "It was Turner's essay, with its celebration of western democracy, that helped exemplify the populist era's positive attitude toward democracy."¹⁸ As Horowitz goes on to point out, the opposing point of view showed itself as opposition to the legitimacy of direct popular legislation: "The dominant attitude toward the democratic idea was illustrated in lawyers' arguments before the Supreme Court that condemned the spread of the initiative and referendum during the progressive era."¹⁹

Although Oregon was not quite the first state to adopt direct legislation, it was the first state to debate these devices thoroughly and thus to attract national attention for the "Oregon system."²⁰ David Schuman has carefully and with rich texture shown the influence of the movement for reform on Oregon's constitutional

11. See generally RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* 96-97 (1955).

12. See *id.* at 108.

13. Frederick J. Turner, *The Significance of the Frontier in American History*, ANNUAL REPORT OF THE AM. HIST. ASS'N FOR THE YEAR 1893 199.

14. See *id.* at 200.

15. See *id.* at 225.

16. *Id.* at 223.

17. *Id.* at 209.

18. Morton J. Horowitz, *Foreword: The Constitution of Change: Legal Fundamentalism Without Fundamentalism*, 107 HARV. L. REV. 30, 59-60 (1993).

19. *Id.* at 60.

20. David Schuman, *The Origin of State Constitutional Direct Democracy: William Simon U'ren and "The Oregon System"*, 67 TEMPLE L. REV. 947, 948 n.7 (1994).

reforms adopted in 1902.²¹ It seems, then, natural and direct to connect the development of the referendum with the particular historical facts of the last decade of the nineteenth century, that is to say, with the emergence of populism and the “closing of the west.” The widespread contemporary attention paid to the Oregon constitutional debates in particular seem to reinforce the reception of referendum and initiative as a kind of western mob rule, something rugged frontiersmen turned to when they could no longer vent their uncivilized energies on divers acts of rowdy settlement.

The early reception of direct democratic measures by the constitutional system is consistent with this picture. In the *Pacific Telephone*²² case, for example, these state constitutional devices were attacked as a denial of the “republican form of government” guaranteed by Article IV of the federal constitution.²³ Much of what was said in the course of litigating that case illustrates the contemporary view. As Horowitz describes it:

The dominant attitude toward the democratic idea was illustrated in lawyers’ arguments before the Supreme Court that condemned the spread of the initiative and referendum during the progressive era. In *Pacific States Telephone & Telegraph Co. v. Oregon*, the Court confronted a challenge to a law passed by popular initiative. Pacific Telephone argued that taxation by initiative was inconsistent with the Republican Government Clause of the Constitution. “An oligarchy or a democracy is equally un-republican; each was equally hateful to the founders of our government, and each is equally subversive of the structure which they erected.” As the counsel for the company boldly phrased it: “The initiative is in contravention of a republican form of government. Government by the people directly is the attribute of a pure democracy and is subversive of the principles upon which the republic is founded.”²⁴

In the end, the Supreme Court found cases arising under the Guarantee Clause not to be justiciable, neither accepting nor rejecting the rhetoric of conservative legal opinion.²⁵ But certainly the lawyers’ language and the ideological invitations implicit in the Turner thesis are deeply linked.

This simple and commonly accepted linkage—the frontier closes, populism grows in the west, initiative results, civic republicanism suffers—has two things wrong with it. First, the idea of direct democracy as a constitutional norm is a much earlier idea. Many who participated in the federal founding entertained similar ideas.²⁶ The Madisonian republican model had the necessary votes to win the day in Philadelphia. “An alternative vision, however, existed, survived, and gave coherence to a rather different tradition of constitution-making and revision.”²⁷ The

21. *Id.*

22. *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912).

23. *Id.* at 137-38.

24. Morton J. Horowitz, *supra* note 18, at 60 (footnote omitted) (quoting *Pacific Telephone*, 223 U.S. at 123, 138 (argument of counsel for the plaintiff)).

25. See *Pacific Telephone*, 223 U.S. at 150-51.

26. See Christian G. Fritz, *Alternative Visions of American Constitutionalism: Popular Sovereignty and the Early American Constitutional Debate*, 24 HASTINGS CONST. L.Q. 287 (1997).

27. *Id.* at 288.

earliest expressions of constitutionalism in the states admitted after the original thirteen showed some commitment to the idea of direct democracy.

Starting in the 1820s, states revising their constitutions or writing new ones began debating the question whether to submit the constitution as a whole draft or instead to separate a number of controversial questions²⁸— especially slavery.²⁹ In his comprehensive survey of the making of western state constitutions throughout the nineteenth century, Christian Fritz has compellingly shown the influence of the idea of progress and the belief in popular sovereignty.³⁰ The ideas of progress and popular participation in constitutional adoption are not the same as referendum and initiative, of course, but they both reflect a commitment to institutional fluidity and democratic participation that are necessary components of direct legislation.

The second problem with the link between the Turner thesis and the emergence of constitutionally established initiative and referendum powers is the problem with the Turner thesis itself. Patricia Limerick and other modern historians of the American west have helped us to see that the west is a place with many common historical and cultural threads.³¹ The frontier, the process Frederick Jackson Turner made familiar to his era (and the following ones as well), is only one part of the distinctive history of the west.

In addition to its history of settlement, the west and its legal epics share a physical and political geography, a huge quantity of federally owned lands, water issues that have driven politics and economics as nowhere else in the United States, outdoor recreation and an ethos of ruggedness, most of the Native American land, and a vast amount of land that is simply not lived on. These shaping characteristics were there before the frontier closed and are there today. To explain events in western history, we need, indeed we have the right to see, connections with the larger and enduring themes of the west. Patricia Limerick has articulated this point of view compellingly:

Deemphasize the frontier and its supposed end, conceive of the West as a place and not a process, and Western American history has a new look. First, the American West was an important meeting ground, the point where Indian America, Latin America, Anglo-America, Afro-America, and Asia intersected. In race relations, the West could make the turn-of-the-century Northeastern urban confrontation between European immigrants and American nativists look

28. See generally ROGER SHERMAN HOAR, *CONSTITUTIONAL CONVENTIONS: THEIR NATURE, POWERS AND LIMITATIONS*, 203-05 (1917) (discussing approaches taken by conventions in Massachusetts, New York, Pennsylvania, Illinois, Oregon, and other states).

29. Akhil Reed Amar synthesizes much of the history of popular sovereignty with the issues of the civil war in *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749 (1994).

30. See Christian G. Fritz, *The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth-Century West*, 25 RUTGERS L.J. 945 (1994).

31. See, e.g., PATRICIA NELSON LIMERICK, *THE LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST* (1987). For a wonderfully readable and comprehensive survey of the work of the dozens of historians who make up "the new western historians," see Charles F. Wilkinson, *The Law of the American West: A Critical Bibliography of the Nonlegal Sources*, 85 MICH. L. REV. 953 (1987).

like a family reunion. Similarly, in the diversity of languages, religions, and cultures, it surpassed the South.³²

This is, of course, not the place, and lawyers not the people, to debate the ultimate correctness of any one vision of regional history as a whole. But this perspective lets us see a completely different image of the constitutional initiative. Rather than an isolated phenomenon of the turn of the twentieth century, these constitutional practices are an evolution that begins as new governments are formed from early in the nineteenth century. Rather than democracy in the sense of rude manners by angry populists, they represent democracy in the sense of genuine efforts to understand what legitimacy might mean in the first European and non-European pluralist societies to write constitutions as part of the American federal system.

The failure to recognize initiative and referendum as an evolved form of democratic pluralism, and to continue to think of them as a sort of hiccup on the road to republican revival, has fostered the development of constitutional doctrine which belittles measures adopted directly by the people. To some extent, the negative attitude is connected with contemporary political issues. Recent initiative results rejecting affirmative action,³³ the rights of non-citizens,³⁴ and, above all, specific legal protections against discrimination based on sexual orientation,³⁵ have cast the referendum as the enemy of various rights-based movements linked to broad toleration and diversity. Following the February, 1998, repeal by Maine voters of that state's law prohibiting discrimination against gay men and lesbians in credit, housing, employment and public accommodations, polling data suggest that "anti-discrimination laws similar to Maine's, which exist in 10 other states, may be somewhat vulnerable to repeal when their fate is determined by public opinion rather than the legislatures that passed them."³⁶ This political dynamic leads rather easily to the progressive belief that referenda and initiatives are inherently bad because they draw upon some mean-spirited intolerance of ordinary people. On the other hand, other recent popular votes have approved the legalization of medical uses of marijuana and physician-assisted suicide, leading conservatives to denounce popular lawmaking because of the ease with which voters are misled by "liberal media" to adopt knee-jerk libertarian positions destructive of the reasoned community of delegated legislative power.³⁷

Needless to say, to those whose constitutional theories are driven by the outcomes they produce, the validity of direct democracy depends on which set of results one prefers. The referenda issues without obvious ideological content will be left to take care of themselves. At the last general election, in November 1996, there were ninety referenda or initiative measures around the country, more than any year since the first world war. Most of these, predictably, were in the

32. LIMERICK, *supra* note 31, at 26-27.

33. See CAL. CONST. art 1, § 31.

34. See *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 763 (C.D. Cal. 1995) (citing California Proposition 187, adopted Nov. 8, 1994)

35. See COLO. CONST. art 2, § 306 (held unconstitutional by *Romer v. Evans*, 517 U.S. 620 (1996)).

36. Carey Goldberg, *Maine Voters Repeal a Law on Gay Rights*, N.Y. TIMES, Feb. 12, 1998, at A1.

37. See B. Drummond Ayres, *Oregon Stays with Its Law on Suicides*, N.Y. TIMES, Nov. 5, 1997, at A24.

west—Oregon with seventeen, California with twelve, Colorado with eight. Many had obvious ideological payloads, some had subtler ones: six states dealt with the use of dogs in bear-hunting, an issue that connects indirectly with gun control forces. Florida had an issue about sugar production fees whose ideological heat is not obvious.³⁸

As a matter of federal constitutional law, the United States Supreme Court has never said that the initiative or referendum is flawed. Ever since the *Pacific Telephone* case in 1912, the Court has said that the issue of whether the states delegate legislative power is a question for their own constitutions, one which is not justiciable as a matter of federal law.³⁹ It is, in other words, a practice to be tolerated if not supported.

In the actual workings of federal constitutional doctrines, however, the perceived origins of the referendum lead the Court to devalue the choices actually made by a state's voters. State legislation is primarily tested under the fourteenth amendment.⁴⁰ Whether under the equal protection clause or the due process clause, the underlying question is the "rationality" of the measure in question.⁴¹ Thus a state environmental law which favors coated paper containers over plastic containers—neither one being biodegradable—will be upheld in the face of expert testimony that each is equally damaging to the environment.⁴² It is enough that "there was evidence before the legislature reasonably supporting"⁴³ the law, even though the legislature may have been "mistaken."⁴⁴ As a practical matter, when the "rational basis" question is a matter of scientific or technical judgment, laws concerning factual or scientific matters will almost certainly be upheld.⁴⁵ When, however, the question of rationality involves an element of moral calculus as well—when, for example, the question is one of whether to honor the preferences of ordinary householders who would rather not have developmentally disabled adults living in their neighborhood, acceptance of a legislative choice is not so automatic.⁴⁶

This process of weighing competing claims to public regard is the essence of adjusting the rights of individuals and groups. When the legislature performs the necessary compromises, the Court seems to accept as inevitable that somebody will lose. So, when one group does in fact lose, the spirit of the legislature can be seen as what Frederick Jackson Turner called intelligent appreciation of complexity or, as Justice Rehnquist put it, "neither the first nor the last time that such a result will occur in the legislative forum."⁴⁷

38. See B. Drummond Ayres, Jr. *Voters Facing a Record Year for Initiatives*, NEW YORK TIMES, Oct. 24, 1996, at A1.

39. See, e.g., *Baker v. Carr*, 369 U.S. 186 (1962); *Kieman v. City of Portland*, 223 U.S. 151 (1912).

40. See generally Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195 (1985).

41. *Id.*

42. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981).

43. *Id.* at 464.

44. *Id.*

45. There are hundreds of discussions of these principles in the literature. The best of them is: Cass R. Sustein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1700-01 (1984).

46. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

47. *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980).

To put the point as simply as possible, when the legislature picks one side in a beauty contest, it is merely making a choice that has to be made. But when the choice is made by the voters at a plebiscite, the winners are choosing themselves. Their choice might then become suspect, as a form of selfishness, or, the opposite side of the same coin, as a form of malice or hostility toward the losers. This case for heightened skepticism of initiative proposals has been most forcefully put by Hans Linde: "collective passions appeal to . . . ad hominem preconceptions like those condemned as 'invidious' in equal protection doctrine."⁴⁸ Justice Linde is absolutely right if the same standards of equal protection rationality apply to voters as to representatives. My argument is that the logic of rationality is different for the elected representative and the citizen.

Except at the anecdotal level (bad Colorado, good Oregon), the actual empirical evidence is unclear whether popular initiatives are less protective of minority interests than are "deliberative" assemblies. A leading public choice theorist has observed that minorities will have a harder time "vetoing" initiatives but will have a correlatively easier time not being vetoed.⁴⁹ Whether they win or lose power under an initiative regime thus turns on the question of whether they are happy with the status quo (losers of power) or seek to improve their lot by government action (winners). Another scholar also makes the intriguing point that referendum voters are in one way particularly unselfish.⁵⁰ The likelihood that one's own vote will pay off personally in a referendum is much lower than in a local legislative election.⁵¹ As a result, the referendum voter may be voting her self-image rather than her self-interest. That peculiarity suggests that the issues in direct democracy are more symbolic than real.

The fate of two different statutes dealing with gay rights illustrates the problem. In *Bowers v. Hardwick*,⁵² the United States Supreme Court upheld a Georgia statute making sodomy a felony. The Court accepted the Georgia legislature's judgment as a reflection of what was fundamental in American liberty.⁵³ In *Romer v. Evans*,⁵⁴ the United States Supreme Court struck down a Colorado initiative which refused to allow civil rights legislation for gays, lesbians and bisexuals, finding that the law was "inexplicable by anything but animus toward the class that it affects."⁵⁵ Consider the substance of what the Court has said here. A section of the Georgia criminal code, adopted so far as we know without particular debate or study by the legislature, copying even the language of the common law (which is to say, the

48. Hans A. Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19, 35 (1993).

49. See Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI.-KENT L. REV. 707, 712 (1991).

50. See generally Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930 (1988).

51. See *id.* at 946.

52. 478 U.S. 186 (1986).

53. See *id.* at 196-97.

54. 517 U.S. 620 (1996).

55. *Id.* at 627.

morals of sanguinary Norman conquerors), is a reflection on fundamental rights.⁵⁶ The act of the people of Colorado, however, which does not make homosexual activity a crime or illegal, is the one which is "inexplicable." The Colorado act, publicly debated throughout an entire state, is dismissed as not deliberative and therefore mean-spirited.

Consider also *Arizonans for Official English v. Arizona*.⁵⁷ This case arose from an Arizona initiative declaring English that state's official language.⁵⁸ A state employee who sometimes spoke Spanish with applicants sued because she feared termination from her job.⁵⁹ As the suit found its way through a particularly tortured path of litigation, it turned out that neither the Governor nor the Attorney General of the state had the slightest interest in taking her job, which she quit anyway.

In the end, the United States Supreme Court dismissed the suit as moot, with some extremely pointed observations that the interpretation of the statute should have been certified to the Arizona Supreme Court many years earlier. But a point important for the Court's attitude toward initiatives arose in the course of the Court's opinion. When the people pass a law their elected officials don't support—the very case for initiative or referendum to begin with—what happens if officials try to abandon the subsequent constitutional litigation? In many contemporary disputes, it is the process of interpretation in the interstices of constitutional challenge that often brings some real rationality to interest-group legislation. Without this post-enactment process, many questions left unanswered in the legislation may be answered badly, especially if the only litigants participating in the process are actual enemies of the law in question. Technically, this question is an issue of standing. In *Arizonans for Official English*, the issue was whether the interest group which had actually prepared the initiative would have standing in the constitutional litigation. In functional terms, since standing is part of the case-or-controversy requirement, and since the purpose of the case-or-controversy requirement is to assure a real dispute rather than a hypothetical debate, the only sensible question is whether anyone besides the actual group behind the law would have standing. The Supreme Court, however, expressed "grave doubts"⁶⁰ about the standing of the initiative proponents, leaving the issue unresolved because the case was moot.⁶¹

Perhaps these concerns with the constitutional status of direct democracy are essentially symbolic. Their effect, at most, is to limit how legislation can be enacted. If opponents of equality for gays and lesbians win by referendum, their victory is constitutionally tainted because it is based on "group animosity." If a legislature, fearful of its constituents, holds hearings and adopts the same statute for some invented reason like conservation of enforcement resources, the law would become one of those compromises that might be upheld. Interest groups that have

56. See *Bowers*, 478 U.S. at 192-93. Cf. Martha M. Young, Comment, *The Salem Witch Trials 300 Years Later: How Far Has the American Legal System Come? How Much Further Does It Need to Go?* 64 TUL. L. REV. 235 (1989) (contrasting evidence used in Salem witch trials with modern evidence theory and criminal procedure).

57. 117 S. Ct. 1055 (1997).

58. See ARIZ. CONST. art XXVIII and accompanying annotations.

59. See *Arizonans for Official English*, 117 S. Ct. at 1057.

60. *Id.* at 1058.

61. *Id.* at 1068.

the support and the money to run a referendum campaign can probably find what they need to frighten legislators. By the same token, initiative proponents denied standing will probably find some way to influence the course of litigation.

Symbolic the difference may be. But this is the very symbolism that is at the heart of the constitutionalism reflected in western constitutions. The nation as a whole is caught up in the conflicts between values and cultures that grow out of the different ways of life that first met in the west. No doubt Justice Scalia overstated⁶² when he described *Romer v Evans* as a Kulturkampf.⁶³ Yet at the heart of disagreements like this are cultural differences, not simply the questions of interest and faction that underlie the Madisonian model of eastern constitutionalism. These are not issues which can be compromised and negotiated in the same way as paperboard containers and plastic jugs. The meaning of a loss in a plebiscite is not that the loser is inferior or stigmatized: it is no more than saying, as H.L.A. Hart said in a different context: "Increase your numbers and then your views may win out."⁶⁴

The politics of moral symbolism has to work differently, even in a deliberative assembly, from ordinary politics. There can be legislative weighing and deliberation on issues of policy and budgets. There is not much to weigh on the question of homosexuality. For some, as a matter of faith and history, it is a sin which they abominate. For others, as a matter of belief and experience, it is a question of personal identity in its own proper moral context. Elected representatives who choose one model or the other can hardly be said to deliberate. They can but choose. Their choice here should have no more constitutional weight than the choices their constituents might make.

Symbolic politics not only works differently, it can create different burdens. There is indeed a special hazard in a constitutional regime which conceptualizes this choice as a matter of governmental deliberation. The losers will come to think of the government itself as an enemy. Justice Rehnquist, quoted above, was writing of a railroad pension dispute when he described losing as "neither the first time nor the last time for such a result in a legislative forum."⁶⁵ Such an attitude is not so easy to adopt when one has been forced to accommodate what one thinks an abominable sin or, alternatively, to receive a judgment that one's very identity is abominated. Either result, made without one's own participation, will be especially liable to alienate and embitter the citizen.

A good case can be made that the most serious threat to public decency is self-pity bred from a sense of moral powerlessness. Alan Wolfe has recently published a major study of middle class values.⁶⁶ His study consists of in-depth interviews, using techniques specifically designed to get beyond the immediate reactions of polling data.⁶⁷ In a sense, his book consists of the deeper rationales of the people who decide plebiscites, a legislative record for the student of referenda. According to his study, in general, "moderation and tolerance . . . are the bedrock moral

62. These five words are usually a safe way to begin a sentence about the United States Supreme Court.

63. See *Romer v. Evans*, 517 U.S. 620, 629 (1996) (dissenting opinion).

64. Herbert L.A. Hart, *Between Utility and Rights*, 79 COLUM. L. REV. 828, 843 (1979).

65. *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980).

66. ALAN WOLFE, *ONE NATION, AFTER ALL* (1998).

67. See *id.* at 17-20.

principles of the American middle class.”⁶⁸ These bedrocks are missing, however, with respect to two issues—bilingualism⁶⁹ and laws providing explicit civil rights for gays and lesbians⁷⁰—the very issues that have been the subject of the Supreme Court’s recent encounters with direct democracy. According to this study, members of the “middle class” believe that homosexual behavior should not be punished but should also not be condoned.⁷¹ For this substantial majority, that abstract principle means that gay and lesbian relationships should not be criminal but that the law should also not explicitly outlaw discrimination on the basis of sexual orientation.⁷² “The question is whether people would be willing to go beyond expressions of ‘negative’ liberty to the ‘positive’ position that homosexuals are deserving of public respect *as* homosexuals.”⁷³

It is not that these opinions are less progressive than the Supreme Court’s current position; they are the exact reverse of the divide between *Bowers* and *Romer*. This situation fits what Wolfe finds to be the general source of political malaise and dissatisfaction. “No wonder that so many citizens are just as frustrated by being pandered to as they are by being ignored.”⁷⁴

As a result, he argues, the greatest threat to a rewarding political community is the sense of self-pity and powerlessness the middle class feels on these issues: “Unlike concrete demands, such as for better schools or child care or policies to deter crime, the demands that arise out of self-pity call for symbolic redress.”⁷⁵

In the end, the only remedy for a people who pity themselves symbolically for their imagined powerlessness is to give them the symbol of power. That symbol is the genius of the west.

68. *Id.* at 72.

69. Strikingly, Wolfe’s respondents objected very strongly to bilingualism but very strongly supported multiculturalism. *Id.* at 154-63. If a generalizable finding, this would leave bilingualism as an issue more symbolic than real. *But see* Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303 (1986).

70. *See* WOLFE, *supra* note 66, at 75-80.

71. *See id.*

72. *See id.*

73. *Id.* at 74-75.

74. *Id.* at 313.

75. *Id.* at 312.