

The Pursuit of “Popular Intent”: Interpretive Dilemmas in Direct Democracy

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I. INTRODUCTION

Direct democracy is on the rise.¹ While there is no federal initiative or referendum,² a majority of states allow at least some version of direct

1. David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 26–31 (1995); Robert Pear, *Debate on Whose Voice Is Heard in Initiatives*, N.Y. TIMES, Nov. 7, 1994, at B11; Robert Pear, *Number of Ballot Initiatives Is the Greatest Since 1932*, N.Y. TIMES, Nov. 5, 1990, at B10. For a description of the means and mechanisms of direct democracy, see *infra* text accompanying notes 20–23.

2. For a discussion of the two, see *infra* text accompanying notes 20–23. See generally ALEXANDER J. BOTT, HANDBOOK OF UNITED STATES ELECTION LAWS AND PRACTICES 267–98 (1990); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1511–12 (1990) (describing initiatives and referenda).

democracy.³ Many state and local ballot measures have spawned divisive, high-profile campaigns about issues as volatile as gambling, gay rights, and gun control. The controversy surrounding ballot measures seems unlikely to abate with the prospect of a 1996 initiative in California that would eliminate affirmative action.⁴

Many controversial, highly visible ballot measures have posed serious constitutional problems.⁵ Perhaps for that reason, legal scholars concerned with the rise of direct democracy have focused almost exclusively on the constitutional questions surrounding popular lawmaking.⁶ They have left largely unexamined the judicial *interpretation* of popularly enacted laws: how courts construe direct legislation when litigants contest statutory meaning rather than constitutionality.⁷

This gap in the literature about direct legislation is both lamentable and surprising. It is lamentable because many popular ballot measures are found to be constitutional or are never challenged as unconstitutional. As these measures are applied and interpreted, they raise the same problems of ambiguity and prompt the same kinds of litigation over interpretation that are so familiar in the context of legislative law. This gap in the literature is surprising given that the last decade has produced so much new scholarship

3. Eule, *supra* note 2, at 1509–10.

4. See John Boudreau, *Effort to Outlaw Affirmative Action Promoted in California: Civil Rights Groups See Initiative as Political-Cultural Grenade*, WASH. POST, Dec. 27, 1994, at A3.

5. See, e.g., *Hunter v. Erickson*, 393 U.S. 385 (1969) (striking down ballot measure that would require voter approval of open housing laws); *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994), *cert. granted*, 115 S. Ct. 1092 (1995) (invalidating state constitutional initiative that would bar state and local government from enacting laws banning discrimination based on sexual orientation); *U.S. Judge Blocks Anti-Immigrant Bill*, WASH. POST, Nov. 17, 1994, at A5 (stating that federal court had enjoined Proposition 187—which would deny public benefits to undocumented immigrants—based on challenge to its constitutionality).

6. For an overview of the leading works and an argument in favor of heightened judicial review of direct democracy, see Eule, *supra* note 2. For work exploring whether initiatives and referenda violate the federal Guarantee Clause, see, e.g., Symposium, *Guaranteeing a Republican Form of Government*, 65 U. COLO. L. REV. 709 (1994); Hans A. Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19 (1993). For work exploring whether direct democracy systematically violates the Equal Protection Clause or otherwise subjugates minorities, see, e.g., Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI.-KENT L. REV. 707 (1991); Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978); Symposium, *The Bill of Rights vs. The Ballot Box: Constitutional Implications of Anti-Gay Ballot Initiatives*, 55 OHIO ST. L.J. 491 (1994) [hereinafter Symposium, *Anti-Gay Ballot Initiatives*]. On the more general question of whether popular initiatives should be subjected to heightened judicial review, see Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 CORNELL L. REV. 527 (1994).

7. Three pieces of published student work are exceptions. See Kara Christenson, Note, *Interpreting the Purposes of Initiatives: Proposition 65*, 40 HASTINGS L.J. 1031 (1989); Elizabeth A. McNellie, Note, *The Use of Extrinsic Aids in the Interpretation of Popularly Enacted Legislation*, 89 COLUM. L. REV. 157 (1989); Stephen H. Sutro, Comment, *Interpretation of Initiatives by Reference to Similar Statutes: Canons of Construction Do Not Adequately Measure Voter Intent*, 34 SANTA CLARA L. REV. 945 (1994). See generally J. Clark Kelso, *California's Constitutional Right to Privacy*, 19 PEPP. L. REV. 327, 334–75 (1992) (analyzing interpretation of California initiatives in context of California's constitutional initiative protecting individual privacy).

about statutory interpretation.⁸ Scholars have called into question basic premises about traditional approaches to statutory interpretation and have proposed and debated many new approaches.⁹ None of this work has addressed the special—and increasingly significant—context of direct democracy.

Direct democracy, moreover, can provide a revealing window on the study of statutory interpretation more generally. The search for a controlling legislative intent has traditionally framed the judicial interpretation of statutes. The viability of such “intentionalism”¹⁰ has long been discredited by scholars and is sharply undermined by widespread contemporary skepticism about objective theories of meaning and about the pluralist political process from which statutes emerge.¹¹ Nevertheless, judges continue to deploy the language of legislative intent when they interpret statutory law—perhaps because they believe in the idea of intent, perhaps because they believe their legitimacy depends upon the *appearance* that they are vindicating the legislature’s policy preferences and not their own.

The case of direct democracy tests the limits of judicial willingness to deploy intentionalist methodology. There are reasons to suspect that a search for “popular intent” will be even more problematic than the traditional search for legislative intent. Consider, for example, the mass size of the electorate; the absence of legislative hearings, committee reports, or other recorded legislative history; and the inability of citizen lawmakers to deliberate about, or to amend, proposed ballot measures. In addition, voters are not professional lawmakers, so it is problematic to impute to the electorate the same knowledge about law, legal terminology, and legislative context that courts routinely ascribe—if sometimes only as aspiration—to legislators. These structural dynamics of the direct lawmaking process should further burden what is in any circumstance a problematic quest for the single intent underlying a law.

In this Article, I explore the interpretive methodology used by courts in construing statutory law enacted through the initiative process. My point of departure is a set of fifty-three decisions I have collected that represents ten years of published decisions by the highest courts in the jurisdictions that permit voters to enact statutory law through the initiative. I use these decisions to explore empirical and normative questions about the interpretation of initiative laws.

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

9. I have argued that much of this work can be understood in terms of a new conception of democratic legitimacy in statutory interpretation. See Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593 (1995).

10. WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION* 525 (2d ed. 1995).

11. See, e.g., Schacter, *supra* note 9, at 599–606 (discussing skepticism about pluralism and statutory meaning that undermines traditional principles of statutory interpretation).

The decisions point to two empirical conclusions, one about the interpretive *approach* courts use and the other about the interpretive *sources* courts consult. In terms of approach, the courts studied widely invoke the same intentionalist principles that dominate conventional statutory construction, replacing the familiar search for legislative intent with an asserted search for the controlling popular intent. In terms of sources, the decisions reflect that courts rely heavily on formal interpretive sources, such as statutory text, language in related legislation, judicial opinions, canons, and, on occasion, ballot pamphlets or voter guides (used in lieu of legislative history). Conversely, courts widely ignore media and advertising as sources of popular intent even though, as I will explore in depth, social science research about voter behavior in ballot campaigns suggests that voters most regularly consult and seek guidance from these sources.

These empirical findings provide the basis for the normative analysis that follows. I draw three principal conclusions. First, the popular intent behind an initiative statute is largely illusory and provides an unstable anchor for judicial interpretation. The popular-intent approach reproduces—and sometimes aggravates—many of the problems posed by the legislative-intent approach, and then raises significant new problems of its own. I explore, in particular, the ways in which the popular-intent approach fails to account for problems of severely limited popular foresight and for the ways in which the direct lawmaking process gives powerful leverage to initiative drafters, who are situated to construct a phantom popular intent through strategic drafting. Moreover, the decisions analyzed here, when read against the social science work about initiative campaigns, point to an interesting paradox that further suggests that popular intent cannot be ascertained: The hierarchy of interpretive sources courts employ *inverts* the informational hierarchy voters use in determining how to vote. This problem eludes easy solution because courts would create formidable new problems if, in the service of popular intent, they inverted their own interpretive hierarchy in order to track voter practices. All of this suggests that the pursuit of popular intent is doomed to fail.

Second, the problems of popular intent suggest a deeper underlying issue, one that should frame attempts to rethink the interpretation of direct legislation. I argue that the interpretive dilemmas explored reflect a striking disjunction between two competing conceptions of law—one that I call “positivist” and one “popular.” The tension between the two supplies a larger conceptual context in which to understand the problems of popular intent; it also helps to point toward a different approach to interpretation of direct legislation.

More specifically, I argue that, rather than remaining wedded to intentionalist methodology, courts construing direct legislation should concede the limits of popular intent and develop alternative interpretive rules framed in light of some of the problems that characterize the direct lawmaking process. In calling for new interpretive principles of this kind, I apply and build upon

what I have called in previous work a “metademocratic” approach to statutory construction.¹² The metademocratic approach acknowledges the inevitability of interpretive discretion and the centrality of the rules used to resolve ambiguity, focuses upon choosing interpretive rules that are self-consciously designed to address identified problems in the democratic process, and links democratic legitimacy not to a mythic brand of interpretive “restraint” but to the use of default principles designed to further a larger vision of democracy.¹³ I argue that metademocratic rules applied in the context of popularly enacted laws can help to generate a less idealized picture of the direct lawmaking process than judicial rhetoric now suggests, can respond to some of the characteristic problems courts confront when trying to “read” the mass electorate, and can encourage other institutions to reform the initiative process.

Third, understanding the particular ways in which popular intent fails, and the underlying disjunction it exposes between positivist and popular conceptions of law, has implications beyond popular lawmaking. Critical analysis of how courts construe direct legislation helps to reveal new dimensions of the problems of conventional statutory interpretation and generates fresh insights about the legislative process.

In Part II, I provide a short overview of direct democracy in the states, with a focus on provisions for the statutory initiative. In Part III, I describe the decisions I have collected and what they reveal about the interpretive methodology employed by courts. In Part IV, I critique the prevailing popular-intent approach on several counts. In Part V, I explore possible responses to the interpretive dilemmas suggested by the decisions analyzed and propose a more promising approach. I conclude with some thoughts about the implications of the study for conventional statutory interpretation.

II. AN OVERVIEW OF POPULAR LAWMAKING IN THE STATES

Direct democracy aspires to a kind of self-government that is less filtered and mediated than that which representative democracy can provide.¹⁴ Its participatory impulse is traceable to Greek city-states and Roman plebiscites.¹⁵ In this country, mechanisms for direct democracy—ranging from

12. *See id.* at 606–11.

13. *Id.*

14. One advocate of the initiative and referendum process argues that:

The initiative broadens the reach of American democracy. The mechanism gives popular mass movements the ability to develop legislative vehicles and secure a date for verdict from fellow citizens. In a manner unmatched in any nation other than Switzerland, the initiative is an expression of confidence in ourselves, a reaffirmation of the confidence of the Framers: that free men and women can govern themselves.

PATRICK B. MCGUIGAN, *THE POLITICS OF DIRECT DEMOCRACY IN THE 1980s*, at 121 (1985).

15. HARLAN HAHN & SHELDON KAMIENIECKI, *REFERENDUM VOTING: SOCIAL STATUS AND POLICY PREFERENCES* 8 (1987). For historical overviews of the use of initiatives in the U.S. and other modern

town meetings to popular constitutional ratification—date to colonial government.¹⁶ American popular lawmaking most dramatically ascended, however, with the rise of the Progressive movement in the late nineteenth and early twentieth centuries.¹⁷ Given that Progressive reformers targeted "politicians, parties, interest groups, and political institutions,"¹⁸ it is unsurprising that the Progressives emphasized the importance of institutionalizing direct democracy. Between 1898 and 1918, twenty-three states enacted the initiative, the referendum, or both.¹⁹

The mechanisms of direct democracy are diverse, and states and municipalities use many different forms of popular lawmaking.²⁰ Voters may remove elected officials through the device of recall,²¹ or they may enact substantive law at the polls. State provisions for enacting substantive law vary widely among the jurisdictions. Depending on state law, voters may adopt state constitutional provisions, statewide statutory law, or local ordinances. Voters may enact such law by either the initiative or the referendum. Initiatives permit voters to *initiate* and vote upon proposed laws without any required legislative approval,²² referenda, by contrast, involve laws that a legislative body has *referred* to the electorate for ratification.²³

In order to situate this analysis within the broader context of statutory interpretation, I focus exclusively here on direct democracy's closest analogue to the statutory product of state legislatures: the statewide statutory initiative, which permits voters to propose and pass statutes without legislative approval. Twenty-one states and the District of Columbia permit voters to enact

states, see THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 7–59 (1989); DAVID B. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* 27–34 (1984); DAVID D. SCHMIDT, *CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION* 3–23 (1989).

16. HAHN & KAMIENIECKI, *supra* note 15, at 8–9; SCHMIDT, *supra* note 15, at 3–4.

17. MAGLEBY, *supra* note 15, at 21–25; SCHMIDT, *supra* note 15, at 5–14.

18. HAHN & KAMIENIECKI, *supra* note 15, at 11.

19. CRONIN, *supra* note 15, at 51.

20. For comprehensive, state-by-state listings, see 29 THE COUNCIL OF STATE GOVERNMENTS, *THE BOOK OF THE STATES* 329–43 (1992).

21. See CRONIN, *supra* note 15, at 125–56.

22. Initiatives are either "direct" or "indirect." A direct initiative requires that sponsors of a proposed measure secure the required number of signatures and, once the measure is on the ballot, that a majority of the voters approve the law. Eule, *supra* note 2, at 1510–11. Some states additionally require that a specified percentage of the voters who turn out for the election cast a vote for the law. *Id.* at 1510–11 n.27. In contrast, an indirect initiative requires that the legislature have an opportunity to enact the proposed law on its own before the measure is put on the ballot. The measure goes to the voters only if the legislature fails to do so within a specified period.

23. Referenda are, to use Julian Eule's categories, "mandatory," "voluntary," or "popular." See *id.* at 1512. A referendum is mandatory when the state's constitution requires that certain laws be submitted to the voters before they are finally approved. A referendum is voluntary if state law permits legislators to determine whether a law will be referred to the electorate. A referendum is popular if voters may, by petition, require that a law be submitted to the electorate before it becomes effective. *Id.*; see also MAGLEBY, *supra* note 15, at 35–36 (distinguishing among different forms of direct legislation).

statewide statutes through the initiative.²⁴ I do not examine referendum measures, which present a hybrid between direct and representative legislation. In addition, consistent with my focus on statutory law, I do not explore here the interpretation of constitutional or local initiatives. It is unlikely that courts deploy substantially different interpretive rules when they construe initiative statutes as opposed to constitutional amendments or local ordinances.²⁵ Insofar as the interpretive approach explored here predominates in these other settings, my analysis of the interpretation of direct democracy has important implications for those settings. Constitutional and local initiatives warrant separate consideration, however, because factors particular to those measures shape the context in which they are enacted and should be accounted for in analyzing and developing appropriate interpretive rules.²⁶

III. JUDICIAL INTERPRETATION OF INITIATIVE STATUTES: AN ANALYSIS OF THE DECISIONS

A. *Profile of the Decisions Studied*

1. *Search Criteria*

The fifty-three decisions I have collected meet several search criteria, and they constitute all of the decisions located that fit within these parameters.²⁷

24. These jurisdictions are: Alaska, Arizona, Arkansas, California, Colorado, the District of Columbia, Idaho, Maine, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming. PHILIP L. DUBOIS & FLOYD F. FEENEY, *IMPROVING THE CALIFORNIA INITIATIVE PROCESS: OPTIONS FOR CHANGE 14* (1992); *see also infra* Appendix A (listing, for each jurisdiction, constitutional or statutory source of power to enact statutes through popular initiative).

25. For examples of decisions construing constitutional and local measures that invoke the intent-based principles that I find predominant in the construction of statutory initiatives, see *Davis v. Berkeley*, 794 P.2d 897, 900 (Cal. 1990) (“When construing a constitutional provision enacted by initiative, the intent of the voters is the paramount consideration.”); *Evans v. Romer*, 882 P.2d 1335, 1349 (Colo. 1994), *cert. granted*, 115 S. Ct. 1092 (1995) (stating that, for purposes of determining whether unconstitutional provisions are severable, court looks to “(1) the autonomy of the portions remaining after the defective provisions have been deleted and (2) the intent of the enacting legislative body” (quoting *Robertson v. City of Denver*, 874 P.2d 325, 335 (Colo. 1994))); *City of Spokane v. Taxpayers of Spokane*, 758 P.2d 480, 483 (Wash. 1988) (stating that, in construing a local initiative, “[j]udicial interpretation should focus on ‘the voters’ intent and the language of the initiative ‘as the average informed lay voter would read it.’” (quoting *Estate of Turner v. Washington State Dep’t of Revenue*, 724 P.2d 1013, 1015 (Wash. 1986))).

26. For purposes relevant to my analysis, constitutional enactments differ from statutes because of their greater durability and resilience. *See* MAGLEBY, *supra* note 15, at 72. For example, initiative statutes, unlike constitutional amendments, are subject to legislative amendment or repeal in many jurisdictions. DUBOIS & FEENEY, *supra* note 24, at 44–46. Local initiatives and referenda differ from statewide measures because of the limitations state law characteristically imposes on local lawmaking power and the resulting preemption issues that local initiatives frequently raise. *See generally* Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930 (1988).

27. A complete list of the cases and a description of the interpretive question raised in each one appears in Appendix B. My research assistants and I used three means to locate these cases. First, we located cases using relevant key numbers in West Publishing’s digest system and any case annotations accompanying the published state code and constitutional provisions that authorized the statutory initiative.

The search criteria were designed to locate recent decisions of the highest court in each jurisdiction in which statutory initiatives are interpreted. Consistent with this objective, the criteria for inclusion were:

- (1) the decision was issued between January 1, 1984 and December 31, 1994;
- (2) the decision was from the highest court of the state or the District of Columbia;
- (3) the decision interpreted a statewide statute passed by initiative (but not a constitutional measure or a referendum statute);²⁸ and
- (4) the decision construed and applied a provision of the measure at issue (as opposed to deciding whether the initiative is constitutional or construing the initiative solely in connection with a determination of its constitutionality).

2. *Geographic Composition of the Decisions*

The decisions represent eleven jurisdictions—ten states and the District of Columbia.²⁹ California cases heavily dominate the set. Of the fifty-three decisions collected, thirty are decisions of the California Supreme Court. That fact is unsurprising given California's heavy usage of direct lawmaking.³⁰ Notwithstanding the predominance of California decisions, however, the principal results I describe are consistent throughout the set of decisions and do not change substantially when the California decisions are omitted.³¹

Of the twenty-one states that permit the statutory initiative, eleven are unrepresented in the set of decisions. For some states, this is because—

Second, we crafted three broadly worded searches for computerized databases. See Memorandum from Jane Schacter, Assistant Professor of Law, University of Wisconsin-Madison, to *The Yale Law Journal* 2-3 (July 29, 1995) (on file with author) [hereinafter Schacter Memorandum]. Third, we included any cases that the cases found through the first two means cited and that met the search criteria, even though the first two methods did not directly discover them. We tabulated and analyzed only majority opinions. We excluded cases that construed a provision initially enacted through the initiative where the opinion indicated that the provision at issue was subsequently amended by the legislature. Either I or at least two research assistants analyzed each case that fit the search criteria.

The search strategies employed might have missed some cases, but several factors make the methods unlikely to have produced a biased set of state supreme court cases over the last decade. First, the use of existing secondary sources (digests and annotations) as well as broad database searches should have minimized the risk of substantial error. Second, the cases I do examine reveal strong trends across the data set; moreover, the cases refer to no body of law reflecting a divergent methodology. Third, the only cases that might have eluded the search strategies employed here in any systematic way would be those that made no mention of the initiative character of the statute or the fact that the voters enacted the law. Cases in which courts do not even advert to the popular origins of a law—even if they exist in any substantial number—are unlikely to be inconsistent with my central finding that courts widely use traditional methods and sources of statutory construction when they interpret initiative laws.

28. See *supra* note 26.

29. The jurisdictions are: Alaska, Arkansas, California, the District of Columbia, Massachusetts, Michigan, Missouri, Montana, Oregon, South Dakota, and Washington.

30. See DUBOIS & FEENEY, *supra* note 24, at 18 (showing that California led all states in number of initiatives appearing on ballots between 1978 and 1988).

31. Where relevant, I discuss any differences between California and the other jurisdictions.

constitutional authority for initiatives aside—the devices are rarely, if ever, invoked.³² For others, it appears that local culture may favor the use of either the *constitutional* initiative (which provides more durability than its statutory counterpart) or the referendum device (which requires legislative action).³³ Thus, the decisions collected here do not reflect the full geographic diversity of all states that permit the statutory initiative, but my research has not revealed evidence that courts in the unrepresented jurisdictions use any substantially different interpretive methodology in construing popularly enacted constitutional provisions or local ordinances.³⁴ The set of decisions collected here should not be regarded as exhaustive; it is intended only to capture recent judicial practice (defined as the last ten years), and only to examine the methodology used or approved by the authoritative appellate court in each

32. DUBOIS & FEENEY, *supra* note 24, at 18 (listing number of initiative measures voted upon between 1978 and 1988 and displaying low numbers for several jurisdictions). Between 1978 and 1988, for example, no statutory initiatives appeared on the Wyoming ballot; only one statutory initiative appeared on the ballot in Arkansas, Nevada, and Oklahoma; and only two statutory initiatives appeared on the ballot in Ohio. *Id.*; see also MAGLEBY, *supra* note 15, at 71 (listing totals for period between 1898 and 1979 and indicating low usage in several states).

33. For example, there is evidence to suggest that Colorado organizers have preferred the constitutional over the statutory initiative: From 1978 to 1988, only five statutory initiatives appeared on the ballot, as compared to 11 constitutional initiatives. DUBOIS & FEENEY, *supra* note 24, at 18; see also MAGLEBY, *supra* note 15, at 72 (noting that in eight states there were more constitutional than statutory initiatives between 1898 and 1978). Along similar lines, there is evidence to suggest that residents of Maine have preferred the referendum to the statutory initiative. Between 1898 and 1978, 124 statutory referenda were introduced in Maine, as compared to only 12 statutory initiatives. *Id.* at 73. This referendum preference may be related to the fact that voters approve referenda at a far higher rate than they do initiatives. See *id.* at 72 (noting 60% aggregate success rate for referenda between 1898 and 1978 compared to 32–37% aggregate success rate for initiatives). This approval-rate factor would not explain states that prefer the constitutional initiative to the statutory one since voters in those states appear to approve statutory initiatives at a higher rate than they approve constitutional initiatives. *Id.* at 72 (noting that from 1950 to 1980, voters in all relevant states combined approved 42% of statutory initiatives compared to only 30% of constitutional initiatives).

34. One Nebraska case falling outside the scope of the study points in a different direction. In *Omaha Nat'l Bank v. Spire*, 389 N.W.2d 269 (Neb. 1986), the Nebraska Supreme Court, in the course of construing a *constitutional* initiative, held that it would consider the provision's language alone in determining the voters' intent. The court stated:

There is no meaningful way to determine the intent which motivates voters to sign a petition for the submission of an enactment, nor is there any real way to determine the intent of those voters who vote for the adoption of an enactment. The motivations and mental processes of the voter in Verdigre or the elector in Elkhorn cannot be determined—except from the words of the enactment itself. Beyond that, all that can be known by this court is that the voters have been subjected to tornadolike winds in voting on this highly political question. We hold that the intent of the voters adopting an initiative amendment to the Nebraska Constitution must be determined from the words of the initiative amendment itself.

Id. at 279. Although the Nebraska court made these comments in the context of constitutional interpretation—and no cases were located from the periods being studied in which that court interpreted an initiative statute—it seems likely that the court would take the same position in the context of initiative statutes, since the identified factors apply equally to statutes. However, other Nebraska decisions seem to adopt the same intent-based principles that dominate the cases studied here and do not restrict courts to the initiative's language alone. See *State ex rel. Spire v. Beermann*, 455 N.W.2d 749, 752 (Neb. 1990) (construing voter-approved constitutional amendment and looking to “‘intent and understanding’” of framers and people (quoting *State ex rel. State Ry. Comm'n v. Ramsey*, 37 N.W.2d 502, 507 (Neb. 1949))); *State ex rel. Douglas v. Beermann*, 347 N.W.2d 297, 305 (Neb. 1984) (construing voter-approved constitutional amendment and looking to “‘intent of the people’”).

jurisdiction. It should, however, yield a relatively accurate representation of the universe it attempts to describe.

B. *The Interpretive Methodology Used by the Courts*

The decisions reveal clear answers to two principal questions: What interpretive *approach* and what interpretive *sources* do the courts studied employ in assigning meaning to contested provisions?

1. *The Primacy of Popular Intent*

In the vast majority of the decisions collected here, the courts declare that their task is to locate the controlling popular intent behind the provision at issue. Of the fifty-three decisions, forty-five (or eighty-five percent) invoke some variant of popular intent.³⁵ Of the eleven jurisdictions represented, eight embraced the popular-intent approach during the time period studied; the other three were silent on the question.³⁶ In most of the decisions analyzed, courts explicitly identify popular intent as the object of their interpretive search, using phrases like "the 'collective intent' of the people,"³⁷ "the voters' intent,"³⁸ "the people[']s inten[t],"³⁹ the "intent of the legislative body; in this case, the electorate,"⁴⁰ or the "intent of the enacting body."⁴¹ A few of the decisions are more indirect in their embrace of popular intent, but they too suggest that

35. Schacter Memorandum, *supra* note 27, at 3–8. The data that form the basis for summaries of the decisions referred to in this Article are set out in this memorandum. *See id.* at 8–14.

36. Each of the three "silent" states—Alaska, Michigan, and South Dakota—has only one case in the set. None of these cases expressly or by implication rejects intent-based interpretation; the courts assign meaning to the contested provision without identifying their interpretive methodology. Moreover, there is evidence that, in cases outside the study, courts in these three states have approved the use of intent-based construction in interpreting popularly enacted law. *See, e.g.,* *Thomas v. Bailey*, 595 P.2d 1, 4 & n.15 (Alaska 1979) (noting that, in construing popularly enacted constitutional amendment, "[t]he basic principles for interpreting statutes apply," and court may consider "evidence on the meaning the voters probably placed on the provision"); *Association of Businesses Advocating Tariff Equity v. Public Serv. Comm'n*, 420 N.W.2d 81, 85 & n.8 (Mich. 1988) (construing referendum provision based on presumption that voters "know what they want" and "understood the proposition," and invoking rule that a "statute must be construed as a whole in order to effectuate the intent of the Legislature" (quoting *In re Proposals D & H*, 339 N.W.2d 848, 854 (Mich. 1983))); *Winter v. Shafter*, 26 N.W.2d 893, 896 (Mich. 1947) (noting that, in construing popularly enacted local charter amendment, court must "ascertain and give effect to the intent of the electorate with due regard to the circumstances and the purposes sought to be accomplished"); *Cummings v. Mickelson*, 495 N.W.2d 493, 498–99 (S.D. 1993) (noting that, in construing popularly enacted constitutional amendments, "the legislative history and historical background" are relevant, and that "[p]articularly applicable in the case of amendments are the rules relating to the intent of the framers and adopters and attainment of the object of a constitution").

37. *Lemon v. United States*, 564 A.2d 1368, 1381 (D.C. 1989) (quoting *Washington State Dep't of Revenue v. Hoppe*, 512 P.2d 1094, 1096 (Wash. 1973)).

38. *Estate of Turner v. Washington State Dep't of Revenue*, 724 P.2d 1013, 1015 (Wash. 1986) (quoting *In re Estate of Hitchman*, 670 P.2d 655, 657 (Wash. 1983)).

39. *North Shore Vocational Regional Sch. Dist. v. City of Salem*, 471 N.E.2d 104, 107 (Mass. 1984).

40. *State v. Gallant*, 764 P.2d 920, 922 (Or. 1988).

41. *Yoshisato v. Superior Court*, 831 P.2d 327, 334 (Cal. 1992) (quoting *In re Lance W.*, 694 P.2d 744, 754 (Cal. 1985)).

popular intent guides the court's inquiry.⁴² On occasion, courts mention what they deem to be the voters' *purpose*⁴³ in enacting the initiative, but in doing so they retain a framework in which the intent of the electorate remains the doctrinal foundation.⁴⁴

None of the decisions meeting my search criteria contains any language that explicitly rejects the popular-intent concept. There are, for example, no express indications in the decisions studied that some courts chose to forsake the search for the subjective popular intent behind a statutory provision in favor of the assertedly objective "plain meaning" approach of the kind so vigorously espoused by Justice Antonin Scalia. The hallmark of this "new textualism" is its emphasis on statutory language and the "reasonable" meaning of the words used in a law.⁴⁵ Textualists view legislative intent as irrelevant on the theory that only a statute's text is subject to the constitutional requirements of bicameralism and presentment and thus only the text represents formal "law." Unenacted, unspecified legislative intentions, by contrast, escape the rigors of bicameralism and presentment and thus cannot claim the legitimacy of statutory text.⁴⁶

Even though fifteen decisions in the study rely exclusively on what the courts deem to be clear and dispositive statutory language, that kind of reliance on statutory language, without more, does not constitute textualist methodology. On the contrary, many courts in the study explicitly characterize statutory language as the *best evidence of intent*; when that language is clear, they declare it unnecessary to consult other sources to discern intent. The

42. See, e.g., *DaFonte v. Up-Right, Inc.*, 828 P.2d 140, 145 (Cal. 1992) ("Thus, the voters understood and intended Proposition 51 to eliminate joint liability only . . ."); *People v. Bigelow*, 691 P.2d 994, 1006 (Cal. 1984) ("No legislative history illumines the adoption of this special circumstance. The ballot arguments and other materials concerning the 1978 initiative do not address the subject."); *Backman v. United States*, 516 A.2d 923, 926 (D.C. 1986) ("We must assume that the District voters relied on the statutory definition of 'narcotic' . . .").

43. For a distinction between statutory "intent" and "purpose," see REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 88 (1975) ("[T]he word 'intent' coincides with the particular immediate purpose that the statute is intended to directly express and immediately accomplish, whereas the word 'purpose' refers primarily to an ulterior purpose that the legislature intends the statute to accomplish or help to accomplish.").

44. See, e.g., *People v. Fritz*, 707 P.2d 833, 835 (Cal. 1985) ("[N]othing in the ballot analysis or arguments which were before the voters suggests such a purpose."); *Estate of Turner v. Washington State Dep't of Revenue*, 724 P.2d 1013, 1016 (Wash. 1986) ("[I]t is the function of this court to discern voter intent behind Initiative 402.").

45. For explorations of textualism, see William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) (analyzing important theoretical underpinnings of Justice Scalia's textualism); William D. Popkin, *An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133 (1992) (criticizing Justice Scalia's divergence from common law mode of adjudication); Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597 (1991) (characterizing Justice Scalia's textualism as reaction against legal process theory).

46. See, e.g., *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 30 (1989) (Scalia, J., concurring in part and dissenting in part) (arguing that it is not task of judicial interpreters "to enter the minds of the Members of Congress—who need have nothing in mind in order for their votes to be both lawful and effective—but rather to give fair and reasonable meaning to the text of the United States Code, adopted by various Congresses at various times").

distinction is between the textualist’s reliance on language as the only legitimate embodiment of law and the intentionalist’s reliance on language as the preferred evidence of the controlling—if unenacted—legislative intent. The opinions collected here generally use the language of the initiatives construed in this second sense, as evidence of the popular intent.

In general, the decisions reflect that courts have transported to the context of direct democracy the techniques and principles used to construe legislatively enacted law.⁴⁷ Of the fifty-three decisions studied, eleven expressly state that ordinary rules of statutory interpretation should apply, twenty-five others simply apply them, and the remainder are silent on the issue. A few decisions acknowledge the difficulty of construing popularly enacted law,⁴⁸ and a few specifically say that the popular origins of the law support a construction designed to effectuate the prerogatives and purposes of direct democracy.⁴⁹ The overwhelming number of decisions analyzed here, however, apply ordinary rules of interpretation to initiative laws.

2. *The Sources of Popular Intent: The Dominance of Formal Legal Sources*

a. *A Taxonomy of Sources*

The decisions studied also suggest some definite conclusions about the sources courts use to ascertain popular intent. In particular, there is little indication that courts modify the interpretive sources they consult to accommodate the particular structural dynamics of the direct legislative process. One might expect the interpretive sources to differ from those used in construing legislative law because of, for example, the absence of a legislative record and the fact that voters are not professional lawmakers. The

47. These cases refute the assertion in *McNellie*, *supra* note 7, that courts do not use traditional principles of interpretation when construing popularly enacted law. *McNellie* apparently characterized courts as rejecting traditional methods of interpretation based on the fact that some courts used ballot pamphlets, but not other extrinsic materials, such as media accounts, in construing initiatives. But that notion seems erroneously to assume that courts *do* use media materials when construing legislative law. In fact, the use of ballot pamphlets closely tracks the use of legislative history, which is the principal extrinsic source used in traditional statutory construction. *See infra* notes 53, 55 and accompanying text.

48. *See, e.g.*, *Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm’n*, 799 P.2d 1220, 1235 (Cal. 1990) (“In order to further the fundamental right of the electorate to enact legislation through the initiative process, this court must on occasion indulge in a presumption that the voters thoroughly study and understand the content of complex initiative measures.”); *Lemon v. United States*, 564 A.2d 1368, 1381 (D.C. 1989) (“The difficulties inherent in discerning the collective intent of a legislative body . . . are even more pronounced where the decision was made directly by the electorate.”).

49. *Yoshisato v. Superior Court*, 831 P.2d 327, 333 (Cal. 1992) (“[W]e must bear in mind ‘our solemn duty jealously to guard the sovereign people’s initiative power.’” (quoting *Brosnahan v. Brown*, 651 P.2d 274, 277 (Cal. 1982))); *In re Estate of Thompson*, 692 P.2d 807, 808 (Wash. 1984) (“[T]his court has consistently applied the rule that such provisions will be liberally construed to the end that the right of initiative be facilitated.”); *cf. SDDS, Inc. v. State*, 481 N.W.2d 270, 272 (S.D. 1992) (“Were we to adopt SDDS’ argument, we would effectively defeat the referendum rights of this state’s citizens.”).

decisions do not support that hypothesis. To the contrary, courts widely subject citizen-lawmakers to the same standards as legislators⁵⁰ and generally confine their search to sources commonly used in construing legislative law. The one exception, discussed at length below, is the use of official ballot materials prepared in connection with proposed initiatives. Because courts use these materials in lieu of legislative history, however, even this is not so unique to the context of direct legislation.

In analyzing the sources courts consult in determining popular intent, I divided the materials into two broad categories of interpretive evidence. The “formal” category includes several sources of positive law or government-generated materials; the “informal” category includes nonlegal, nongovernmental sources.

i. *Formal Sources*

- *Statutory Language.* This category comprises the words of the statute that the voters enacted. Although there are decisions in which the statute was silent on the point at issue, it is explicit or implicit in all the decisions that statutory language is a relevant source for interpretation.

- *Legal Texts.* This is a broad category designed to subsume the range of legal provisions and materials that might inform statutory construction. I included here other statutes, including statutes related to the one being construed and statutes in effect before the enactment of the one being construed; any legislative history available for such other statutes; judicial decisions; administrative regulations, rulings, or other materials; and any other legal text viewed by a court as relevant to interpreting the provision at issue. I counted canons of statutory construction as a legal text, analogous for the purposes of the study to a citation to a judicial decision for a rule or principle of law.⁵¹ I also considered a legal treatise referring to an existing legal doctrine to be a legal text.

- *Official Ballot Material.* All states that authorize the statutory initiative require state government officials to generate and make available to voters some information about the initiative. Ten states in all—four of which are represented in the study—prepare a ballot pamphlet to give voters guidance about ballot measures.⁵² I included in this category such ballot pamphlets or voter guides; other ballot summaries, abstracts, or titles; arguments for and

50. Sometimes courts are explicit on this point. See *Backman v. United States*, 516 A.2d 923, 926 (D.C. 1986) (“We must hold the legislature and the citizenry to the same standards when interpreting the laws they enact.”); cf. *Taxpayers*, 799 P.2d at 1235 (“[T]his court must on occasion indulge in a presumption that the voters thoroughly study and understand the content of complex initiative measures.”).

51. See generally Symposium, *A Reevaluation of the Canons of Statutory Interpretation*, 45 VAND. L. REV. 529 (1992).

52. States represented in the study that require a ballot pamphlet are: California, Massachusetts, Oregon, and Washington. See DUBOIS & FEENEY, *supra* note 24, at 126–32.

against a measure collected and disseminated by the government (though frequently written by partisans in the battle); statements or analyses that state law required the attorney general or other state official to perform; and any other material about the ballot measure that state law or regulation required that voters be provided.

ii. *Informal Sources*

- *Media Reporting or Analysis.* This category includes any newspaper, television, or radio accounts concerning the ballot measure, including narrative reporting, analysis, editorials, opinion pieces, or any other material published in media sources, exclusive of advertising. This category also includes published exit polls or other opinion surveys.

- *Advertising.* This category includes political advertising about the ballot measure, including broadcast and print advertising and campaign materials (such as handbills, posters, or bumper stickers).

- *Other.* This category includes any informational sources—such as dictionaries—that do not fall within any of the categories listed above.

b. *The Frequency of Sources*

Tables 1–3 below show the extent to which courts either relied upon as authority *or* explicitly identified as legitimate any of the sources identified above.⁵³ There are clear patterns in the hierarchy of sources consulted by courts.

53. The materials that a state supreme court identifies as legitimate are significant even if the court does not rely upon them in a particular case because decisions by the highest court give guidance about the boundaries of appropriate interpretation to lower courts, government officials, and litigants. There are several instances in the cases in which a court identifies a source—such as a ballot pamphlet—as an appropriate form of guidance on the question of intent but finds nothing relevant in the source. In order to present the most complete picture of interpretive sources available to courts construing popularly enacted law, I counted an observation of this sort as identification of a legitimate source. At the same time, the vagaries of judicial rhetoric make it perilous to attempt a clear distinction, in every case, between what courts identify as legitimate versus what they actually “rely upon.” For this reason, I did not separate out these two categories, and both kinds of references are included in the data summaries.

	STATUTORY LANGUAGE	LEGAL TEXTS	BALLOT MATERIAL	MEDIA	ADVERTISING	OTHER
NUMBER OF DECISIONS	53	53	22	1	0	3
PERCENTAGE	100%	100%	42%	2%	0%	6%

TABLE 1. *Sources Relied on or Identified as Legitimate—All Jurisdictions (53 Decisions)*⁵⁴

	STATUTORY LANGUAGE	LEGAL TEXTS	BALLOT MATERIAL	MEDIA	ADVERTISING	OTHER
NUMBER OF DECISIONS	30	30	16	0	0	1
PERCENTAGE	100%	100%	53%	0%	0%	3%

TABLE 2. *Sources Relied on or Identified as Legitimate—California (30 Decisions)*

	STATUTORY LANGUAGE	LEGAL TEXTS	BALLOT MATERIAL	MEDIA	ADVERTISING	OTHER
NUMBER OF DECISIONS	23	23	6	1	0	2
PERCENTAGE	100%	100%	26%	4%	0%	9%

TABLE 3. *Sources Relied on or Identified as Legitimate—Non-California Jurisdictions (23 Decisions)*

The data reveal heavy concentration—indeed, almost exclusive focus—on formal sources. The frequency of usage of any of the three categories of formal sources—language, other legal texts, and official ballot material—exceeded that of any informal source by an overwhelming margin. The opinions consistently used or identified as legitimate the statutory language of the ballot measures and legal texts. Among formal sources, official ballot material was also influential, although substantially less so than language and legal texts. As Tables 2 and 3 reflect, this pattern holds true for California and

54. The data upon which Tables 1–3 are based are set out in Schacter Memorandum, *supra* note 27, at 14–25.

non-California decisions alike. Both sets of decisions reflect the fact that courts use official ballot materials with some frequency, especially any ballot pamphlet required by law to be provided to voters. California courts show the greatest enthusiasm for ballot pamphlets, using or approving their use in fifty-three percent of the decisions studied. These pamphlets are generally used like legislative history. In the absence of committee reports, floor debate, and the like, courts sometimes look to these booklets as legitimate evidence of voter intent. It is not surprising that the California decisions reflect significantly higher usage of ballot material (53%) than do the non-California decisions (26%) given that, among the non-California jurisdictions studied, only three require a ballot pamphlet.⁵⁵

By contrast, the sources I characterized as informal played virtually no role in judicial analysis of the laws at issue. Indeed, the only informal sources that figured significantly—dictionaries—appear in the "other" category.

The findings regarding media and advertising sources are particularly stark: With a single exception, the opinions studied never mentioned information provided to voters by the news media or by advertisements. Only one case had a majority opinion that mentioned a media source, and that reference was only incidental. In *Lemon v. United States*,⁵⁶ the District of Columbia Court of Appeals construed an initiative imposing mandatory minimum sentences for crimes committed with weapons. While the court chose a more expansive interpretation of the sentencing provision based largely on its analysis of the statutory language, it also cited as background an article in the *Washington Post* that reflected the level of popular disgust with increased gun availability and usage.

IV. READING THE MASS ELECTORATE: THE INTRACTABLE SEARCH FOR POPULAR INTENT

A. *Introduction: Some Characteristic Problems of Intentionalism*

I turn now to evaluating the prevailing popular-intent approach and the associated interpretive practices reflected in the decisions. In assessing an avowedly intentionalist approach to statutory interpretation I do not, of course, write on a clean slate. Dating to the work of Max Radin, intent-based statutory interpretation has been the subject of continuous scholarly derision.⁵⁷ The

55. See *supra* note 52. Because many states do not have published legislative history of the sort that is abundant in the federal statutory context, however, these courts' relatively frequent overall use of ballot pamphlets is notable.

56. 564 A.2d 1368, 1379 (D.C. 1989).

57. See Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930) [hereinafter Radin, *Statutory Interpretation*]; see also Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950) (critiquing indeterminacy of traditional canons of interpretation). Radin later had second thoughts about his

attacks have been sufficiently unrelenting to prompt one observer to suggest that intent-based interpretation “has no serious defenders in the academy.”⁵⁸ Although the contemporary version of the critique is sometimes expressed in terms of complex problems of collective action and “decision theory,”⁵⁹ the underlying idea remains the same simple but powerful notion argued by Radin: It is fallacious to ascribe meaningful intentionality to a multimember body.

This entrenched scholarly skepticism about intentionalist principles of statutory construction is, however, noticeably unmatched in the courts. The longstanding academic critiques notwithstanding, intent-based approaches continue to dominate at least the *rhetoric* of judicial interpretation⁶⁰—and the decisions analyzed here suggest the same dominating rhetorical presence of intentionalism in the realm of direct legislation. As I discuss later, it may be that the invocation of popular intent is, in the end, only rhetorical.⁶¹ For purposes of this part, however, I take the courts’ opinions at face value and assess the interpretive methodology they profess to follow.

To some extent, popular intent simply reproduces familiar problems of intentionalism writ large.⁶² For example, the problem of aggregating multiple individual intentions, substantial as it is in the context of the legislative process, is compounded by the daunting scale of direct lawmaking. Even if we granted that *individual* voter intent existed—a dubious premise, I will

own critique. See Max Radin, *A Short Way with Statutes*, 56 HARV. L. REV. 388, 410–11 (1942) (suggesting that his earlier statements were “too sweeping” and embracing purpose-oriented approach to statutory construction).

58. Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1087 (1992); see also William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1507 (1987) (“Scholars from a variety of viewpoints agree that the idea of legislative intent is incoherent and that judges have substantial lawmaking discretion in applying statutes.”). But see Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 864–66 (1992) (responding to traditional criticisms of legislative intent and arguing that a properly conceived notion of intent can be meaningful); Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803, 807–08 (1994) (calling for revival of intent-based interpretation through model of “textualist originalism”).

59. See, e.g., John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565, 568 (1992) (arguing that, under public choice theory, “democratic laws will exhibit internal chaos and contradiction and will be arbitrary in their effects”); Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992) (arguing that legislative intent is oxymoron because institutional forces shape legislative outcomes more than does congressional consensus). For a general overview of these claims, see Schacter, *supra* note 9, at 638–39. For a refutation of the argument that Arrow’s theorem and the associated problems of cycling, agenda manipulation, and strategic voting render legislative outcomes incoherent and ultimately meaningless, see Richard H. Pildes & Elizabeth S. Anderson, *Slingshot Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2131–35 (1990).

60. See Schacter, *supra* note 9, at 598–99 & n.20.

61. See *infra* Subsection V.B.2.

62. See Kelso, *supra* note 7, at 347–48 (arguing that California courts “have fictionalized an ‘electorate intent’ in much the same way that they have fictionalized a ‘legislative intent’”).

argue—courts simply could not cumulate what may be millions of voter intentions.⁶³

Similarly, the exigencies of arithmetic complicate the problems caused by language and its limitations. As is familiar in the legislative domain and well beyond, it is problematic to assume that statutory language can uncontroversially convey distinct and determinate legal commands or, more generally, that any communication to voters about the substance of a proposed law will be universally understood in a single way.⁶⁴ The cases analyzed here offer many examples: What is a "crime involving dishonesty" for purposes of a voter-enacted impeachment rule?⁶⁵ Is a nondefendant employer, immune from suit under a workers' compensation law, a "responsible party" for purposes of allocating liability among party-defendants under a tort reform initiative?⁶⁶ When have prior criminal proceedings been "brought and tried separately" for purposes of a sentence enhancement rule?⁶⁷

And this problem can be particularly vexing when law is enacted by a large group of voters, diverse across many dimensions. Given the scale of the mass electorate, "interpretive communities"⁶⁸ are likely to proliferate, and aspects of experience or identity may mediate and influence the way meaning is assigned to language or concepts.⁶⁹ From whose vantage point, for example, shall we ask whether, for purposes of a witness impeachment statute, shoplifting is a "crime involving dishonesty" (as opposed, say, to one of economic duress),⁷⁰ or whether, for purposes of a mandatory minimum sentencing statute, all accomplices to a robbery were "armed while engaged" in the robbery if only one person in the group was carrying a weapon?⁷¹ On occasion, moreover, proponents and opponents of ballot measures may quite

63. See, e.g., *Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm'n*, 799 P.2d 1220, 1230 n.7 (Cal. 1990) (noting that more than five million people voted on California's 1990 campaign reform propositions). This point was expressly noted by the dissent in the recent United States Supreme Court decision invalidating an Arkansas constitutional initiative that imposed term limits on federal officeholders. See *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842, 1911 (1995) (Thomas, J., dissenting) (noting in construing the purpose of the initiative that "inquiries into legislative intent are even more difficult than usual when the legislative body whose unified intent must be determined consists of 825,162 Arkansas voters"). Compare the context of legislative democracy, where courts may be able to get at least a glimpse of the individual intent of some legislators through materials like transcripts of legislative proceedings, other legislative history, amendments proposed by particular legislators or groups of legislators, press releases, or other public statements. Even information of this kind, however, does not eradicate the problems of aggregation because the question of how to cumulate multiple intentions remains.

64. See Schacter, *supra* note 9, at 599–603 (discussing how skepticism about meaning has affected statutory interpretation).

65. See *State v. Gallant*, 764 P.2d 920, 920–21 (Or. 1988).

66. See *DaFonte v. Up-Right, Inc.*, 828 P.2d 140, 141 (Cal. 1992).

67. See *In re Harris*, 775 P.2d 1057, 1058 (Cal. 1989).

68. See generally STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980).

69. See Schacter, *supra* note 9, at 623–25 (discussing problem of "epistemological pluralism" in statutory interpretation).

70. See *State v. Gallant*, 764 P.2d 920, 920–21 (Or. 1988).

71. See *Abrams v. United States*, 531 A.2d 964, 965–66 (D.C. 1987).

strategically deploy language and rhetoric to evoke targeted responses from particular groups.⁷²

These familiar issues compromise the coherence of popular intent, but they will not be the focus of my discussion. In this part, I will discuss the three principal problems that the decisions analyzed most clearly suggest. I begin with a discussion of two problems—the limits of voter foresight and the related problem of strategic drafting. I then turn to what I call the paradox of the inverted informational hierarchy. These problems reveal significant weaknesses in the interpretive practices used in the decisions and lay the groundwork for developing a more promising approach to interpreting direct legislation. Several of the problems I will discuss, however, also have implications for the way we think about ordinary statutory interpretation. While the structural dynamics of direct legislation throw these issues into relief, I will argue in the concluding part of the Article that a consideration of these issues in the context of direct legislation can also challenge some of the assumptions about the legislative process that are sometimes regarded as uncontroversial.⁷³

B. *The Boundaries of Popular Foresight*

One problem prominently illustrated by the decisions analyzed is that the notion that voters had any intent at all on the interpretive question facing the court—individually or collectively—is often untenable. That interpretive question is frequently obscure, technical, or one that requires knowledge of a body of related laws and doctrines. There is no particular reason to believe that voters had anything at all in mind on such questions. This recalls Max Radin's

72. A vivid example drawn from outside the study is the highly strategic use of the phrase and idea of "special rights" in the many campaigns around the country concerning proposed antigay initiatives. See, e.g., *Equality Found. v. City of Cincinnati*, 860 F. Supp. 417, 422 (S.D. Ohio 1994), *rev'd*, 54 F.3d 261 (6th Cir. 1995) (involving federal constitutional challenge to city charter amendment with title "No special class status may be granted based upon sexual orientation, conduct or relationships"); cf. *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994), *cert. granted*, 115 S. Ct. 1092 (1995) (involving federal constitutional challenge to state constitutional amendment that prohibits "homosexual, lesbian or bisexual orientation, conduct, practices or relationships" from being the basis of any claim to "minority status, quota preferences, protected status or claim of discrimination"). Sometimes the phrase appears in the legislation, other times it is the central slogan of the campaign. See generally William E. Adams, Jr., *Pre-Election Anti-Gay Ballot Initiative Challenges: Issues of Electoral Fairness, Majoritarian Tyranny, and Direct Democracy*, 55 OHIO ST. L.J. 583, 629-47 (1994) (setting out texts of several proposed antigay ballot measures). A close examination of the rhetoric of special rights suggests that it is strategically designed to exploit perceived white opposition to existing antidiscrimination law, notwithstanding that many who deploy it claim to support existing law and to oppose only adding gay men and lesbians to the list of groups protected by such laws. In a previous work, I analyzed the use of the rhetoric of "special rights" and argued that it is deployed to challenge—covertly—the normative basis for all civil rights protections. See Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 300-07 (1994); see also Suzanne B. Goldberg, *Facing the Challenges: A Lawyer's Response to Anti-Gay Initiatives*, 55 OHIO ST. L.J. 665, 670-72 (1994) (examining equation of civil rights with special rights). The antigay initiative example underscores the complexity of assigning a universal "popular" meaning to words used in laws, ballot pamphlets, media strategies, or elsewhere in initiative campaigns.

73. See *infra* Part VI.

observation that the chance that several hundred legislators would have had the same intention on a particular point, or that the point would even have occurred to them in passing the law, could only be "infinitesimally small."⁷⁴

The problem of limited foresight is, however, more severe for citizens than for legislators. It is not only that many interpretive questions were not actually foreseen, but that these questions are systematically *unforeseeable* to voters. Ballot propositions are presented to voters largely in a legal vacuum, unconnected in any specific way to the surrounding legal context.⁷⁵ Because of this lack of context, many of the interpretive issues that confront courts are outside the plausible realm of voter contemplation. A vote in favor of a ballot question will often signify, at best, an electoral judgment on the salient and general policies in question, not on the rarefied points that often generate interpretive litigation.

For example, when Massachusetts voters enacted Proposition 2 1/2 limiting the charges that can be assessed against cities and towns, it is unlikely that they either did consider or could have considered whether special independent entities like the Boston Water and Sewer Commission could claim the protection afforded cities and towns.⁷⁶ Similarly, when Missouri voters passed a law prohibiting electrical utilities from passing along construction expenses to consumers before a new or renovated facility is operating, they most likely had no reason to consider the possibility of a utility abandoning the construction project entirely, or the legal questions that abandonment would raise.⁷⁷ As is reflected in Appendix B, examples like these recur throughout the cases analyzed.

Attributing legal knowledge of this sort to voters may lead to desirable results, at least from the standpoint of promoting a coherent overall body of law, but to characterize this knowledge as within the voters' contemplation is implausible. There is no basis in the literature about initiative campaigns—or in intuitions about elections and voters more generally—to believe that voters have any detailed knowledge about the legal context surrounding the proposed initiative. One can see the case for expecting legislative drafters to be aware of such things as related and prior law, judicial interpretations of similar language, and relevant interpretive canons that reviewing courts may apply. Whether all legislators do, in fact, have this knowledge may be another matter, but given the staff, legislative analyses, and other resources available to professional lawmakers, it is reasonable enough to expect them to know something about the "legal landscape" into which a new law will fit. Because

74. See Radin, *Statutory Interpretation*, *supra* note 57, at 870.

75. The ballot pamphlet can supply some limited legal context or explanation to voters, but it has problems of its own. I discuss problems with the ballot pamphlet below.

76. See *Boston Water & Sewer Comm'n v. Metropolitan Dist. Comm'n*, 562 N.E.2d 470, 471 (Mass. 1990).

77. See *State ex rel. Union Elec. Co. v. Public Serv. Comm'n*, 687 S.W.2d 162, 163–64 (Mo. 1985).

this is not the case with ordinary voters, many of the legal consequences of new initiative laws are systematically unforeseeable to citizen-legislators.

C. *Drafter Intent and Phantom Popular Intent*

A different but related problem reflected in the decisions studied is that courts fail to account for structural features of the direct lawmaking process that enable proponents and drafters of initiative laws to manipulate the concept of popular intent. The discussion of limited popular foresight in the last section introduced a point that is central here: Voters generally lack detailed knowledge of the legal context surrounding a proposed initiative statute. Similarly, voters are often unfamiliar with the technical legal jargon that is used in the text of initiatives.⁷⁸ Among the terms construed in the decisions collected here are, for example, “joint and several liability,”⁷⁹ “right of contribution,”⁸⁰ and “declarant.”⁸¹ While largely incomprehensible to many voters, these terms can trigger very precise and significant legal consequences. The unfamiliarity of legal terminology to many voters creates powerful leverage for the initiative’s drafters, for it enables them to have an unseemly private dialogue of sorts with the courts, who also understand these terms. Through careful use of terminology, drafters can construct a desired—but largely phantom—popular intent.

Given that this problem flows from a structural feature of the process—the lack of familiarity of citizen-lawmakers with many technical legal concepts—it should persist in some form even if we assume benign motivation on the part of initiative drafters and organizers. That is, even if we assume that proponents of initiatives do not try to exploit this informational advantage, the advantage would still exist. However, this assumption of innocence seems increasingly naive.⁸² The “initiative industry” has become more sophisticated,⁸³ and well-financed, concentrated interests have begun to play a dominant role in the initiative arena. One recent study, for example, reflects that business interests made two-thirds of all contributions to initiative campaigns in California in 1990 and eighty-three percent of all contributions to the eighteen most expensive initiative campaigns in that state between 1952 and 1990.⁸⁴

78. I discuss various dimensions of this problem *infra* in Section IV.D.

79. *DaFonte v. Up-Right, Inc.*, 828 P.2d 140, 145–47 (Cal. 1992).

80. *Bird-Johnson Corp. v. Dana Corp.*, 833 P.2d 375, 378–80 (Wash. 1992).

81. *Whitman v. Superior Court*, 820 P.2d 262, 267 (Cal. 1991).

82. See *Pear*, *supra* note 1, at B11 (describing increasing use of initiatives by business groups, including California’s tobacco industry).

83. See, e.g., *MAGLEBY*, *supra* note 15, at 59–76; *Magleby*, *supra* note 1, at 30; Timothy Egan, *Debate Over Pay for Ballot Initiatives*, N.Y. TIMES, Aug. 21, 1994, at A26.

84. See David B. Magleby, *Direct Legislation in the American States*, in *REFERENDUMS AROUND THE WORLD: THE GROWING USE OF DIRECT DEMOCRACY* 218, 243, 244 (David Butler & Austin Ranney eds., 1994).

With this sophistication and specialization comes the risk that the drafting of popularly enacted law is becoming more susceptible to strategic behavior of the kind that is quite typical in the legislative domain. One need not accept the most extreme accounts of the legislative process offered by public choice theorists to conclude that legislators frequently choose statutory ambiguity based on strategic calculations about the political value of uncertainty.⁸⁵ Similarly, initiative organizers and drafters, often assisted by political consultants, may well find it expedient to use words chosen for ambiguity on points likely to be controversial, and then to exploit that ambiguity carefully during the campaign.⁸⁶ To the extent that courts using the popular-intent method assume not only that voters had an informed intent in relation to the law, but also that the initiative's drafters sought to inscribe the law with a clear meaning, courts are ignoring the power of drafters to manipulate the process. In this way, the popular-intent approach enables small groups to appropriate the political authority of the electorate through the leverage of statutory drafting.

This risk of abuse is especially severe where the initiative is worded so that the effect of a "yes" vote is unclear,⁸⁷ or where the ballot measure is so lengthy or complex that legally significant details can easily be buried.⁸⁸ Some state laws attempt to address these problems indirectly by limiting initiatives to a "single subject,"⁸⁹ or by providing some mechanism for official review of the initiative's language. Some states offer drafting assistance to initiative petitioners, some mandate preballot review of the language or "form" of the initiative, some require a state official to prepare the ballot caption or title, and some authorize preelection judicial review to determine whether proposed initiatives violate substantive or procedural limitations on their use.⁹⁰ In the vast majority of jurisdictions, however, the initiative's

85. For example, legislators might choose ambiguity over clarity because ambiguity leaves them room to characterize selectively their vote for different constituencies, enables them to assemble a winning coalition, or allows them to delegate controversial questions to a judicial or administrative interpreter. SAMUEL MERMIN, *LAW AND THE LEGAL SYSTEM: AN INTRODUCTION* 268 (2d ed. 1982); Schacter, *supra* note 9, at 604-05. For broad perspectives on the problem of deliberate legislative ambiguity, see generally MURRAY EDELMAN, *THE SYMBOLIC USES OF POLITICS* 22-72 (2d ed. 1985); THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 92-126 (2d ed. 1979); DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 3-21 (1993).

86. This phenomenon is readily apparent in the context of recent antigay initiatives; textual phrases like "minority status" or "special rights" are undefined, yet they are subject to powerful symbolic use in antigay initiative campaigns. See *supra* note 72 (discussing the rhetoric of "special rights").

87. See DUBOIS & FEENEY, *supra* note 24, at 121-22 (discussing voter confusion and data concerning voters who vote contrary to their preferred outcome); MAGLEBY, *supra* note 15, at 144 (same).

88. See DUBOIS & FEENEY, *supra* note 24, at 113-14 (discussing problem of "Trojan horse" provisions in initiatives).

89. Daniel H. Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 *UCLA L. REV.* 936, 936-38 (1983).

90. See generally DUBOIS & FEENEY, *supra* note 24, at 28-37 (reviewing state law provisions). For an overview of preelection judicial review, see generally James D. Gordon III & David B. Magleby, *Preelection Judicial Review of Initiatives and Referendums*, 64 *NOTRE DAME L. REV.* 298, 298-300 (1989).

petitioners do the drafting,⁹¹ and existing prohibitions on misleading provisions are focused on relatively obvious attempts to mislead.⁹² Current state laws thus fail to capture the full range of strategic behavior that may shape the drafting of the initiative.

D. *The Paradox of the Inverted Informational Hierarchy:
Mass Politics and Formal Law*

Read against social scientists' descriptions of voter behavior in ballot campaigns, the decisions analyzed suggest an intriguing paradox about the sources of popular intent, one that draws sharply into question the decipherability of mass electoral intentions. The formal source at the center of judicial interpretation of initiative laws—statutory language—is widely ignored by, or substantially incomprehensible to, voters. The same is true of legal texts and, to a lesser extent, official ballot materials. At the same time, the sources most heavily consulted by voters during the ballot campaign—media and advertising—are widely ignored by courts and are, in any event, frequently too diffuse, disparate, indeterminate, or biased to be effective as judicial sources of popular intent. Put simply, the hierarchy of interpretive sources that courts consult in the asserted service of locating popular intent is roughly *inverse* to the hierarchy of informational sources that voters consult most regularly in ballot campaigns. Moreover, as I discuss below, this situation cannot be easily rectified by inverting the hierarchy of judicial sources in order to bring courts and voters into line with one another because any such attempt would create substantial problems of its own. Although some reforms might be possible at the margin, the gap between what voters do and what courts do cannot, in all likelihood, be fully closed.

In this section, I first discuss what social science research suggests about voter reliance upon the informal sources that the decisions analyzed so studiously avoided. I then discuss what the research suggests about voter use and comprehension of the formal sources that courts privilege. Finally, I consider why the gap between judicial and popular practices is likely an enduring one.

91. See DUBOIS & FEENEY, *supra* note 24, at 28 (noting that “[o]nly six jurisdictions now formally offer any form of drafting assistance to initiative proponents”).

92. For a review of these types of state laws, see *id.* at 24–43. For an argument that additional safeguards are needed, see CALIFORNIA COMM’N ON CAMPAIGN FINANCING, DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA’S FOURTH BRANCH OF GOVERNMENT 327–39 (1992) [hereinafter DBI]; DUBOIS & FEENEY, *supra* note 24, at 161–73.

1. *Voters and the Media*

The most comprehensive studies of voter behavior in ballot campaigns demonstrate that media communications and political advertising are the most important sources shaping how voters understand the initiative proposals on which they are asked to vote. The judicial disregard of such sources reflected in the decisions collected here is striking given the conclusion of David Magleby's leading study of initiative and referendum processes that "[i]n proposition elections, voters rely almost entirely upon the mass media for information about propositions. This is true of both well publicized measures . . . and of relatively obscure legislatively initiated measures" ⁹³ Along with other studies, ⁹⁴ the recent California Commission on Campaign Financing's exhaustive look at California's initiatives concluded that "the mass media emerge as the primary source of information used to develop voter attitudes on ballot measures. News and paid political advertising comprise the major sources of information voters use in casting their ballots on initiatives." ⁹⁵ Paid political advertising is especially important in ballot campaigns where media coverage is not otherwise abundant because thirty- and sixty-second spots are then the dominant mass images available to voters. Although advertising is avowedly partisan and intended to persuade rather than inform, it can play a central role in characterizing for the electorate what is at stake in the campaign. ⁹⁶

These conclusions about the influence of mass communications are reinforced by various surveys in which voters frequently identify as their principal sources of information one media source ⁹⁷ or a group comprising several media sources. ⁹⁸ Moreover, many voters report that they receive

93. MAGLEBY, *supra* note 15, at 133. Magleby's 1984 study remains the broadest and most extensive empirical analysis of direct democracy. For more recent work by Magleby pursuing similar themes, see Magleby, *supra* note 84; Magleby, *supra* note 1.

94. See, e.g., CRONIN, *supra* note 15, at 116-23 (1989); BETTY H. ZISK, MONEY, MEDIA AND THE GRASS ROOTS: STATE BALLOT ISSUES AND THE ELECTORAL PROCESS 245-48 (1987); see also DUBOIS & FEENEY, *supra* note 24, at 126 (noting primacy of newspapers and television among sources upon which initiative voters rely).

95. DBI, *supra* note 92, at 198.

96. See ZISK, *supra* note 94, at 247 (noting that sloganeering commercials reduce complex measures and are sometimes critical, especially for voters who do not read newspapers); see also CRONIN, *supra* note 15, at 118 ("In many states, the most important aspect of the media in issue elections is paid television political advertisements.").

97. See DBI, *supra* note 92, at 247 (citing study ranking newspapers first, followed by ballot pamphlets, then national and local television, respectively).

98. See, e.g., MAGLEBY, *supra* note 15, at 133 ("[F]or propositions, over 80 percent of the voters reported that their most important source of information was television, radio, or newspapers."); ZISK, *supra* note 94, at 248 (citing study finding that 80% of California public "relied strongly on a combination of television information and group cues in reaching their voting decision, in contrast to the 'knowledgeable' voters' reliance on newspapers").

information about ballot questions from only one source, and for many that source is the electronic media.⁹⁹

These findings are not surprising given that ballot campaigns are by no means the only political contests in which media and advertising play a dominant role in supplying information and influencing voter attitudes. The mass media are widely regarded as “the primary source of information about public affairs received by most citizens.”¹⁰⁰ Thus, they have formidable powers to frame and shape not only political campaigns, but “public opinion”¹⁰¹ more generally.¹⁰² Many have argued that the mass media derive substantial power from their “capacity to determine the content of public concerns, to ‘set the agenda’ for public discussion.”¹⁰³ In the context of campaigns, this agenda-setting function means that the media often identify the defining questions and set the boundaries of legitimate debate about the issues.¹⁰⁴ As part of this process, political advertising and the issues covered by the news media influence one another in reciprocal ways.¹⁰⁵

99. See, e.g., MAGLEBY, *supra* note 15, at 134.

100. Michael Margolis & Gary A. Mauser, *Public Opinion as a Dependent Variable: An Empirical and Normative Assessment*, in MANIPULATING PUBLIC OPINION: ESSAYS ON PUBLIC OPINION AS A DEPENDENT VARIABLE 365, 366 (Michael Margolis & Gary A. Mauser eds., 1989) [hereinafter MANIPULATING PUBLIC OPINION]; see also Robert Huckfeldt & Paul Allen Beck, *Contexts, Intermediaries, and Political Behavior*, in THE DYNAMICS OF AMERICAN POLITICS: APPROACHES AND INTERPRETATIONS 252, 260 (Lawrence C. Dodd & Calvin Jillson eds., 1994) (characterizing television as “the dominant medium for political information”). See generally ROBERT M. ENTMAN, *DEMOCRACY WITHOUT CITIZENS: MEDIA AND THE DECAY OF AMERICAN POLITICS* (1989) (exploring relationships among mass media, elites, and audiences and arguing for journalistic reforms that would better inform and engage citizens); DORIS A. GRABER, *MASS MEDIA AND AMERICAN POLITICS* (3d ed. 1989) (describing mass media’s role in communicating, influencing, and shaping American politics).

101. For an analysis of the concept of “public opinion” that suggests intriguing parallels between that concept and “popular intent,” see VINCENT PRICE, *PUBLIC OPINION* (1992).

102. Helpful overviews appear in SHANTO IYENGAR, *IS ANYONE RESPONSIBLE?: HOW TELEVISION FRAMES POLITICAL ISSUES* 132–34 (1991) (discussing mass media’s role in politics and distinguishing among “agenda-setting,” “framing,” “priming,” and “bandwagon” effects); PRICE, *supra* note 101, at 80–83 (discussing ways in which media’s “surveillance” and “correlation” functions shape public opinion); Terence H. Qualter, *The Role of the Mass Media in Limiting the Public Agenda*, in MANIPULATING PUBLIC OPINION, *supra* note 100, at 139, 140–52 (discussing role of media agenda setting in constructing a social consensus); cf. David O. Sears, *Symbolic Politics: A Socio-Psychological Theory*, in EXPLORATIONS IN POLITICAL PSYCHOLOGY 113, 128–30 (Shanto Iyengar & William J. McGuire eds., 1993) (discussing role of “media framing” in symbolic politics).

There is a divergence of views among scholars as to the capacity of the mass media to change people’s political beliefs. For a review of these different perspectives and an argument suggesting that the media can sometimes “move audiences in directions counter to their predominant dispositions,” see ENTMAN, *supra* note 100, at 75–88.

103. Qualter, *supra* note 102, at 140; see Maxwell E. McCombs & Donald L. Shaw, *The Agenda-Setting Function of the Mass Media*, 38 PUB. OPINION Q. 176 (1972) (examining role of city newspaper and network television in setting agenda of issues in 1972 presidential campaign); Donald L. Shaw & Shannon E. Martin, *The Function of Mass Media Agenda Setting*, 69 JOURNALISM Q. 902 (1992) (arguing that news media encourage dialogue among diverse groups); cf. PRICE, *supra* note 101, at 81 (describing media’s “correlation function” as “bring[ing] together contrasting ideas and views within the attentive public, report[ing] to its members what others think, and thus help[ing] to organize its collective reaction”).

104. Qualter, *supra* note 102, at 146–47; cf. GRABER, *supra* note 100, at 215–18 (describing how simplistic and superficial coverage of issues that candidates emphasize forces electorate to base its voting decisions on candidates’ general personality characteristics).

105. See generally KATHLEEN HALL JAMIESON, *DIRTY POLITICS: DECEPTION, DISTRACTION, AND*

Moreover, the role of the mass media in politics cannot meaningfully be understood in terms of agenda-setting theory alone. As many theorists have argued, in an age of ever more pervasive and dispersed mass communications technology, the political process has come to be substantially *constituted* by the welter of words, images, and ideas that television and other media sources produce during elections.¹⁰⁶ According to this view, it is impossible to distinguish clearly between domains of "media images" and "politics." The media—especially television—necessarily play a powerful role in shaping and constituting, rather than merely reflecting, politics and public ideas.¹⁰⁷

To recognize that media and advertising shape politics in this way is not, however, to say that the mass media can *unilaterally impose* particular political meanings on the public. The media do not operate in a vacuum, but within the social context that surrounds them. This is significant in several ways. In epistemological terms, because broadcast and print journalists are themselves part of the public, they necessarily draw upon "public language" and prevailing "cultural 'maps' of the social world" as they communicate political ideas.¹⁰⁸ Those who report on politics stand within—and thus cannot operate entirely independent of—the dominant narratives, conventions, and idioms of contemporary politics. In more practical and immediate terms, the mass media depend to a substantial extent upon others for the political information they report. Sources thus play a central role in shaping political news.¹⁰⁹ Finally,

DEMOCRACY 127–49 (1992) (describing symbiotic relationship between political advertising and news coverage).

106. See, e.g., MURRAY EDELMAN, *CONSTRUCTING THE POLITICAL SPECTACLE* (1988) (analyzing pervasive consequences of shift from factual accounts to media imagery); DOUGLAS KELLNER, *TELEVISION AND THE CRISIS OF DEMOCRACY* 149 (1990) (noting wide agreement "that television has become the dominant force in U.S. politics, that presidential campaigns are now exercises in media politics, and that elections are won and lost via television"); J.M. Balkin, *What is a Postmodern Constitutionalism?*, 90 MICH. L. REV. 1966, 1978 (1992) (discussing "mediatization" of politics); cf. EDWARD S. HERMAN & NOAM CHOMSKY, *MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA* (1988) (arguing that mass media work to "manufacture consent" for policies that serve entrenched, elite interests).

107. See ENTMAN, *supra* note 100, at 77 (arguing that "public opinion grows out of an interaction between media messages and what audiences make of them"); KELLNER, *supra* note 106, at 133–77 (arguing that "television played an essential role in the creation of a conservative hegemony during the 1980's"). See generally JEAN BAUDRILLARD, *SELECTED WRITINGS* 207, 210 (Mark Poster ed., 1988) (positing "implosion of the social in the media" and arguing that "we will never in future [sic] be able to separate reality from its statistical, simulative projection in the media").

108. STUART HALL ET AL., *POLICING THE CRISIS: MUGGING, THE STATE, AND LAW AND ORDER* 61, 54 (1978); *id.* at 57 (discussing "the media's mapping of problematic events within the conventional understandings of the society"). Hall and his co-authors offer an elaborate analysis of the "social production of news." *Id.* at 53–77; see also KELLNER, *supra* note 106, at 115 (arguing that media personnel "assimilate certain views of the world, frames, codes and practices that they 'naturally' reproduce"); cf. JOHN FISKE, *TELEVISION CULTURE* 292 (1987) (describing metaphors used in television news and noting that such metaphors reflect an "institutional discourse shared between the news, the viewers, and, of course, the politicians").

109. See DAN NIMMO & JAMES E. COMBS, *MEDIATED POLITICAL REALITIES* 170 (2d ed. 1990) ("A close monitoring of political news reveals the result: From one-half to two-thirds of front-page stories of major newspapers or lead stories in network TV news originate from official sources."); JUDITH S. TRENT & ROBERT V. FRIEDENBERG, *POLITICAL CAMPAIGN COMMUNICATION: PRINCIPLES AND PRACTICES* 25 (2d ed. 1991) (noting that "[a]t each stage of the campaign, the relationships between candidates and the media who cover them are vital not only to the candidate but to the individual media representative. The candidate

in thinking about how the mass media shape politics and political understandings, it is important to recognize that media communications are but one part of a larger, multidimensional interpretive enterprise that produces political understandings and meanings. To borrow media theorist John Fiske's "intertextual" framework for analyzing television,¹¹⁰ media communications and political advertising constitute only one "level" of the communicated political "text." Subsequent media commentary about the political coverage and advertising in a campaign,¹¹¹ as well as communications among voters about political news and advertising and about political issues more generally,¹¹² comprise additional levels of the political text.

All of these factors suggest that the power of television, newspapers, and advertising to mediate political realities¹¹³ should not be casually equated with the more reductive notion that the mass media autonomously *create* political realities. But this mediating power is nevertheless a formidable one in politics, for as theorist Stuart Hall and his colleagues have noted, media communications have a "reality-confirming effect,"¹¹⁴ as the "media 'take' the language of the public and . . . return it to them *inflected with dominant and consensual connotations*."¹¹⁵

In the context of ballot propositions, there is evidence that news and advertising play a particularly prominent role in shaping the voting public's understanding of initiatives.¹¹⁶ Characterizations of the purpose and effect of measures that are often complex can be crucial, for, as David Magleby notes, a vote on a ballot question can only reflect what the voters understood the

needs the visibility . . . and the media need information . . ."). For more general analyses of the newsgathering process, see HERBERT J. GANS, *DECIDING WHAT'S NEWS* 81 (1979) (arguing that sources' access to journalists "reflects the social structure outside the newsroom; and because that structure is hierarchical, the extent to which information about various parts of America is available to journalists is hierarchically and differentially distributed"); HALL ET AL., *supra* note 108, at 58, 62 (arguing that journalistic reliance on institutional or elite sources leads media to "reproduce symbolically the existing structure of power in society's institutional order" and to "help close the circle by which the definitions of the powerful become part of the taken-for-granted reality of the public by translating the unfamiliar into the familiar world").

110. See FISKE, *supra* note 108, at 108. In his analysis of television, Fiske posits that there are three levels of the television "text": first, the programs themselves; second, published commentary and publicity about television programs; and third, the ways viewers understand and talk among themselves about what they have seen. *Id.* at 108-27.

111. See, e.g., JAMIESON, *supra* note 105, at 127-33 (describing news coverage of campaign advertising); NIMMO & COMBS, *supra* note 109, at 158-65 (describing television talk shows that "describe, review and interpret the meaning of the major political news event of the past week").

112. See, e.g., Huckfeldt & Beck, *supra* note 100, at 261-64 (describing "personal discussion networks" in which citizens discuss politics); Shaw & Martin, *supra* note 103, at 93 (arguing that mass media produces political dialogue among diverse groups).

113. See generally NIMMO & COMBS, *supra* note 109, at 23-71 (discussing how television news shapes viewers' understanding of current events).

114. HALL ET AL., *supra* note 108, at 62.

115. *Id.*

116. DBI, *supra* note 92, at 197-226; CRONIN, *supra* note 15, at 116-23; MAGLEBY, *supra* note 15, at 133-37, 168-70; ZISK, *supra* note 94, at 245-48. On the agenda-setting role of initiative petitioners, see Gordon & Magleby, *supra* note 90, at 298.

question to be about.¹¹⁷ How the media characterize a ballot measure is undoubtedly influenced by how the initiative's proponents draft, structure, and "package" the measure, but once the measure is drafted and approved for the ballot, media accounts and paid advertising assume the pivotal role in defining the proposition for the voters.

Moreover, specific features of the popular lawmaking process underscore the power of media images and characterizations to influence public understanding in ballot campaigns. The initiative process frequently combines increased information costs with decreased informational resources. Voters confronted with a proposed initiative implicating complex questions of policy have high associated information costs,¹¹⁸ yet the strong candidate and party cues that are often important proxies in traditional elections are absent.¹¹⁹ In fact, some studies show that many voters are unwilling to wade into complex ballot questions; they cast votes for candidates, but do not vote on propositions that appear on the same ballot.¹²⁰

One recent analysis suggests that initiative voters "have little incentive to acquire detailed information"¹²¹ and must, in the absence of familiar cues, search for other "information shortcuts."¹²² Media reports and strategically crafted advertising offer a ready and widely available source for such shortcuts.¹²³ Prominent among such signals are, for example, endorsements

117. See MAGLEBY, *supra* note 15, at 141.

118. Arthur Lupia, *Busy Voters, Agenda Control, and the Power of Information*, 86 AM. POL. SCI. REV. 390 (1992); David Magleby, *Opinion Formation and Opinion Change in Ballot Proposition Campaigns*, in MANIPULATING PUBLIC OPINION, *supra* note 100, at 95, 104.

119. DBI, *supra* note 92, at 198. The search for efficient political information is by no means confined to ballot propositions. See generally ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 229 (1957) (discussing high costs of political information); Donald Granberg, *Political Perception*, in EXPLORATIONS IN POLITICAL PSYCHOLOGY, *supra* note 102, at 70, 93 ("As a means of making sense of the complex political reality and as a cognitive shortcut, political cue theory depicts people as developing schemas.").

120. See CRONIN, *supra* note 15, at 67 (asserting that a "5 to 15 percent dropoff or falloff of voter participation is common in state issue elections"); MAGLEBY, *supra* note 15, at 100 ("Data on the levels of voter participation in elections having statewide propositions show that on average 15–18 percent of those who turn out do not vote on statewide propositions."); *id.* at 83–95 (reporting that on occasion as many as 25% of voters who come to the polls do not vote on ballot propositions). But see DBI, *supra* note 92, at 185 (suggesting that "voter fatigue and voter dropoff are not significant problems in California" and that "the extent of initiative drop-off is minimal—comparable to voter drop-off for such statewide offices as lieutenant Governor and secretary of state").

121. Lupia, *supra* note 118, at 391.

122. Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63, 63 (1994). Even ballot pamphlets often require an investment of time and effort over and above what many voters are prepared to make. *Id.* at 65 ("The fact that voters could obtain a great deal of information from the California Ballot Pamphlet is not in question. However, whether voters might reasonably be expected to spend the time and effort required to learn from the pamphlet is questionable and undermines its potential effectiveness.").

123. DBI, *supra* note 92, at 198. The mass media are not the only source for such shortcuts. See, e.g., Huckfeldt & Beck, *supra* note 100, at 271 ("[T]he citizen is embedded in an intermediation environment combining personal discussion networks, mass media, and secondary organizations . . ."); see also *supra* notes 110–12 and accompanying text.

by some “elites” and, to a lesser extent, by the press.¹²⁴ One study in California, for example, analyzed a proposed insurance reform initiative and suggested that many voters were strongly influenced by the positions of consumer groups, Ralph Nader, insurance companies, trial lawyers, and others.¹²⁵ The impact of newspaper endorsements is less clear and appears to be more contextual, but one comprehensive California study of newspaper endorsements found that “a substantial editorial impact on vote choice had occurred.”¹²⁶

Voter reliance upon the cues and proxies communicated through media sources is likely to be especially strong where the ballot questions are lengthy or complicated because that is where the information costs associated with the voting decision are highest. And there is some evidence of a trajectory toward longer and more complex initiatives. During the 1988 and 1990 elections, for example, Californians voted on thirteen initiatives that exceeded 5000 words (approximately twenty double-spaced, typewritten pages), including one proposal of 15,633 words (approximately sixty-two double-spaced, typewritten pages).¹²⁷

Consider an example of complex ballot propositions in which it is reasonable to suppose that media and advertising helped to shape public attitudes about the interpretive questions that confronted the court. In *Taxpayers to Limit Campaign Spending v. Fair Political Practices Commission*¹²⁸ and *Gerken v. Fair Political Practices Commission*,¹²⁹ the California Supreme Court struggled with dual campaign finance reform initiatives that passed on the same ballot. The issue there was whether one or both measures would take effect, which depended under the state constitution upon whether the two measures conflicted. If they did, then only the one receiving the greater percentage of votes would go into effect. Proposition 73, which secured a fifty-eight percent affirmative vote, limited campaign contributions and mass mailings and prohibited public funding of elections for all state and local elective offices. Proposition 68, which secured a fifty-four percent affirmative vote, limited campaign expenditures and provided for state matching of campaign funds for state legislative races only. The court found

124. MAGLEBY, *supra* note 15, at 155–59; *see* DBI, *supra* note 92, at 212–13; Lupia, *supra* note 118, at 397. Lupia’s study found that voter knowledge about the position of affected industry or interest groups served as an efficient cue and allowed “relatively uninformed voters . . . to use their limited resources efficiently while influencing electoral outcomes in ways that they would have if they had taken the time and effort necessary to acquire encyclopedic information.” Lupia, *supra* note 122, at 72. These endorsements mimic the party and candidate cues used in candidate elections, but they are more diluted.

125. *See* DBI, *supra* note 92, at 215 (reporting field poll from May and July 1988). Lupia’s study reached a similar conclusion. *See* Lupia, *supra* note 122, at 72.

126. DBI, *supra* note 92, at 212.

127. *Id.* at 85. The daunting excess of such measures makes voters understandably “hard-pressed to understand them.” *Id.*

128. 799 P.2d 1220 (Cal. 1990).

129. 863 P.2d 694 (Cal. 1993).

that the two conflicted so that only Proposition 73 could take effect.¹³⁰ Even after large portions of Proposition 73 were ruled unconstitutional in separate federal litigation, the California court ruled that Proposition 68 could not take effect because the surviving portions of Proposition 73 were separate, distinct, and thus severable from the remainder of the statute.¹³¹

What was the "intent" of the concurrent majorities that passed these measures? Was it to enact both, to the extent that portions of both could be harmonized? Was it to ensure that one or the other passed? Was it to express a preference for one over the other? In all likelihood, the question is unanswerable. But surely a court would be hard pressed even to approach that question intelligently without considering what the research suggests would be the most important evidence: how the competing measures were framed, characterized, and represented in the media and advertising, particularly in relation to one another. In *Taxpayers to Limit Campaign Spending* and *Gerken*, the court celebrated its fealty to the voters yet failed to look at the information likely to have most powerfully shaped how voters understood these two measures.

Without closely analyzing the media sources that judges so persistently ignored in the decisions studied—a task I have not undertaken—it is premature to say that, had courts consulted media or advertising sources, they would necessarily have reached different interpretive results. But it is reasonable to suppose that results might have changed in some cases.¹³² The study does

130. See 799 P.2d at 1236–37.

131. See 863 P.2d at 698.

132. A case drawn from outside the study nicely illustrates how the refusal to consider media sources can affect results and contains a dissenting opinion that—rare among cases in this area—directly confronts the relevance of media sources to judicial interpretation. In *Bishop v. Linkway Stores*, 655 S.W.2d 426 (Ark. 1983), the Arkansas Supreme Court construed an anti-usury constitutional amendment enacted by the voters through a referendum. The amendment limited the "maximum lawful rate of interest on any contract" to 5% above the Federal Reserve Discount Rate. *Id.* at 428.

The amendment also made void "[a]ll contracts for consumer loans and credit sales having a greater rate of interest than seventeen percent." *Id.* The plaintiff bought furniture on credit and was charged a 15% interest rate, which he argued was usurious because the amendment capped interest rates at 13.5% at that time. The question was whether the separate 17% limitation on consumer loans created a 17% ceiling on any consumer loan or, as the plaintiff argued, meant that the limit on consumer loans was the "lesser of 17 percent or 5 percent over the Federal Reserve Discount Rate." *Id.* at 429. The majority chose the latter reading, interpreting the statute to impose a "two-fold limitation on the maximum amount of interest a lender can charge on a consumer loan or credit sale." *Id.* In so doing, the majority claimed the mantle of plain meaning, arguing that "where the meaning of an act or constitutional amendment is clear and unambiguous, this Court is primarily concerned with what the document says, rather than what its drafters may have intended." *Id.* at 428–29. The dissent, by contrast, complained that the majority had failed to consider the "history of the times and voters' intent." *Id.* at 429 (Hatfield, J., dissenting). The dissent went on to state:

Newspaper articles and media broadcasts, considered hearsay under Rule 801, Rules of Evidence, can be admitted as an exception under Rule 803(24), Rules of Evidence, since they are relevant and can be tested by other evidence and opposing counsel's examination. Such articles are vitally important here to show the "history of the times" and *what* was communicated to the voters concerning Amendment 60. Important in this regard and a further reason for admission is that the record reflects that only *one* interpretation was placed on the effect of Amendment 60 as to consumer rates, *i.e.*, that they would be no more than 17%. *No*

point, for example, to circumstances and configurations in which the exclusive use of formal interpretive sources is most likely to be unreliable when measured against a stated goal of effectuating the will of the electorate. For example, the gap between judicially imposed and popularly understood meaning can be substantial when courts give statutory language a technical or stylized legal meaning in the face of a contrary, common understanding likely to have been reiterated and reified by media representations.¹³³ Similarly, when courts address a highly obscure legal question that implicates laws other than the initiative, exclusive reliance on formal legal sources may cause a court to resolve the question in a way that is inconsistent with the broad characterizations of the initiative that were likely to dominate media and advertising representations.¹³⁴ Results aside, it is unseemly for courts to pay such conspicuous homage to popular prerogative while ignoring the sources of information so central to the populace.

contrary evidence appeared in the record. Surely this is relevant in interpreting voter intent in approving Amendment 60.

Id. at 432 (Hatfield, J., dissenting). From the perspective of the dissenting justices, thus, the outcome of the case should have been dictated by what they regarded as the singular and clear understanding about the interest rate on consumer loans that was communicated to voters by newspapers and broadcast media.

133. For example, in *Backman v. United States*, 516 A.2d 923 (D.C. 1986), the District of Columbia Court of Appeals construed the term “narcotic” in the Mandatory Minimum Sentencing Initiative of 1981. Under the terms of the initiative, certain offenses involving a “narcotic drug” triggered mandatory minimum sentences, except that a court could exempt a first-time offender from the sentencing provisions if the defendant “was (1) an ‘addict’ at the time of the violation and (2) committed the offense ‘for the primary purpose of obtaining a *narcotic* drug which he [or she] required for his [or her] personal use because of his [or her] addiction to such drug.’” *Id.* at 925 (alterations in original) (quoting D.C. CODE ANN. § 33-541(c)(2) (Supp. 1986)). In *Backman*, the defendant was convicted for possession with intent to distribute heroin but sought a waiver from the sentencing requirement arguing that his actions were undertaken to support his cocaine habit. Looking to a separate ordinance passed by the City Council that defined “narcotic” to exclude cocaine, the court ruled the defendant ineligible for the exemption (and the mandatory minimum sentence) because cocaine was not a “narcotic.” *Id.* at 926. In doing so, the court said that it was obliged to “assume that the District voters relied on the statutory definition of ‘narcotic’ in [the separate city council ordinance]”—and not, for example, on Webster’s Dictionary, which the court acknowledged did define cocaine as a narcotic. *Id.* at 926 & n.4. This is an instance in which it is likely that media representations focusing simply on “drugs” would have supported a popular understanding of the initiative at odds with the view ultimately taken by the court.

134. For example, *Travelers Indemnity Co. v. Gillespie*, 785 P.2d 500 (Cal. 1990), involved Proposition 103, an initiative that enacted “mandatory renewal” rules that sharply restricted the grounds upon which insurance companies could cancel automobile policies. The issue in the case was whether insurers could cancel policies without meeting any of the statutory grounds if they intended to withdraw from the California market. The initiative did not specifically address this question. Securing approval to withdraw was neither guaranteed, nor necessarily expeditious, under California law. Nevertheless, the court ruled that insurers could cancel policies simply upon filing their request to withdraw. In doing so, the majority relied heavily upon some obscure language in the initiative that addressed a related issue about withdrawal, as well as upon its analysis of the separate legislative law governing insurance company withdrawal from the state. Proposition 103, however, was apparently widely billed as a measure to rein in insurance company discretion so as to make insurance “‘fair, available, and affordable.’” *Id.* at 516 (Broussard, J., dissenting) (quoting Proposition 103). This is thus an instance in which the broad rhetoric attached to the initiative might well have suggested to voters a different result on the question of whether insurers were free to ignore the statutory restrictions on cancellation once they decided to initiate proceedings to leave the state.

2. Voters and Formal Interpretive Sources

Against this background of media-dominated initiative campaigns stands a starkly divergent set of judicial practices—practices that reflect the tenacious hold of traditional legal method on courts.¹³⁵

a. Statutory Language

Echoing traditional statutory interpretation, courts treat the language of the initiative as the most important interpretive source. Notwithstanding its centrality to courts, however, it is doubtful that a majority of the electorate even *reads* the text of ballot propositions. The comprehensive study of the California initiative process performed by the California Commission on Campaign Financing concluded flatly that "[v]ery few people actually read initiative texts, and their legalese constitutes an intimidating part of the [ballot] pamphlet."¹³⁶ A separate study by the California Policy Seminar reported a voter survey reflecting that less than seventeen percent of voters said that they "'usually' read the legal text."¹³⁷

Indeed, because voters widely regard the language of ballot measures to be impenetrable, both of these studies seriously entertained the idea of *purging* the actual statutory language from the ballot pamphlet distributed to voters. The California Policy Seminar concluded that "[c]onsideration should be given to removing the legal text altogether."¹³⁸ The California Commission, although declining to propose that reform, endorsed the 1990 move by the Secretary of State requiring that ballot texts be moved to the back of the pamphlet as a way to minimize the mischief ascribed to them.¹³⁹ In their search for popular intent, courts are thus privileging precisely the material that observers of the initiative process consider irrelevant at best, and menacing at worst, to most voters.

Moreover, even if more voters did read the ballot measures in full, there is evidence that an alarmingly high percentage would find the language difficult to comprehend.¹⁴⁰ The most exhaustive "readability" study of ballot

135. It may be that this tenacious hold is rooted in the way the courts studied here understand the demands of the traditional rule of law. See *infra* text accompanying notes 184–87.

136. DBI, *supra* note 92, at 261.

137. DUBOIS & FEENEY, *supra* note 24, at 136 (quoting Philip Dubois et al., *The California Ballot Pamphlet: A Survey of Voters: A Preliminary Report Prepared for the Office of the Secretary of State 7* (March 1991) (unpublished manuscript for California Policy Seminar, on file with author)); cf. MAGLEBY, *supra* note 15, at 140 ("Because ballot propositions often deal with complex issues, it is important to differentiate between the voters' knowledge about the broad issue involved and their knowledge about the proposition itself.").

138. DUBOIS & FEENEY, *supra* note 24, at 135. For the California Commission's discussion, see DBI, *supra* note 92, at 261–62.

139. See DBI, *supra* note 92, at 254.

140. Many studies conclude that the language of ballot measures is frequently confusing to voters. See *id.* at 87; CRONIN, *supra* note 15, at 208–09; DUBOIS & FEENEY, *supra* note 24, at 96–124; MAGLEBY,

questions concluded that ballot language typically requires a reading comprehension level that far exceeds that held by the vast majority of a state's population. David Magleby studied the ballot language in four states—California, Massachusetts, Oregon, and Rhode Island—for the years 1970–79. Using complex formulae, he found that, in order to comprehend ballot descriptions, a voter in California or Oregon would have needed to read at the sixteenth to eighteenth grade level (bachelor's degree plus two years); in Massachusetts or Rhode Island, a voter would have needed to read at the fourteenth to fifteenth grade level (second to third year of college).¹⁴¹ In terms of formal schooling, *less than twenty percent of the adults* in any of these states could have been expected to have these levels of education.¹⁴² A separate study of Arizona, Colorado, Oregon, and Washington reported by Thomas Cronin revealed that between fifty-two and seventy-four percent of voters admitted confusion about the policy choice presented by their state's ballot measures.¹⁴³ Cronin identified “drafting confusion” as a major source of voter confusion.¹⁴⁴

The problems undermining the use of ballot language can only be exacerbated by the trend toward ever-lengthening measures and the increasing use of technical legal terms in initiative laws. As discussed earlier, terms like “joint and several liability” in a tort reform initiative, “declarant” in a criminal procedure initiative that altered the hearsay rule, and “right of contribution” in an environmental initiative are unlikely to be familiar to many voters.¹⁴⁵ By according the greatest interpretive weight to the words used in initiatives, courts not only elevate the importance of a source widely ignored by voters, but they favor a source that is accessible only to a select subgroup of voters.

b. *Formal Legal Texts*

There is nothing in the research about voter behavior to support the dubious notion that voters are familiar with the legal texts that courts invoke so frequently as part of their asserted search for popular intent. Nevertheless, courts use these legal texts—previous judicial interpretations of the contested term; the meaning of the same or similar terms used in a different statute; the prior law or legislation that the initiative replaced; or canons of construction against which legislatures are presumed to draft legislation—more than any

supra note 15, at 118–19. This confusion, in fact, has led all states that permit the statutory initiative to require that some form of explanatory ballot material be provided to the voters. DUBOIS & FEENEY, *supra* note 24, at 125–33.

141. See MAGLEBY, *supra* note 15, at 118–19.

142. *Id.* at 119. There have been some readability reforms since Magleby published his book. See DBI, *supra* note 92, at 240.

143. See CRONIN, *supra* note 15, at 74.

144. See *id.* at 208–09.

145. See *supra* notes 79–81 and accompanying text.

other category except the statutory language itself. In deploying these sources, courts impute to voters, expressly or by implication, sophisticated knowledge of the legal background against which an initiative law is drafted.¹⁴⁶

Some of the legal knowledge imputed to voters by decisions in the study is strikingly implausible. In *People v. Skinner*,¹⁴⁷ for example, the electorate passed a law reforming criminal procedure, including the insanity defense. The terms of the initiative required a defendant asserting the insanity defense to prove both (1) a failure to understand the consequences of the criminal act *and* (2) an inability to appreciate the difference between right and wrong.¹⁴⁸ The court held, however, that the voters' intent was to restore to California the "*M'naghten* test," which would require a defendant to show one element or the other, but not both. In order to impose that reading, the court not only disregarded a notation in the ballot pamphlet stating that the change "could increase the difficulty of proving that a person is not guilty by reason of insanity,"¹⁴⁹ but also read the "and" in the statute as an "or."¹⁵⁰

Similarly implausible assumptions of voter sophistication concerning the state of the law and legal doctrine appear in other decisions in the study, such as those attributing to the voters knowledge of the rules regarding multiple hearsay,¹⁵¹ the presumption of statutory prospectivity,¹⁵² and the relationship between an initiative mandating provision of certain services in connection with domestic violence and a prior legislative law on the subject.¹⁵³

c. *Official Ballot Pamphlets*

Official ballot pamphlets are used in a minority of jurisdictions.¹⁵⁴ Where pamphlets are distributed, they pose many of the same problems—albeit ones not as severe—as statutory language. This is an ironic state of affairs, for the widely acknowledged impenetrability of statutory language is a principal reason that many states require the government to provide more readily understandable explanations of ballot measures to voters. Particularly in states requiring provision of a ballot pamphlet to registered voters,¹⁵⁵ the purpose

146. Courts sometimes take this stance explicitly. In one case in the study, the court noted that "[w]e must hold the legislature and the citizenry to the same standards when interpreting the laws they enact." *Backman v. United States*, 516 A.2d 923, 926 (D.C. 1986).

147. 704 P.2d 752 (Cal. 1985).

148. *Id.* at 753.

149. *Id.* at 758 (quoting ballot pamphlet).

150. *Id.* at 759.

151. See *Whitman v. Superior Court*, 820 P.2d 262, 267 (Cal. 1991).

152. See *Tapia v. Superior Court*, 807 P.2d 434, 441 (Cal. 1991).

153. See *City of Tacoma v. State*, 816 P.2d 7, 10–11 (Wash. 1991).

154. See *supra* note 52 and accompanying text.

155. See DUBOIS & FEENEY, *supra* note 24, at 127–33 (surveying pamphlets required under each state's law).

is to communicate what is at issue and to explain it to voters in a reasonably clear, succinct fashion. Yet the goals that ballot pamphlets are designed to further appear to remain substantially unfulfilled.

The sheer length of the pamphlet can undermine its goals. In California, for example, the 1990 pamphlet was 224 pages long.¹⁵⁶ Moreover, in several states, proponents and opponents of the measure are asked to draft the arguments for and against the measure that form the centerpiece of the ballot pamphlet.¹⁵⁷ These authors will have every incentive to characterize the measure in partisan, politically driven ways, rather than to attempt any detached, impartial summary.¹⁵⁸ Summaries or arguments of this sort can mislead—and are sometimes designed to mislead—voters about the effects and potential consequences of the vote. Consider, for example, the two competing campaign finance reform initiatives that were enacted in California. In the ballot arguments, proponents of one measure characterized the other as a “*TRICK DESIGNED TO DEFEAT THE REAL CAMPAIGN REFORM CONTAINED IN [THIS PROPOSITION] . . .*”¹⁵⁹ To the extent that ballot arguments reflect this kind of partisanship, they may—inadvertently—provide courts with a glimpse of the themes that were used in advertising, but they cannot be uncontroversially regarded as repositories of dispassionate analysis and information.¹⁶⁰

Independent of problems of length and partisanship, there are substantial questions about the usage and value of ballot pamphlets. Ballot pamphlets clearly command more readers than does statutory language. However, estimates of the extent to which voters read these pamphlets vary greatly. Both Magleby and the recent California Policy Seminar study concluded that most voters do not use ballot pamphlets.¹⁶¹ Some studies are more optimistic, placing the percentage between thirty percent and sixty percent of those who

156. Magleby, *supra* note 1, at 33.

157. DUBOIS & FEENEY, *supra* note 24, at 126–33.

158. Cf. Lowenstein, *supra* note 89, at 954 & n.73 (stating that ballot pamphlets are “drafted for tactical reasons,” and therefore may not “reflect the intent of . . . the greater number of persons who vote for [the initiatives described by them]”).

159. Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm’n, 799 P.2d 1220, 1226 (Cal. 1990) (quoting ballot materials).

160. In a case drawn from outside the study, one court candidly acknowledged this problem: “Ballot arguments often embody the sound-bite rhetoric of competing political interests vying for popular support. However useful they may be in identifying the general evils sought to be remedied by an initiative measure, they are principally designed to win votes, not to present a thoughtful or precise explication of legal tests or standards.”

Hill v. National Collegiate Athletic Ass’n, 865 P.2d 633, 646 n.5 (Cal. 1994).

161. MAGLEBY, *supra* note 15, at 136; see also DUBOIS & FEENEY, *supra* note 24, at 133 (“Although some jurisdictions report heavy voter reliance on the pamphlet, as a general rule only a minority of voters actually read it, even when it is sent to them through the mail.” (footnote omitted)).

vote.¹⁶² In either event, it would appear that some substantial percentage of voters do not read the material.¹⁶³

Second, the distribution of voters who read and do not read ballot pamphlets does not appear to be random. Echoing the findings concerning statutory language, several studies suggest a demographic skew, with more highly educated and more affluent voters reading the ballot material at the highest rates.¹⁶⁴ This is not surprising, given lingering readability problems with pamphlets. Even though state laws requiring pamphlets have generally been part of an effort to make ballot questions more comprehensible and accessible to voters,¹⁶⁵ the results have been mixed.

The 1992 California Commission report concluded that pamphlets are still full of what many regard as "legalistic gobbledegook."¹⁶⁶ For example, applying standard readability formulae to two 1990 measures revealed that a voter would need three to four years of college to read at the level required for comprehension.¹⁶⁷ Moreover, given the unfamiliarity of many voters with legal jargon and doctrines,¹⁶⁸ even those voters who possess the level of education required to read the pamphlet may well be unable to form the sort of "intent" that the courts' interpretive approach assumes.

The overrepresentation of elite, better-educated voters among users of ballot pamphlets also highlights a related, but larger, problem with popular intent: Courts draw conclusions about the will of the populace, writ large, based on the very small number of voters who participate in ballot elections. Eugene Lee concludes that "[a]mong those who vote, those from upper

162. DBI, *supra* note 92, at 244 ("Most surveys indicate that somewhere between 30% and 60% of voters rely on the booklets for information . . ."); see CRONIN, *supra* note 15, at 81–82 (reporting study of 1976 election in which 75% of voters surveyed stated that they had made some use of pamphlet).

163. On occasion, questions are raised about whether voters even received, or had access to, the pamphlet. See, e.g., Robert A. Jordan, *Voters Can Win in Ballot Battle*, BOSTON GLOBE, Dec. 3, 1994, at 13 (describing legal challenge to several initiatives based on failure to print ballot summaries directly on ballot and noting that some plaintiffs claimed that they had not received pamphlet before voting). In a decision stemming from this challenge, the Massachusetts Supreme Judicial Court held that the state constitution permits election authorities to provide required ballot summaries to voters on a separate sheet of paper when it is not feasible to print the summary on the ballot. *Tobias v. Secretary of the Commonwealth*, 646 N.E.2d 1054, 1060 (Mass. 1995). The court did not address, however, whether some voters had not received the sheet, as the plaintiffs argued. *Id.* at 1056.

164. See DBI, *supra* note 92, at 247 ("The propensity of those with little formal schooling not to read the voters' pamphlet is compounded by the complexity of the booklet itself."); *id.* at 248 (51,000 voters responding to survey in back of 1990 ballot pamphlet reflected a similar demographic skew: 28% had a college degree; 90% had some college; 92% usually voted in both primary and general elections; 95%+ voted on "most or all" ballot propositions); MAGLEBY, *supra* note 15, at 137 (44% of those with advanced degrees gleaned information from election handbook whereas only 7% of those with less than eighth-grade education did so); cf. CRONIN, *supra* note 15, at 82 (suggesting that as many as 15% to 20% of Americans cannot read or have "very low reading ability").

165. For example, California mandates comprehensibility to the average voter, Oregon's secretary of state decides if the materials are sufficiently clear, and Oklahoma requires comprehensibility for an eighth grader. DBI, *supra* note 92, at 238 & n.37.

166. *Id.* at 239 (quoting television editorial).

167. *Id.* at 241.

168. See *supra* text accompanying notes 146–53.

socioeconomic categories are disproportionately represented among those who decide referendums. Most specifically, education has a strong impact on the likelihood of voting on propositions.¹⁶⁹ Low turnout is, of course, a well-known problem in the context of candidate elections and raises similar questions in that setting.¹⁷⁰ Data indicating that many voters who come to the polls and vote for a candidate do not vote on ballot measures,¹⁷¹ however, suggest that this problem has added dimensions where direct legislation is involved.

3. *The Unbridgeable Gap?*

The discussion above might suggest an obvious incremental solution: Ask courts to invert the interpretive hierarchy and assign meaning to direct legislation based on the same informal sources that voters so heavily use in learning about initiatives. The idea would be to reform the doctrine of popular intent to give judges a more reliable picture of the voters' will.

Bringing media sources into the interpretive canon would be at once quite radical (in taking judges out of familiar and conventional interpretive terrain) and quite modest (in retaining the normative centrality of intent-based interpretation).¹⁷² Asking judges to wade into the domain of media coverage and advertising in search of a singular and dispositive popular intent, however, imagines a judicial task that is onerous and—more significantly—ultimately incoherent. This task seems doomed to fail when measured against the goal of enabling judges to locate a single popular intent. Judicial immersion in the unwieldy body of images, words, and political slogans that may comprise the media coverage and advertising related to a ballot measure is likely to intensify, not reduce, the problems of indeterminacy that already undermine the search for popular intent. Particularly in a high-profile campaign, the mass of

169. Eugene C. Lee, *The American Experience, 1778–1978*, in *THE REFERENDUM DEVICE* 46, 55 (Austin Ranney ed., 1981). Magleby notes that:

Citizens with lower socioeconomic status not only are less likely to come to the polls but also are less likely to vote on many statewide propositions if they do come. Citizens at the other end of the socioeconomic ladder enjoy a double advantage: they are both more likely to turn out to vote and more likely to register a preference on the proposition.

MAGLEBY, *supra* note 15, at 108–10.

170. See, e.g., FRANCES FOX PIVEN & RICHARD A. CLOWARD, *WHY AMERICANS DON'T VOTE* 4 (1988) (noting low turnout and suggesting that “the active American electorate overrepresents those who have more, and underrepresents those who have less”); *The Disappearing American Voter*, 24 *NAT'L J.* 2747 (1992) (reviewing RUY A. TEIXEIRA, *THE DISAPPEARING AMERICAN VOTER* (1992)) (noting overall decline in voter turnout since 1960).

171. See *supra* note 120 and accompanying text.

172. Indeed, McNellie, who supports the use of ballot pamphlets, exit polls, and media sources in interpreting direct legislation, argues that this approach adapts the traditional model of statutory construction to the interpretation of popularly enacted initiatives. McNellie, *supra* note 7, at 172–73. McNellie's argument, however, vastly understates the problems associated with using these sources and, conversely, overstates the potential determinacy of initiatives and the capacity of courts to discover a singular “objective intent” underlying a popular or legislative law. See *id.* at 171.

media representations is sprawling and diffuse, and it will rarely yield definitive answers about the design of the voters. Consider, for example, the contemporary phenomenon of talk radio. What could we ask judges to distill from such apparently influential, but cacophonous, sources?¹⁷³

In some cases, there will be information in media sources that is relevant to the interpretive issues before the court. When reasonably accessible, direct, and uncontroverted in addressing the question at issue,¹⁷⁴ there are good reasons for courts to consider such information along with other relevant factors.¹⁷⁵ It is quite another thing, however, to suppose that consulting media sources will enable judges to locate a fixed, retrievable popular intent. It is unlikely that intent-based interpretation can find its deliverance by recasting judges as cultural critics or political consultants and asking them to determine which stories, symbols, or sound bites most likely influenced voters and shaped a discrete collective understanding.

In addition, assigning a central place to media sources invites strategic behavior on the part of partisans in the initiative battle, such as attempts to fill the airwaves and the larger public record with characterizations and claims intended to influence subsequent judicial interpretation.¹⁷⁶ In the end, this solution would create as many problems as it would solve.

A second incremental improvement to intentionalist methodology that might address the gap between judicial and voter practices would be to expand and improve the ballot pamphlet in a way that increases its utility as an interpretive resource. If the quality of the ballot pamphlet were improved, and the range of information in it expanded, it might serve as a bridge of sorts between judges and voters by giving courts a finite, accessible interpretive resource that had actually been consulted in relevant ways by a significant portion of the electorate.

This approach has serious shortcomings of its own. First, as discussed above, even though all voters have the opportunity to use the ballot pamphlet, elites tend to use it more than others. Without significantly broadening the segment of voters who use the pamphlet, choosing a rule that disproportionately weights its contents would exacerbate this demographic skew. At the same time, enhancing the role of the ballot pamphlet as an interpretive resource for courts would likely *subvert* efforts to make the pamphlet more accessible to more voters. In fact, the goal of making the

173. See Mike Hoyt, *Talk Radio: Turning up the Volume*, COLUM. JOURNALISM REV., Nov.–Dec. 1992, at 44 (noting range of topics discussed and voices heard on talk radio).

174. See *Bishop v. Linkway Stores*, 655 S.W.2d 426, 431–32 (Ark. 1983) (Hatfield, J., dissenting) (advocating consideration of media sources); see also *supra* note 132 (describing majority and dissenting opinions' approach to interpretation of popularly enacted constitutional amendment).

175. See *infra* Section V.C for a discussion of what some of these factors should be.

176. Cf. Joan Biskupic, *Scalia Takes a Narrow View in Seeking Congress' Will*, CONG. Q., Mar. 24, 1990, at 913, 917–18 (discussing whether legislators, with aid of lobbyists, manipulate legislative history to try to influence judicial interpretation).

pamphlet more useful to voters is in stark tension with the goal of maximizing the pamphlet as an interpretive resource and redressing some of the problems described here. Loading up the ballot pamphlet with extended verbiage designed to spell out potential consequences, to explicate the legal context surrounding a proposed initiative, and to particularize the “intent” of a measure is likely to make the pamphlet *less* useful to voters trying to arrive at a position on the basic policy question at issue. The suggestions of recent initiative reform studies, for example, point precisely in the opposite direction; they focus on streamlining and simplifying the pamphlet to make it more accessible to large numbers of voters.¹⁷⁷

In addition, like the notion of bringing media sources into the interpretive canon, this approach would create incentives for strategic behavior on the part of partisans. Where proponents and opponents write the “for and against” arguments that must be included in the pamphlet, heightening the interpretive weight of pamphlets might well invite partisans to draft these sections with a view to creating a desired “intent” for purposes of future interpretive litigation.¹⁷⁸

A third incremental improvement to intentionalism might be to relocate the inquiry from specific intent to a more general, abstract level. Some of the decisions studied, for example, try to finesse the problems with popular intent by searching out the overarching purpose of the law and choosing an interpretation regarded as consistent with that purpose. This is a familiar move in statutory construction, reflecting the enduring influence of the “legal process” school’s purpose-based approach to interpretation.¹⁷⁹

Relying on an asserted statutory purpose is attractive from the standpoint of more realistically reflecting what initiative laws frequently are: a general policy approved by a majority of voters. And that policy is a relevant consideration for interpretation. But within the context of the direct lawmaking process, the notion of purpose is problematic in its own right. First, as is frequently the case in the legislative arena, the purpose inquiry is wholly circular when the very question at issue is what purpose the voters had in passing a law. Shifting the inquiry to purpose does not solve so much as restate the basic problem by shifting the indeterminacy to a higher level of abstraction.¹⁸⁰ Second, purpose can be a crude and undifferentiated measure

177. DBI, *supra* note 92, at 260–62; DUBOIS & FEENEY, *supra* note 24, at 169–70.

178. See Kelso, *supra* note 7, at 358 (arguing that California courts should give ballot pamphlet “little or even no weight in the interpretive process” because it contains material written by biased advocates).

179. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1377–80 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

180. See, e.g., Eskridge, *supra* note 58, at 1544–45. California’s pair of campaign finance “counter-initiatives,” see *supra* text accompanying notes 128–31, illustrate how an initiative’s purpose can itself be hotly contested. After the two initiatives passed on the same ballot, it fell to the California Supreme Court to determine whether one or both would take effect. See *Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm’n*, 799 P.2d 1220, 1221 (Cal. 1990) (holding measure that received fewer votes to be inoperative). The court reconsidered the issue after portions of one of the initiatives were declared

that provides no real limits at all. To the extent that purpose tries to recreate what the intent "would have been" had voters foreseen the interpretive problem, the acontextuality of those problems from the voters' perspective suggests that voters would not have been situated to analyze the issue closely even had they known of it. Moreover, judicial reliance upon "popular purpose," like reliance on popular intent, can also render the initiative process vulnerable to manipulation by initiative proponents and drafters. If courts construe all ambiguities to be consistent with the initiative's broad purpose, then drafters will have every incentive to make ballot measures not only strategically ambiguous, but long, complex and full of obscure, yet legally potent, provisions. Many voters will not read or readily comprehend these provisions, but that fact will be largely irrelevant if purpose is the interpretive benchmark.

In sum, the gap between judicial and voter practices seems enduring—perhaps inevitable. I turn in the next part to the larger significance of this gap and to possible alternative interpretive methodologies.

V. BEYOND POPULAR INTENT

A. *The Dilemma of Clashing Conceptions of Law*

As the preceding parts reflect, the idea of popular intent is riddled with problems that are formidable at the level of interpretive doctrine. But the problems run deeper than interpretive doctrine alone. In this part, I suggest a broader conceptual framework within which to analyze these problems and to assess possible responses to them.

A central point suggested by this study is a radical rupture between two conceptions of law. Law, on the one hand, is seen by the courts here in highly *positivist*, material terms. According to this positivist conception, the law principally consists of the statutory text and what is reflected in other formal legal sources, such as related statutes, judicial opinions, and canons of construction. The farthest this conception extends is to include ballot material, which is mandated by and prepared in accordance with state law, reduced to an identifiable text, and reminiscent of traditional legislative history.

Contrast a second, *popular* conception of law—law as it is seen from the perspective of the voters in an initiative campaign. This conception is far more fluid and diffuse, for law here is constructed only minimally by its text or other formal legal sources. The words of the law are but a starting point for the larger, more complex, and sprawling social process of generating legal

unconstitutional and came to the same conclusion. *See Gerken v. Fair Political Practices Comm'n*, 863 P.2d 694 (Cal. 1993). Central to the court's inquiry was whether the two measures could be reconciled, which turned significantly on the purpose of each measure. *Id.* at 699. In an instance like this one, resort to purpose cannot itself resolve the issue.

meanings. In the context of initiative laws, the mass media form a central, indeed constitutive, part of this larger organization and production of meaning. Mass advertising, television images, newspaper reporting and editorializing, and—increasingly—talk radio occupy the center stage where lawyers are accustomed to seeing law books and doctrines. To borrow from Murray Edelman, a principal theorist of the symbolic uses of politics,¹⁸¹ political language and images created and proliferated by the mass media powerfully shape the legal reality experienced by the voters¹⁸²—voters whose will the court purports to privilege. Viewed in these terms, the “law” is not neatly distinguishable from the unbounded body of ideas, images, and symbols that dominate the political processes that generate laws.¹⁸³

The positivist and popular conceptions of law may each be seen to correspond to important elements of the traditional rule of law.¹⁸⁴ The positivist conception, with its emphasis on the written legal word, echoes the importance of notice and identifiable, knowable legal commands.¹⁸⁵ The courts studied here may so consistently confine themselves to formal legal sources because they understand the rule of law to impose that limitation. The popular conception, however, may also be linked to a principle emphasized by the traditional rule of law—the insistence upon a “constrained judicial role,” thought to be “required for democracy, a core substantive value.”¹⁸⁶ Privileging the perspective of the voters—those entrusted to make the law—can be understood to honor the separation of powers and to protect the electorate’s prerogatives.¹⁸⁷

Judicial interpretation of initiative laws stands at a prime point of tension between the positivist and popular conceptions of law: Judges say they must honor the popular will, yet they are constrained by the formal boundaries of

181. For his major works in this field, see EDELMAN, *supra* note 106; EDELMAN, *supra* note 85.

182. “[P]olitical language is political reality; there is no other so far as the meaning of events to actors and spectators is concerned.” EDELMAN, *supra* note 106, at 104.

183. For a discussion of the ways in which gay civil rights laws are assigned meanings along these lines, see Schacter, *supra* note 72, at 295–317.

184. For explorations of the elements and problems of the traditional rule of law, see Martha Minow, *Partial Justice: Law and Minorities*, in *THE FATE OF LAW* 15, 36–40 (Austin Sarat & Thomas R. Kearns eds., 1991); Francis J. Mootz III, *Rethinking the Rule of Law: A Demonstration that the Obvious is Plausible*, 61 *TENN. L. REV.* 69 (1993); Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 *B.U. L. REV.* 781 (1989).

185. Mootz, *supra* note 184, at 71 & n.2 (discussing rule of law as seen by Friedrich von Hayek and quoting Hayek’s assertion “that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances” (quoting FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 54 (1944))); Radin, *supra* note 184, at 785–86 (exploring notion that “there must be rules” and “rules must be capable of being followed,” and insistence upon “know-ability” and “perform-ability” of legal rules).

186. Radin, *supra* note 184, at 790.

187. In the ways they reflect values linked to the traditional rule of law, the positivist and popular conceptions of law may be associated, respectively, with the “instrumentalist” and “substantive” accounts of the rule of law suggested by Professor Margaret Jane Radin. See *id.* at 791 (“[T]he central precepts of the Rule of Law can be defended either instrumentally, as necessary to make a legal system work to structure behavior, or substantively, as necessary to fairness, human dignity, freedom and democracy.”).

law from venturing into exactly the sources that most powerfully create the electorate's understanding of popular law. There is, in other words, a jarring clash between the formal legal culture and the popular, political culture. Although this culture clash is not confined to the domain of direct legislation,¹⁸⁸ it is sharply visible there. And the challenge of reconciling—or at least accommodating—these disparate, colliding forces is an important part of what makes the interpretive dilemmas in direct democracy so difficult. Interpretive rules cannot resolve the problematic disjunction between these competing conceptions of law, but interpretive practices should, at least, be shaped in light of this disjunction. As I explore potential responses to the problems of popular intent, I consider how they address these clashing conceptions of law.

B. *The Failure of Formalist Responses*

I have already suggested that one formalist response—incremental improvement in intent-based interpretation—is inadequate. The idea of asking judges to locate popular intent based on information from media and advertising substantially embraces the popular conception of law, but, as I have argued, it underestimates the difficulties raised by that conception. I turn now to two other responses that may be seen in the formalist tradition—strong textualism and what I call “rhetorical formalism.”

1. *The Strong Textualist Response: Forsaking Intentionalism?*

One formalist response to problems of popular intent would be to jettison intent entirely and to redirect the interpretive search toward the “ordinary” or “plain” meaning of the statutory terms. This approach would replicate in the area of direct legislation what many contemporary textualists have advocated in the context of legislative interpretation.¹⁸⁹ By “strong textualism,” I refer to an approach that takes seriously the notion that plain statutory meanings exist, as opposed to one that imposes exacting, text-based rules of construction as a way to narrow what are perceived to be the pathologies of the legislative process and the statutory products it generates.¹⁹⁰

188. See *infra* Part VI for a discussion of the implications for the legislative process.

189. See generally Eskridge, *supra* note 45 (describing as “the new textualism” an approach that focuses on statutory text and disfavors legislative history).

190. The clearest example of the latter textualist approach is the method recommended by Judge Frank Easterbrook, who concedes that “[t]he ‘plain meaning’ rule is plainly ridiculous,” but advocates text-based, strict construction for reasons along these lines. See Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL’Y 87, 91 (1984). I have argued that Justice Scalia’s approach, though couched very much in terms of “strong textualism,” can be understood along similar lines. See Schacter, *supra* note 9, at 636–46.

At a minimum, this approach would suffer from the same serious problem that weakens it in the legislative context: the animating, yet often untenable, idea that there is a single ordinary or plain meaning.¹⁹¹ As the interpretive questions listed in Appendix B suggest, the decisions considered in this study richly document this problem in the context of initiative laws. Thus, this approach would merely replace the illusion of popular intent with the illusion of plain meaning.

Moreover, the research suggesting that voters neither read, nor necessarily comprehend, the language of initiatives means that it is especially problematic in this context to make language the exclusive, or even primary, object of judicial attention. Although textualism is frequently justified by its adherents in terms of traditional notions of democratic theory and judicial restraint,¹⁹² employing it in the context of direct legislation seems exactly at cross purposes with the majoritarian ideas upon which textualism purports to rest. This is especially so because the legal terms of art commonly used in ballot measures are often meaningful only to a small, elite community of lawyers, judges, and knowledgeable observers. Text-based interpretation of initiative statutes thus cannot be persuasively justified based on claims of judicial restraint and majority will. The social science work about voter behavior suggests that, quite the contrary, privileging the source *least* relevant and accessible to voters can only *reduce* their lawmaking powers and *augment* the cognate powers of judges.

In the end, the textualist approach seems oblivious to—if not contemptuous of—the idea of a popular conception of law. This uncritical embrace of an extreme articulation of the positivist conception is thus problematic.

2. *The Rhetorical Formalist Response: The Virtues of the Judicial Wink?*

Another way to respond to the problems I have identified is to suggest that my critique fundamentally misconceives popular intent. Perhaps courts do not really intend to locate and vindicate the voters' design after all and merely deploy the vocabulary of popular intent to legitimate the value-laden yet inevitable choices that judges must make. I have elsewhere called this idea

191. For critiques attacking as fallacy the purported objectivity of textualism, see Eskridge, *supra* note 45, at 666–84; Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988–89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 300–03 (1990); Zeppos, *supra* note 58, at 1080–88. This critique of textualism can come from unlikely places, as Judge Easterbrook's appraisal of the plain meaning rule reflects. See Easterbrook, *supra* note 190, at 87–92. Indeed, even Justice Scalia, textualism's most avid contemporary defender, concedes the necessity to go beyond statutory text and to consider statutory structure, context, and "established canons of construction." Schacter, *supra* note 9, at 644 (discussing ways in which Justice Scalia's approach necessarily comes unhinged from bare text of law) (quoting *Chisom v. Roemer*, 501 U.S. 380, 404 (1991)).

192. See Eskridge, *supra* note 45, at 649–56; Schacter, *supra* note 9, at 643–46.

"rhetorical formalism"—the notion that the *rhetoric* of judicial restraint and legislative supremacy, even if benignly insincere, figures importantly in the drama of democratic legitimacy by reminding judges that they are not legislators and by bolstering the acceptability of judicial results to the public.¹⁹³ Unlike a "real" formalist defense of popular intent, which would argue that judges can, in fact, locate a controlling popular intent or plain statutory meaning, the rhetorical formalist would claim simply that it is better for judges to say that they can do so—that is, to cloak in the garb of popular-intent choices made based on the judge's sense of which of the competing statutory interpretations is best.¹⁹⁴

It is not at all difficult to conclude that judges who interpret initiatives may invoke the rhetoric of popular intent for exactly this purpose. Indeed, some of the opinions in this study concede that there are problems with popular intent, and one goes so far as to characterize popular intent as a necessary fiction.¹⁹⁵ But while the rhetorical formalist view might descriptively capture what at least some judges are doing, the normative strength of the claim is far weaker.

When judges profess to be mere agents of the electorate, they do three related things at once, each of which is problematic. First, they endorse and perpetuate the idea that the initiative permits the *voters* to make the choices of law and policy that are contested in the litigation, even though the problems described here cast that proposition sharply into doubt. Second, they conceal the policy choices that, by virtue of the vacuity of popular intent, they themselves must make. Third, they obscure the lines of accountability by attributing the important choices to the voters and not to themselves.

The net effect is powerful but problematic because it helps to sustain idealized and illusory ideas about direct democracy. Some decisions in the study use impassioned prose to characterize the initiative as democracy in its purest form, as the closest we can come to genuine popular sovereignty.¹⁹⁶ Judicial eloquence aside, the study powerfully suggests that formidable obstacles prevent voters from autonomously making all the policy choices that arise in connection with the initiatives they enact. By nevertheless attributing all such choices to the voters, the rhetoric of popular intent conceals the limitations of popular lawmaking and idealizes direct democracy as a vehicle of pure popular sovereignty.

193. See Schacter, *supra* note 9, at 655.

194. See, e.g., Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353, 406 (1989).

195. See *Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm'n*, 799 P.2d 1220, 1235 (Cal. 1990) ("In order to further the fundamental right of the electorate to enact legislation through the initiative process, this court must on occasion indulge in a presumption that the voters thoroughly study and understand the content of complex initiative measures.").

196. See *Yoshisato v. Superior Court*, 831 P.2d 327, 333 (Cal. 1992); see also *In re Estate of Thompson*, 692 P.2d 807, 808 (Wash. 1984).

Viewed in terms of the two conceptions of law that I have suggested, the rhetorical formalist solution declares an unconvincing victory for the positivist conception. Like the textualist response, this approach suppresses the challenge posed by the popular conception. Unlike the textualist response, this approach does so through a judicial wink, an affirmation of popular intent strictly as a fiction necessary to sustain judicial legitimacy. In thus denying the disjunction between the two conceptions of law, the rhetorical formalist response leaves the law to be covertly created by judges but overtly credited to the people.

C. *A Different Approach: Courts, Candor, and Democracy*

Each of the responses I have considered is seriously flawed. The particular ways in which they fail, however, can help point in a more promising direction. I distill from the deficiencies in these responses three ideas. First, the inadequacies of improved intentionalism and textualism suggest that we should be skeptical of formalist interpretive principles promising what they cannot deliver. Second, the problems of rhetorical formalism suggest that we should care about judicial rhetoric and the way it can sustain idealized representations about law and politics. Third, we should ask whether a different interpretive approach addresses—although it surely cannot eliminate—the problematic disjunction between the positivist and popular conceptions of law.

Sometimes voters have resolved the interpretive question that confronts the court, and in those cases, absent unconstitutionality, the court should honor a clear electoral choice. Sometimes, conversely, an initiative law may be so hopelessly ambiguous as to implicate the void-for-vagueness doctrine.¹⁹⁷ In the face of initiatives neither self-evidently clear, nor unconstitutionally vague, however, the question is how a court should choose from among competing, plausible interpretations of the contested terms. Steadfastly insisting that voters made a determinate, transparent policy choice or deploying the hollow fiction that voters have done so are not the only options open to a court confronted with the kinds of interpretive questions illustrated in the study.

197. See, e.g., *Equality Found. v. City of Cincinnati*, 860 F. Supp. 417, 447–49 (S.D. Ohio 1994), *rev'd*, 53 F.3d 261 (6th Cir. 1995). Although reversed on appeal, the district court in *Equality Foundation* ruled unconstitutional on numerous grounds a city charter amendment that prohibited the city from enacting a law banning discrimination on the basis of sexual orientation. Finding the law to be plagued by what it characterized as “abundant” confusion about its “scope and impact,” *id.* at 448, the court struck it down as, among other things, unconstitutionally vague. In so doing, the court noted that the ordinance amended by this initiative subjected noncomplying employers to criminal penalties, and that the initiative burdened legislative advocacy and political association, interests protected by the First Amendment. *Id.* at 444–46, 449. These elements traditionally strengthen a vagueness claim. See generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12–31 (2d ed. 1988).

A question that merits study, in light of the problems discussed in this Article, is whether the void-for-vagueness doctrine ought to be applied more frequently in the face of substantially ambiguous initiative laws or, conversely, whether mechanisms should be developed that permit courts to return to the voters initiatives that courts deem uninterpretable. For a discussion of other potential process reforms, see *infra* text accompanying notes 234–43.

A more promising direction would be for courts to acknowledge forthrightly the limits of popular intent, and to resolve ambiguities through interpretive rules that account for the factors that make it so problematic to say what the electorate "meant." I have called this approach to statutory interpretation "metademocratic" in other work addressing the legislative process.¹⁹⁸ The metademocratic model rejects the notion that only an originalist approach to statutory interpretation can claim democratic legitimacy and, instead, takes as its point of departure the inevitability of interpretive discretion in giving meaning to statutory law. Shifting the focus from *eliminating* to *channeling* judicial discretion in statutory construction, the metademocratic approach reconfigures the idea of democratic legitimacy by calling for the use of interpretive rules designed self-consciously to further a larger vision of democracy.¹⁹⁹ I have argued that many contemporary theories of interpretation, although rooted in starkly divergent conceptions of democracy, may be understood within this metademocratic framework.²⁰⁰

In the domain of direct lawmaking, the metademocratic approach suggests that, rather than perpetuating the futile pursuit of popular intent, interpretive rules should be designed to select from among plausible statutory meanings in ways that address the problems described in this study. Such rules would derive their democratic legitimacy not from a feigned originalism, but from their ability to resolve statutory ambiguity based on underlying ideas about "democratizing" the direct lawmaking process. Rather than so unpersuasively denying that a thick fog often surrounds popularly enacted law, in other words, courts might acknowledge that fog and consider carefully the factors that create it. And rather than denying or ignoring the disjunction between popular and positivist conceptions of law, courts might instead confront that disjunction and use it as their point of departure in choosing interpretive rules. Reconceived

198. See Schacter, *supra* note 9, at 606–46.

199. *Id.* at 606–11.

200. *Id.* I have argued that four variants of the metademocratic approach can be distilled from contemporary theories of interpretation. Each exhorts courts to use interpretive principles calculated to promote a distinctive vision of democracy. The doctrine spawned by the Supreme Court's holding in *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), rooted in a democratic imperative linked to maximizing electoral accountability, asks courts to "preserve politics" by deferring to administrative agencies' reasonable interpretations of ambiguous regulatory statutes based on the claim that agencies enjoy derivative executive accountability. Schacter, *supra* note 9, at 613–18. Principles drawn from civic republicanism, critical race theory, feminism, and strains of postmodernism implore courts to resolve ambiguity in ways that favor the interests of subordinated social groups as a way to pursue a democratic vision of equality and inclusion that "reconstructs politics." *Id.* at 618–26. Principles building upon the "legal process" tradition, including the work of legal pragmatists, ask judges to "complement politics" by providing distanced reflection on interpretive questions in ways that can enhance democracy by improving the quality and coherence of legislative law. *Id.* at 626–36. Textualist approaches, echoing important themes of public choice theory, seek to "discipline politics" by requiring exacting textual specificity in ways calculated to discourage perceived abuses of the legislative process. *Id.* at 636–46.

The ideological diversity of these approaches challenges conventional notions of interpretive "restraint" and suggests that metademocracy spans a wide spectrum. I have argued that debates over statutory interpretation should move beyond reductive claims of activism and restraint, and should address questions about which substantive vision of democracy should shape interpretive rules. *Id.* at 660–63.

in these terms, interpretive litigation can provide a structure for making visible and addressing some of the problems described in this Article.²⁰¹

Framing metademocratic interpretive rules for the initiative process requires identifying the ways in which the democratic aspirations of the direct lawmaking process are compromised. The analysis offered here points to some salient dynamics. To be sure, the set of decisions collected here cannot capture the universe of problems that undermine the democratic character of the initiative process.²⁰² This is particularly so because these cases, by definition, exclude claims of unconstitutionality, where rules of constitutional law and not of interpretation should be the appropriate response to the antidemocratic character of particular initiatives.²⁰³ But the decisions explored here can substantially augment and enrich our understanding of the democratic character of the initiative process. What the study most strongly suggests is that the informational dynamics of direct lawmaking impede deliberation and create opportunities for strategic abuse of the process. These problems, in turn, undermine the meaningful political participation and equality that are important preconditions of vibrant democratic processes.²⁰⁴ Problems of this sort are

201. As I argue below, courts need not be the *only* institutional structure for addressing these problems, but they can help to catalyze action by other institutions. See *infra* text accompanying notes 234–43.

202. The scope of direct democracy is enormous. See Charlow, *supra* note 6, at 528 & n.1 (describing wide use of direct lawmaking mechanisms at state and local levels and noting that “[t]he total number of referenda nationally, including local measures, may have been as high as 10,000 to 15,000 annually around 1970”). Given this scale, no empirical study based *solely* on decided cases could achieve universality because many ballot propositions generate no litigation.

203. Paradigmatic examples are initiatives that selectively curtail or burden the political rights and opportunities of identifiable groups, like racial minorities or gay men and lesbians. See *Hunter v. Erickson*, 393 U.S. 385 (1969); *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994), *cert. granted*, 115 S. Ct. 1092 (1995). The metademocratic interpretive rules I propose for application in nonconstitutional cases are meant to complement, not substitute for, these constitutional doctrines. Contemporary ballot propositions restricting benefits to immigrants, the availability of civil rights protection for gay men and lesbians, and affirmative action remedies raise these constitutional problems quite starkly. On the larger question of the extent to which mechanisms of direct democracy systematically subjugate minorities, see Symposium, *Anti-Gay Ballot Initiatives*, *supra* note 6, at 491–93; Baker, *supra* note 6, at 708–11; Bell, *supra* note 6, at 1–9; Charlow, *supra* note 6, at 529–31; Eule, *supra* note 2, at 1548–49. See generally NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994) (presenting overarching model that argues for distinction between “minoritarian” and “majoritarian” bias in law and legal institutions).

204. For arguments advocating the centrality of participation and deliberation to democracy, see generally BENJAMIN R. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* 117–311 (1984) (arguing for transformative vision of participatory politics and citizenry active in various levels of political and social life); *FRONTIERS OF DEMOCRATIC THEORY* 95–323 (Henry S. Kariel ed., 1970) (providing excerpts from theorists stressing link between participation and democracy); CAROLE PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* 67–111 (1970) (arguing for extension of participatory democracy to workplace); Cass R. Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539, 1548–51 (1988) (describing arguments for centrality of deliberation to democracy). For arguments advocating a broad conception of equality in democratic theory, see IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 116–21, 163–68 (1990); Sunstein, *supra*, at 1552–53. For a discussion of interpretive rules shaped by these democratic values, see Schacter, *supra* note 9, at 618–26 (discussing approaches to “reconstructing politics”); *id.* at 656 & nn.326–27, 663 (discussing linkages between democracy and equality).

hardly unique to the initiative process,²⁰⁵ but they are acute and contextually shaped in this setting in ways that should drive the rules courts use to construe initiatives. As I discuss these problems, I distinguish between issues of deliberation and issues of abuse.

1. *Informational Deficits: Interpretation and Deliberation*

One set of problems involves informational deficits in the initiative process. Several factors impede meaningful collective deliberation about proposed initiatives. Voters often do not read proposed laws, but instead rely on media coverage that is frequently reductive. The laws and the ballot pamphlets explaining them are difficult to comprehend. The obscuring legal jargon in initiatives and the gaps in the public's knowledge about the surrounding legal context hamper voters' ability to weigh and assess proposals. Even when voters read and understand proposed laws, they may fail to anticipate or consider an issue that arises only when the initiative law is later applied to a particular set of facts. These factors leave citizen-lawmakers poorly situated to deliberate about proposed initiatives.

Interpretive litigation about the meaning of an ambiguous term in an initiative can compensate for some of these informational deficits and create a structure for the deliberation that was absent from the process that produced the initiative. The litigants, as well as any intervenors and amici curiae, can explore in depth and argue the merits of different plausible interpretations of the initiative. The court can assign meaning to the contested provision with the benefit of this extended exploration and the court's own knowledge of the legal context in which the initiative is situated. Viewed from this perspective, the adjudicative process can act as a complementary adjunct to the direct lawmaking process.²⁰⁶

Consider an example from the study. In *SDDS, Inc. v. State*,²⁰⁷ the South Dakota Supreme Court construed an initiative that provided that no large-scale solid waste facility could be operated unless the state legislature "enact[ed] a bill approving" the facility.²⁰⁸ The legislature in that case did so, and the governor signed the bill. Opponents of the facility, however, obtained enough signatures to subject the law to a referendum, in which the voters could rescind the law prior to its taking effect. The question was whether the legislature's law approving the facility should be deemed "enacted" within the meaning of the initiative even though, under the state's constitution, the law approving the

205. See Schacter, *supra* note 9, at 660–63 (describing problems of structural inequality in legislative process and linking them to democratic theories underlying different interpretive rules). As I discuss in Part VI, versions of each of these problems plague the legislative domain as well and should be addressed there.

206. *Id.* at 626–36 (discussing interpretive rules designed to "complement politics").

207. 481 N.W.2d 270 (S.D. 1992).

208. *Id.* at 271.

facility would now be subjected to a referendum before taking effect. Relying upon what it considered to be the important policy of protecting the referendum process, the South Dakota court ruled that the law approving the facility could not be deemed “enacted” for purposes of the initiative until the referendum was held.

This decision was atypical of the study set because the court did not invoke popular intent, characterize the decision as one dictated by the voters’ will, or adopt a hypertechnical interpretation of the word “enact.” Instead, the court viewed the word “enact,” in the context of the initiative, as unclear and poorly chosen. The court thus chose a construction of the term that was consistent with the state’s policy subjecting *all* legislatively enacted laws to the referendum process.²⁰⁹

The interpretive litigation in *SDDS* gave the participants and the court the opportunity to probe an issue that voters, in all likelihood, neither considered nor had reason to anticipate: What would happen if opponents gathered sufficient signatures to trigger a referendum on the legislative law? As *SDDS* demonstrates, a court’s choice from among competing constructions is unavoidably value laden, but it can also be one that is based on the kind of informed deliberation in which the voters did not—and could not—have engaged when they enacted the law.

The judicial process is not a perfect substitute for a more robustly deliberative initiative process. But if initiative lawmaking is seen as an ongoing, multi-institutional process that necessarily involves voters at one point and courts at another, then interpretive litigation can go some distance toward ameliorating the informational and deliberative deficits suggested by the study. The adjudicative process could most appropriately and effectively do so, moreover, if courts maximized procedural opportunities for participation by a range of interests. In addition to liberally granting applications for intervention and for *amicus curiae* participation, courts should consider appointing *pro bono* representation for unrepresented, or even unorganized, interests.²¹⁰

2. *Informational Pathologies: Interpretation and Abuse of the Initiative Process*

A different set of problems suggested by the study relates not simply to a failure of deliberation, but to some troubling structural inequalities in the process. The informational deficits described above, combined with the apathy

209. *Id.* at 272.

210. *Cf.* 5 U.S.C. § 568(c) (1993) (authorizing subsidized participation for affected interests in proceedings under Negotiated Rulemaking Act of 1990); David M. Rosenzweig, Note, *Confession of Error in the Supreme Court by the Solicitor General*, 82 GEO. L.J. 2079, 2113 (1994) (“It is well settled, for example, that the [Supreme] Court has the authority to appoint counsel, in the capacity of *amicus curiae*, to argue any position in a case, even when a party refuses to do so.”).

of large segments of the electorate, create fertile terrain for highly organized, concentrated, and well-funded interests to abuse and manipulate the initiative process. Informational asymmetries allow such interests to strategically propound, package, and draft initiatives in ways that enable them, in some circumstances, to create a phantom popular intent and thus to appropriate the political authority of the largely passive electorate.

The study suggests some factors that increase the risks of abuse. Laws that are lengthy, densely packed with legal jargon, or complex are likely to be the most problematic. Length and complexity will minimize voter engagement and increase the power of proponents to use initiatives to change the law in ways not completely understood by, or clearly communicated to, the voters.²¹¹ Initiatives worded in ways that obscure the effect of a "yes" vote pose similar problems. Heavy spending on subliminally directed advertising, particularly if it is one-sided, can increase the risk of abuse by focusing voters on abstract, visceral symbols and diverting them from the particulars of the proposed initiative.²¹² The potential for exploitation is particularly severe when the initiative explicitly or implicitly targets socially marginalized groups, for such issues may inflame popular passions.²¹³ Perhaps to the chagrin of James Madison and his devotees,²¹⁴ the direct lawmaking process is not alone in its capacity to inflame majorities to the detriment of socially subordinated minorities,²¹⁵ but the structural attributes of direct democracy powerfully enable this phenomenon.

In the face of factors like these, but in the absence of a claim or finding of unconstitutionality, courts should be reluctant to construe ambiguous words in initiative laws expansively.²¹⁶ The clearest examples in the study are the

211. See generally DUBOIS & FEENEY, *supra* note 24, at 113–14 (discussing hidden consequences of "Trojan horse" provisions).

212. The frequency with which one-sided spending is observed in interpretive cases may be lower than the frequency with which such spending actually occurs; data suggests that one-sided oppositional spending is more likely to be effective than one-sided spending in support of a measure. See ZISK, *supra* note 94, at 115–16; Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. REV. 505, 517–19, 544–47 (1982). Successful oppositional spending means the initiative is rejected and consequently requires no interpretation. But the fact that one-sided spending is sufficiently potent to defeat many initiatives nevertheless underscores the fact that well-funded interests have leverage to manipulate the process.

213. On the ways in which exploitation of this kind operates in the domain of direct democracy, see Bell, *supra* note 6, at 1–9; Eule, *supra* note 2, at 1522–30. For an analysis of how the rhetoric of antigay initiative campaigns appeals to race-based fear and animus, see Schacter, *supra* note 72, at 300–07.

214. See Eule, *supra* note 2, at 1522–30 (discussing Madison's antipathy to direct democracy).

215. A dramatic example of this dynamic in contemporary legislative politics is the unrelenting use of a caricatured depiction of the "welfare mother" in the debate about welfare reform. See Dorothy E. Roberts, *The Value of Black Mothers' Work*, 26 CONN. L. REV. 871, 873 (1994) (describing "image of the lazy Black welfare queen who breeds children to fatten her allowance"); Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719, 741 (1992) (describing how "ideology of division" in welfare reform debate "play[s] to America's deepest racial fears and to resentment of the poor, single, unemployed mother").

216. When a court is construing an initiative *solely* to determine its constitutionality, these same factors militate in favor of an opposite rule of construction. A court confronted with a constitutional initiative that targets a socially subordinated group, for example, would better account for the risks of abuse if it assumed

many initiatives—especially from California—that modify crimes and defenses, criminal procedure, penalties, and sentencing rules. Contemporary experience suggests that this is an area where voters are likely to have focused heavily on broad themes and slogans about being “tough on crime,” some of which are mixed subtly and not so subtly with coded racial messages.²¹⁷

One notable example is the television advertising that supported California’s Proposition 115, the subject of several decisions in the study. That initiative expanded death penalty statutes, established new criminal liability, imposed wide and detailed reforms in criminal procedure, and limited the rights afforded criminal defendants under California’s constitution. Commercials supporting Proposition 115 spotlighted Richard Ramirez, the convicted “Night Stalker” murderer.²¹⁸ Ramirez’s image repeatedly appeared in commercials decrying the asserted “loopholes” and “delay” in the state’s criminal justice system. Broad, visceral appeals like those deployed in these political advertisements forcefully distract the electorate from the arcane, albeit potent, details of laws such as Proposition 115.

Because Proposition 115 was 3764 words long²¹⁹—roughly fifteen double-spaced typewritten pages—it is wildly unlikely that most voters focused at all on the interpretive questions facing the court, such as whether Proposition 115 authorized hearsay testimony in a preliminary hearing by someone without personal knowledge of the case,²²⁰ or whether it authorized a court to order disclosure of a defense witness’s address and to sanction a noncomplying attorney.²²¹ The combined force of visceral imagery and language that is both complex and ambiguous suggests that Proposition 115’s proponents were well situated to exploit the initiative process through strategic drafting and advertising. This influence militates in favor of a narrow construction of the law, one that declines to permit ambiguous language to work major changes in the law when there are strong reasons to doubt that voters considered and approved specific changes.²²²

True, the overarching “tough on crime” character of laws like Proposition 115 might point in the opposite direction. If the voters’ broad “purpose” was deemed the interpretive benchmark, then ambiguities should be construed to

in its constitutional analysis that the initiative would be applied broadly, not narrowly. In the context I address, however, a court applies an initiative that has either survived, or not demanded, constitutional scrutiny.

217. See generally JAMIESON, *supra* note 105, at 15–42 (analyzing controversial “Willie Horton” advertisements used during 1988 presidential campaign and describing power of racially charged political advertising).

218. See *California Elections: The Ad Campaign*, L.A. TIMES, May 31, 1990, at A33.

219. DBI, *supra* note 92, at 86.

220. See *Whitman v. Superior Court*, 820 P.2d 262, 265–68 (Cal. 1991).

221. See *In re Littlefield*, 851 P.2d 42, 48, 52 (Cal. 1993).

222. If an initiative was enacted under circumstances like these, but has clear and unambiguous language, then the remedy must be found in constitutional law. The analysis I offer assumes some ambiguity in the law. Whether a law is ambiguous is, of course, a point itself likely to be contested in many cases.

further that larger purpose. Using a broad-purpose approach in circumstances like these, however, would encourage exactly the abuse of the initiative process that I have described. Applying a narrowing rule, in contrast, would reduce the incentives for initiative proponents to draft long, intricate, and ambiguous laws, the complexity of which can effectively be shrouded by slogans and soundbites.

In a sense, the proposed narrowing approach reaches the same result as would the traditional "rule of lenity," a canon favoring the construction of ambiguous criminal laws against the government because of underlying concerns about notice and due process.²²³ But instead of basing the decision on the fantasy that voters enacted the initiative with the rule of lenity (or any other canon) in mind, this approach would instead scrutinize the process surrounding the passage of the law and choose a rule designed to address the systematic problems in that process.

3. *The New Interpretive Rules in Action: Problems and Prospects*

In a system that adopts the rules I suggest, litigants and courts would be required to develop factors for distinguishing between the sorts of problems I have described here—that is, for distinguishing between the absence of deliberation (which characterizes the direct lawmaking process generally) and the abuse of the initiative process (which characterizes a subset of initiatives). The narrowing, antiabuse rules of construction I suggest for the Proposition 115 cases differ from the broad, prodeliberative rule I propose for the *SDDS* case. What is the basis for the distinction? I have suggested some "danger signals" that increase the risk of abuse of the initiative process: length, complexity, confusing wording, obscurity about the effect of an affirmative vote, heavy advertising (especially when coded with race-based or similar symbols), and propositions explicitly or implicitly targeted at socially subordinated groups.²²⁴ Consider these factors in the context of the examples I have used. The initiative at issue in *SDDS* was relatively short and plainly worded, whereas Proposition 115 was approximately 3700 words long, full of legal terms of art, and concerned with rarefied questions of legal procedure. *SDDS* involved a relatively straightforward question with an unanticipated twist; Proposition 115 involved arcane questions of criminal procedure. In addition, unlike the *SDDS* initiative, Proposition 115 was promoted through exploitative, race-tinged advertising.

223. On the rule of lenity, see ESKRIDGE & FRICKEY, *supra* note 10, at 655–56.

224. As an aid to judicial interpretation, it may be appropriate to require that a record of advertising materials used in the initiative campaign be maintained. This could be assembled by litigants as part of interpretive litigation or be routinely maintained by state election officials. For a review of existing state laws regulating maintenance of advertising "logs" by media outlets, see DUBOIS & FEENEY, *supra* note 24, at 50–58.

Taken together, these differences provide a basis for distinguishing the absence of deliberation in the *SDDS* initiative from the risks of manipulation in the case of Proposition 115. This distinction is, nevertheless, neither self-evident nor self-executing. There will undoubtedly be debates about which rules should be applied in which cases. But indeterminacy objections should not disqualify these metademocratic rules.²²⁵ Virtually *all* interpretive rules require value-laden line drawing by judges. The important question is not how to avoid the inevitable need for line drawing, but what kinds of lines we want courts to draw. The decisions collected here suggest that asking courts to draw lines around a controlling popular intent provides only a thin veneer for policy choices that courts make in the name of vindicating popular intent. The metademocratic approach I propose, though also value laden, abandons the failed formalism that inspires popular intent and reconceives democratic legitimacy in terms of democracy-enhancing rules.

Moreover, rules chosen for their capacity to be applied uncontroversially have important shortcomings of their own. Perhaps the clearest example of a “bright line” metademocratic rule would be a universal rule of narrow construction applied to *all* initiative laws based on the systemic problems in the direct lawmaking process.²²⁶ But that rule would be flawed in important respects. First, consistent with its focus on the initiative’s text, it would replicate some of the basic problems posed by the “strong textualist” response. Placing such exclusive and dispositive weight on the statutory text and its clarity in all cases might produce desirable consequences from the standpoint of reforming drafting, but it would mean that policy outcomes would always turn on a source that is peripheral at best, and incomprehensible at worst, to voters. In addition, such a rule would unwisely treat all initiatives identically and thus fail to draw contextual distinctions between different laws and the differently configured processes that produce them.²²⁷ Finally, asking judges to subject *only* popularly enacted law to this disfavored interpretive treatment might create a powerful perception of elitism and, at the very least, raise the question whether legislative laws must likewise be subjected to the same across-the-board treatment.²²⁸ If the notion were that the existence of

225. I probe and respond in more depth to formalist objections to metademocratic rules in Schacter, *supra* note 9, at 650–55.

226. See Kelso, *supra* note 7, at 344–45 (arguing that California initiatives “should be strictly construed in order to minimize the changes to California law”).

227. The relevance of such contextual differences in construing legislative statutes is explored and argued at length in Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 462–508 (1989).

228. If nothing else, it may well be difficult to persuade judges to adopt this stance because the vast majority of the states that authorize the initiative elect their judges. See Eule, *supra* note 2, at 1587–90. Carving out laws enacted by the voters for special rules of narrow construction may be politically untenable for elected judges. To some extent, any version of the approach I propose raises this problem, and the elected status of judges might give us a clue as to why their opinions are so often filled with impassioned prose about the sanctity of direct democracy. The more contextual approach I advance might, however, at least mitigate some of these problems of perception.

problems in the lawmaking process must always lead to narrow construction, then there would be a strong case for applying the same rule in the legislative context—as, indeed, observers such as Judge Frank Easterbrook have argued.²²⁹ Adopting that stance across the board, however, would carry with it a problematic antiregulatory—or at least, pro-status quo—bias that introduces a specter of “Lochnerism.”²³⁰ Although it would not produce antiregulatory results in every case,²³¹ such a rule, applied across the range of statutes, would burden the enactment of efficacious laws by imposing a heightened standard of clarity upon drafters. Viewed in this light, a universal rule of narrow construction seems too blunt an instrument.

Interpretive rules of the kind I suggest are no panacea. Judges should not be romanticized as populists. In addition, the courts, like other institutions, suffer from structural inequalities of their own.²³² Litigation is expensive and meaningful access to courts limited. Broader amicus curiae participation and pro bono representation could partially mitigate the inequalities of access, but these inequalities would not be eliminated entirely. Moreover, candor is not without its costs; it is possible that more forthright judicial practices will increase public cynicism about courts.²³³

Because, however, interpretation is inevitable, the interpretive power of judges is largely ineradicable, and doctrinal attempts to conceal that power are unconvincing, there remain gains that can justify these costs. Consider some potentially significant benefits. First, the rules I describe can improve outcomes in specific cases by infusing the initiative lawmaking process with norms favoring deliberation and discouraging abuses of the process. The direct effect of applying metademocratic rules on the larger initiative process will admittedly be marginal because only a subset of cases necessitate interpretive

229. See Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 549 (1983).

230. *Lochner v. New York*, 198 U.S. 45 (1905) (striking down law regulating workers' hours). *Lochner* has come to symbolize the dangers of antiregulatory judicial obstructionism. See generally TRIBE, *supra* note 197, § 8–2 (discussing association of *Lochner* with “period [during which] the Supreme Court was quite willing—certainly more willing than it has otherwise ever been—to scrutinize and invalidate economic regulations pursuant to the due process clause”).

231. In some cases, a narrowing construction might defeat this larger aim. Adopting such a rule in interpreting a law enacting market-based “regulatory reform” provides an example. Nevertheless, applied in all cases, we could expect the aggregate effect of such a rule to narrow the overall corpus of statutory law. As Judge Easterbrook has readily stated, the animating purpose of deploying such a rule across the range of all cases is to discourage robust statutory law and to support the primacy of private ordering. See Easterbrook, *supra* note 229, at 549 (justifying narrowing rules of construction based on norm that “most social relations would be governed by private agreements, customs, and understandings, not resolved in the halls of government”).

232. See KOMESAR, *supra* note 203, at 124–28.

233. For competing views about the wisdom of candor in statutory interpretation, compare GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 180 (1982) (“Without honesty and candor we cannot even know where we are.”) with Zeppos, *supra* note 194, at 385–86 (arguing that candor may undermine judicial legitimacy if judicial decisionmaking process cannot clearly be distinguished from that employed by political branches).

litigation. But for those cases, the interpretive results may be more thoughtful and more honest.

Metademocratic rules may, moreover, produce more systematic results by helping to challenge and change prevailing assumptions about direct democracy. The approach I have described can help to generate a more realistic picture of the initiative process by bringing to the fore some of the chronic problems illustrated by the cases analyzed here. This judicial approach can thus help bring the popular lawmaking process into clearer focus and challenge idealistic representations of the initiative as an instrument of pure popular sovereignty. Debates about individual initiatives and, indeed, about the desirability of popular lawmaking more generally, would be enriched by highlighting the informational dynamics and associated systemic problems discussed above. Making more visible the inevitably substantial role courts play in shaping direct legislation would similarly enrich these debates.

This effect depends, in part, upon the proposition that what judges say matters, that judicial rhetoric has some role in creating public understandings about our political institutions. Nothing in this Article would suggest that voters parse judicial opinions with care. Yet in a more diffuse sense, courts represent one of many places where larger understandings about our politics and institutions are forged.²³⁴ How the judiciary conceives of the initiative process and represents it in language contributes to the creation of social understandings, especially given the relatively high visibility of the popular lawmaking process and the fact that media sources frequently publicize judicial decisions resolving high-profile cases in this area.²³⁵ Judicial approaches to interpretation can also spawn wider debates about the political process that generates legislation, such as the debates about congressional behavior that Justice Scalia's skeptical approach to legislative history has ignited.²³⁶

Perhaps more important than the constitutive capacity of judicial rhetoric is the power of courts to prompt action by other institutions. Changing the rules of interpretation in a way that reveals and elaborates underlying structural problems that burden the initiative process can help to generate reforms in that process. Potential reforms meriting study span a wide spectrum, from relatively incremental changes designed to improve existing processes for initiative lawmaking,²³⁷ all the way to elimination of the initiative.²³⁸ It is beyond

234. See LISA J. MCINTYRE, *LAW IN THE SOCIOLOGICAL ENTERPRISE: A RECONSTRUCTION* 109–35 (1994) (discussing “constitutive effects of law”); Schacter, *supra* note 9, at 649 & n.293 (discussing “constitutive” theories of law and their relevance to interpretive practices).

235. Eule, *supra* note 2, at 1581–82, 1585.

236. See, e.g., *The Role of Legislative History in Judicial Interpretation: A Discussion Between Judge Kenneth W. Starr and Judge Abner J. Mikva*, 1987 *DUKE L.J.* 361; see also Biskupic, *supra* note 176, at 913 (describing congressional hearings about statutory interpretation prompted largely by Justice Scalia's views).

237. Comprehensive and detailed reforms have recently been proposed. See, e.g., DBI, *supra* note 92, at 327–46 (setting out proposals by California Commission on Campaign Financing that relate to drafting and amendability; preelection public hearings; circulation and qualification; required number of votes for

the bounds of this Article to explore these reforms in any detail, but three possible reforms emerge as most clearly responsive to the problems suggested by the decisions studied. These possibilities illustrate the kinds of reforms that metademocratic rules might encourage other institutions to explore, and thus illustrate an important, but unexplored and undervalued linkage between interpretive rules and the political process.

First, drafting reforms are the most obvious example. At least some of the problems described here could perhaps be productively addressed by requiring clearer, less jargon-filled, and substantially shorter laws.²³⁹ Second, consideration might be given to discontinuing the initiative in selected areas where the risks of confusion, manipulation, or exploitation are likely to be most severe, much as several states currently restrict the use of direct lawmaking in particular circumstances.²⁴⁰ The study suggests that these risks are particularly acute, for example, where voters are asked to enact detailed rules of legal procedure governing the process that adjudicates criminal guilt.²⁴¹ Risks of manipulation and exploitation are likewise severe when the initiative process is used to allow voters to alter the architecture of the democratic process in ways that disadvantage socially subordinated groups, as

passage; enhanced disclosure requirements; application of "fairness doctrine" to ballot measures; reforming ballot pamphlets; studying campaign finance limitations; considering fee-based "voter information funds" to redress one-sided advertising; and revised judicial review concerning conflicting ballot measures); DUBOIS & FEENEY, *supra* note 24, at 161-73 (setting out proposals by California Policy Seminar that relate to changing qualifications for ballots; reducing number and complexity, and increasing clarity, of initiatives; improving ballot pamphlets; and strengthening campaign finance and disclosure restrictions); Richard B. Collins & Dale Oesterle, *Structuring the Ballot Initiative: Procedures that Do and Don't Work*, 66 U. COLO. L. REV. 47, 104-26 (1995) (recommending numerous reforms, including use of indirect initiatives; word limits; legislative power to amend constitutional initiatives; heightened enforcement of single-subject rule; and several changes to qualification and election processes designed to enhance discussion and debate about proposed initiatives).

238. For divergent views on the wisdom of direct democracy, compare Ronald J. Allen, *The National Initiative Proposal: A Preliminary Analysis*, 58 NEB. L. REV. 965 (1979) with Cynthia L. Fountaine, Note, *Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative*, 61 S. CAL. L. REV. 733 (1988). For a proposal to expand direct democracy to the national level, but to reform its processes dramatically, see BARBER, *supra* note 204, at 281-89 (proposing legislative initiative and referendum process with "a mandatory tie-in with neighborhood assemblies and interactive-television town meetings for the purpose of civic education"; multichoice format that would permit voters to register the intensity of their policy preferences; and "two reading" format "to guard against a too-impetuous citizenry or a too-powerful elite gaining temporary control of public opinion," which would include "two voting stages, separated by six months of deliberation and debate"). For proposals concerning a national referendum on constitutional amendments, see BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 54-55 (1991); Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988). Cf. RICHARD D. PARKER, "HERE, THE PEOPLE RULE": A CONSTITUTIONAL POPULIST MANIFESTO 54-65 (1994) (calling for infusion of constitutional law with "populist sensibility").

239. For proposals along these lines, see DBI, *supra* note 92, at 110-19, 331, 337; DUBOIS & FEENEY, *supra* note 24, at 135-36; MAGLEBY, *supra* note 15, at 195; Collins & Oesterle, *supra* note 237, at 109.

240. For example, in Massachusetts, the initiative may not be used for measures relating to religion, and in Alaska, Massachusetts, and Wyoming, the initiative may not be used for measures affecting the courts. See DUBOIS & FEENEY, *supra* note 24, at 24-28 (describing these and other restrictions in different states).

241. See *supra* notes 217-23 and accompanying text (discussing criminal justice reform cases).

in the case of contemporary antigay ballot initiatives.²⁴² Finally, and more fundamentally, the initiative might be reconceived as a general policy directive rather than a vehicle for enacting specific rules in complex areas. The decisions analyzed here suggest that initiatives are far better suited to express broad policy preferences than to write detailed, technical laws. Whether such a reconceived initiative were binding or advisory, it would still enable the electorate to exercise a significant role in the political process. As David Magleby has noted:

[V]oters could have profound influence over the issue agenda by means of advisory referendums such as the 1975 British vote on entry into the European Economic Community. The wording of the referendum was short and straightforward. The advantage of this approach is that the public can indicate its preference for general policy and the legislature can handle the statutory or constitutional steps necessary for the implementation and administration of the policy.²⁴³

Reforms like these are more likely to reach the public agenda if the underlying difficulties in the direct lawmaking process are made visible. Shifting the interpretive stance of courts can increase the visibility of problems that courts are well situated to see and can thus be part of a larger, more institutionally interactive set of responses to these problems. In doing so, this new interpretive stance can further the metademocratic goal of improving democratic processes and institutions.

VI. CONCLUSION: THE BROADER IMPLICATIONS OF THE STUDY

This study casts substantial doubt on the popular-intent approach as it has been both conceived and applied by courts. Analyzing the judicial pursuit of popular intent within the context of social science research about voter behavior in ballot campaigns reveals that pursuit to be both misguided and

242. Indeed, precisely this idea is reflected in judicial decisions declaring antigay initiatives unconstitutional because such laws "'fenc[e] out' [of the political process] an independently identifiable class of persons." *Evans v. Romer*, 882 P.2d 1335, 1339 (Colo. 1994), *cert. granted*, 115 S. Ct. 1092 (1995) (quoting *Evans v. Romer*, 854 P.2d 1270, 1282 (Colo.), *cert. denied*, 114 S. Ct. 419 (1993)); see also *Equality Found. v. City of Cincinnati*, 860 F. Supp. 417, 430-34 (S.D. Ohio 1994), *rev'd*, 53 F.3d 261 (6th Cir. 1995).

243. MAGLEBY, *supra* note 15, at 195; cf. CRONIN, *supra* note 15, at 240-41 (suggesting that advisory referenda could "stimulate public debate, attract voter interest, and allow the public to play at least some role beyond selecting the people sent to the state legislatures," but arguing that such referenda should be a "complement to rather than a substitute for the regular system"). Shifting more authority to the legislative and/or executive branches in this fashion would not obviate the need or justification for metademocratic rules of interpretation because those institutional settings suffer from democratic flaws of their own. See generally Schacter, *supra* note 9, at 613-46, 662-63 (discussing various critiques of contemporary democratic institutions that inspire theories of interpretation). But such a reform would respond to some of the most serious problems suggested by the cases studied here.

impoverished. The search for popular intent is misguided because of the characteristic weaknesses of intentionalism, the lack of voter engagement with, or comprehension of, the interpretive issues confronting courts, and the striking disjunction between the sources that influence voters and those that influence courts. The search for popular intent is impoverished because all of these factors, when combined with the informational deficits and pathologies explored here, reveal the extent to which the very concept of popular intent is rooted in reductive, illusory ideas about the direct lawmaking process. I have argued that these problems, in turn, reveal a deeper rupture between positivist and popular conceptions of law, and call for alternative interpretive rules framed in light of some of the problems the study suggests are characteristic of the initiative process.

While the study bears most directly upon the interpretation of popularly enacted law, there are larger implications here for statutory interpretation and legal theory. Despite some important structural differences between the representative and direct lawmaking processes, there are commonalities suggesting that the two are better located on a continuum than in dichotomous opposition to one another. At least at the level of ideal type, the representative process offers a far greater opportunity for deliberation and debate.²⁴⁴ But at the level of actual experience, our legislative process frequently falls far short of the ideal type, so that the differences between the two lawmaking processes may be more in degree than kind.²⁴⁵

For example, legislators, like voters, frequently do not meaningfully deliberate, do not write—or even read—the text of bills, make voting decisions based on proxies or cues (such as interest group or party position), do not foresee or understand issues that arise after they enact statutes, and engage in strategic behavior. Media sources such as television, talk radio, and newspapers heavily influence legislators. There are, in other words, informational deficits and informational pathologies in the legislative process, just as there are in the initiative process.²⁴⁶ To the extent that these factors hamper popular laws, they also hamper legislative laws, though often less visibly so.

More fundamentally, while the disjunction between what I have called "positivist" and "popular" conceptions of law is quite stark in the context of direct democracy, it is not limited to that context. The same disjunction can be

244. See Eule, *supra* note 2, at 1526.

245. This point is emphasized in Richard Briffault, *Distrust of Democracy*, 63 TEX. L. REV. 1347 (1985) (reviewing MAGLEBY, *supra* note 15).

246. Contemporary legislative politics provide some vivid illustrations. See, e.g., Stephen Engelberg, *Business Leaves the Lobby and Sits at Congress's Table*, N.Y. TIMES, Mar. 31, 1995, at A1 (describing role of business lawyers and lobbyists in drafting antiregulatory legislation that elected representatives then sponsor); Elizabeth Kolbert, *When a Grass-Roots Drive Actually Isn't*, N.Y. TIMES, Mar. 25, 1995, at A1 (describing rise of "synthetic grass-roots movements," reflected in television commercials featuring actors appearing to be ordinary citizens, as prime example of how interest groups attempt to influence legislators by "changing the climate of public opinion, largely through television advertising").

observed, as well, in the legislative setting, where it also poses serious challenges for some core premises of statutory interpretation.

The traditional model of legitimacy in statutory interpretation reflects an approach that draws a sharp distinction between the functions of the legislative and judicial branches of government based upon the perceived demands of democratic theory. The traditional approach demands interpretive "restraint" as a way to enable the dynamic of electoral accountability to operate; voters can assess the choices made by legislators only if those choices are clear and unobscured by judicial choices covertly made in the name of interpretation.

The popular conception of law, however, calls into question the extent to which the dynamic of accountability can operate. The problem is that voters receive information about, and come to understand, legislative law from a sprawling and diffuse set of sources—most prominently assorted media. As with initiative laws, the meanings that voters attach to legislative laws and other governmental policies flow as much—if not more—from ongoing, media-driven processes than from the bare legal language of law or other formal legal sources.

Consider the Civil Rights Act of 1991,²⁴⁷ which emerged from protracted, highly publicized legislative battles. The enduring legacy of those battles was the endless debate over whether that bill, designed to overrule a set of restrictive Supreme Court interpretations of federal antidiscrimination laws, legitimated "quotas."²⁴⁸ That question, in turn, implicated complex and somewhat rarefied legal questions about the scope and meaning of prior statutory law and judicial interpretation in that area. Despite the extensive press coverage the "quota" controversy received, little of the legal complexity was—or perhaps could have been—captured in the media's characterizations and coverage of the debate.

The ability of voters to make informed choices about the 1991 legislation enacted by their representatives depends upon their ability to learn the effect, scope, and likely consequences of that law. Yet it is hard to have confidence that much more than sloganeering contributed to popular understanding of precisely what the 1991 law said or meant. And the 1991 Act, high profile as it was, is hardly unique in this regard.

For example, 1994's debates about federal health care reform and crime control legislation vividly illustrated the difference between public awareness of the text of a law or proposed law—which sometimes runs into the thousands of pages—and public awareness of the rhetoric about the laws. The saturation coverage accorded to the latter was hardly matched with similar coverage of the former. Moreover, lawmakers on all sides seem to have

247. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 2 U.S.C. §§ 601, 1201–24; 16 U.S.C. §§ 1a–5 note; 29 U.S.C. § 626; 42 U.S.C. §§ 1981, 1981 notes, 1981a, 1988, 2000e, 2000e note, 2000e-1, 2000e-2, 2000e-4, 2000e-4 note, 2000e-5, 2000e-16, 12111, 12112, 12209 (Supp. 1991)).

248. See Schacter, *supra* note 72, at 303 (reviewing rhetoric that surrounded debate).

become ever more sophisticated about the power of rhetoric and characterization, as evidenced, for example, by the strategically chosen, sometimes "Orwellian,"²⁴⁹ titles given to legislation.

This pervasive "spin" of law seriously undermines the possibility of meaningful electoral accountability. Thus, the problems with popular intent suggest some deep and difficult problems with legislative intent as well. Beyond statutory interpretation, these issues raise profound questions by fundamentally challenging the idea of "notice" at the heart of the traditional rule of law: Is there a "meaning" in legal texts that citizens can ever know and distinguish from mere characterizations of law that appear in press and other accounts? Can we distinguish law, as it is passed, from law as it is portrayed and perceived in the sprawling, symbol-rich, high-tech social process that creates legal meanings? This study suggests that we need to revisit traditional ideas of accountability and notice to meet the challenge of a legal order that, increasingly, cannot be meaningfully confined to the traditional domains of law.

249. The phrase is from Anthony Lewis, *Tilting the Scales*, N.Y. TIMES, Feb. 3, 1995, at A19 (describing proposed "Common Sense Legal Reform Act" as having "wonderfully Orwellian name"). For an example, see Ana Puga, *House GOP Aims to Halt "Frivolous" Prison Litigation*, BOSTON GLOBE, Feb. 5, 1995, at 2 (describing proposed amendments to Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 (1988), that would limit substantially civil rights lawsuits that inmates may file).

APPENDIX A: THE STATUTORY INITIATIVE IN THE STATES AND THE
DISTRICT OF COLUMBIA

STATE	SOURCE OF AUTHORITY
Alaska	ALASKA CONST. art. XI, § 1
Arizona	ARIZ. CONST. art. IV, pt. 1, § 1
Arkansas	ARK. CONST. amend. 7
California	CAL. CONST. art. II, § 8
Colorado	COLO. CONST. art. V, § 1
District of Columbia	D.C. CODE ANN. § 1-285 (1992)
Idaho	IDAHO CONST. art. III, § 1
Maine	ME. CONST. art. IV, pt. 3, § 18
Massachusetts	MASS. CONST. art. XLVIII, pt. 1
Michigan	MICH. CONST. art. II, § 9
Missouri	MO. CONST. art. III, § 49
Montana	MONT. CONST. art. III, § 4
Nebraska	NEB. CONST. art. III, § 2
Nevada	NEV. CONST. art. XIX, § 2
North Dakota	N.D. CONST. art. III, § 1
Ohio	OHIO CONST. art. II, § 1
Oklahoma	OKLA. CONST. art. V, § 1
Oregon	OR. CONST. art. IV, § 1
South Dakota	S.D. CONST. art. III, § 1
Utah	UTAH CONST. art. VI, § 1
Washington	WASH. CONST. art. II, § 1
Wyoming	WYO. CONST. art. III, § 52

APPENDIX B: THE DECISIONS STUDIED

CASE NAME	CITATION	INITIATIVE AT ISSUE	INTERPRETIVE QUESTION
Benner v. Wichman	874 P.2d 949 (Alaska 1994)	Tort Reform Ballot Initiative	Whether word "party" in tort reform statute included nonlitigant defendants
Morris v. Torch Club, Inc.	749 S.W.2d 319 (Ark. 1988)	Initiated Act No. 1 of 1942 (alcohol regulation)	Whether private clubs dispensing alcohol violated initiative's ban on "giving away" alcohol in dry counties, such that a subsequent legislature-enacted law that permitted service of alcohol at clubs under specified conditions had unlawfully amended the initiative
People v. Garcia	684 P.2d 826 (Cal. 1984)	Briggs Initiative (death penalty)	Whether interpretation that finding of felony-murder special circumstance required proof of intent to kill would be applied retroactively
People v. Turner	690 P.2d 669 (Cal. 1984)	Briggs Initiative (death penalty)	Whether two first-degree felony-murder convictions, neither of which could alone justify death penalty absent finding of intent to kill, could together open door to death penalty hearing
People v. Bigelow	691 P.2d 994 (Cal. 1984)	Briggs Initiative (death penalty)	How broadly to construe "murder for financial gain" death penalty special circumstance; how imminent should arrest have been to justify murder-to-avoid-arrest special circumstance; and whether kidnapping-murder special circumstance required proof of both simple and aggravated kidnapping
People v. Jackson	694 P.2d 736 (Cal. 1985)	Proposition 8 (criminal sentencing)	Whether defendant could receive enhanced sentence for "burglary of a residence" even though that particular crime was not one contemplated by statute; and whether new penalty enhancement statute was limited by another statute barring imprisonment for more than twice the base term

CASE NAME	CITATION	INITIATIVE AT ISSUE	INTERPRETIVE QUESTION
People v. Boyd	700 P.2d 782 (Cal. 1985)	Briggs Initiative (death penalty)	Whether evidence relating generally to defendant's character but not bearing upon any of specific aggravating or mitigating factors listed in death penalty statute was admissible
People v. Skinner	704 P.2d 752 (Cal. 1985)	Proposition 8 (criminal sentencing)	Whether use of "and" instead of "or" in definition of mental illness established much stricter definition of insanity defense
People v. Weidert	705 P.2d 380 (Cal. 1985)	Briggs Initiative (death penalty)	Whether statutory provision mandating death penalty or life without parole for intentional killing of witness to prevent testimony in criminal proceeding applied when testimony was in juvenile proceeding
People v. Fritz	707 P.2d 833 (Cal. 1985)	Proposition 8 (criminal sentencing)	Whether trial court, in sentencing defendant previously convicted of "serious felony" within meaning of new statute, retained traditional discretion to strike prior conviction
People v. Balderas	711 P.2d 480 (Cal. 1985)	Briggs Initiative (death penalty)	Whether "prior felony convictions" as described in death penalty statute were limited to those occurring before commission of capital crime
People v. Hendricks	737 P.2d 1350 (Cal. 1987)	Briggs Initiative (death penalty)	Whether death penalty special circumstance implicitly required intent to kill; and whether being "previously convicted of murder in the first or second degree" acted as special circumstance where conviction was for murders committed after ones at issue
People v. Woodhead	741 P.2d 154 (Cal. 1987)	Proposition 8 (criminal sentencing)	Whether, under statute prohibiting commitment to Youth Authority of any person convicted of serious felony, phrase "no person convicted of" included in its scope only defendant's current conviction

CASE NAME	CITATION	INITIATIVE AT ISSUE	INTERPRETIVE QUESTION
People v. Anderson	742 P.2d 1306 (Cal. 1987)	Briggs Initiative (death penalty)	Whether initiative required court to give instruction that intent to kill was element of felony-murder special circumstance
People v. Guerrero	748 P.2d 1150 (Cal. 1988)	Proposition 8 (criminal sentencing)	Whether penalty enhancement could be based on prior "burglary of a residence" as mentioned in statute when no offense specifically defined as such existed in penal code
Evangelatos v. Superior Court	753 P.2d 585 (Cal. 1988)	Proposition 51 (tort reform)	Whether initiative limiting individual tortfeasor's liability for non-economic damages to their percentage of fault applied retroactively
People v. Guzman	755 P.2d 917 (Cal. 1988)	Briggs Initiative (death penalty)	Whether language of statute "while the defendant was engaged in" should have been read as broadly as old version's "during the commission of" and "immediate flight after committing"
People v. Griffin	761 P.2d 103 (Cal. 1988)	Briggs Initiative (death penalty)	Whether qualification of felony murder as special circumstance required premeditation
People v. Burton	771 P.2d 1270 (Cal. 1989)	Briggs Initiative (death penalty)	Whether under death penalty initiative "prior felony convictions" included juvenile adjudications
<i>In re Harris</i>	775 P.2d 1057 (Cal. 1989)	Proposition 8 (criminal sentencing)	Whether, in sentence enhancement provision, phrase "on charges brought and tried separately" required that prior convictions be brought in separate proceedings
People v. Andrews	776 P.2d 285 (Cal. 1989)	Briggs Initiative (death penalty)	Whether phrase "would be punishable" in death penalty statute should be read narrowly to mean <i>must</i> be punishable, or broadly to mean <i>may</i> be punishable
Travelers Indem. Co. v. Gillespie	785 P.2d 500 (Cal. 1990)	Proposition 103 (insurance regulation)	Whether mandatory renewal provision, enacted as part of Proposition 103, applied to insurers who had submitted applications to withdraw from state insurance market

CASE NAME	CITATION	INITIATIVE AT ISSUE	INTERPRETIVE QUESTION
Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm'n	799 P.2d 1220 (Cal. 1990)	Propositions 68 and 73 (campaign finance)	Whether two conflicting campaign finance reform propositions should be given effect to extent possible, or whether only measure receiving larger number of affirmative votes should be given effect
Curl v. Superior Court	801 P.2d 292 (Cal. 1990)	Briggs Initiative (death penalty)	Whether defendant's statutory right to jury trial on truth of prior murder special circumstance allegation also encompassed right to jury trial on collateral challenge
Tapia v. Superior Court	807 P.2d 434 (Cal. 1991)	Proposition 115 (Crime Victims' Justice Reform Act)	Whether provisions of Proposition 115 relating to conduct of trials applied to prosecution of crimes committed before initiative passed
Whitman v. Superior Court	820 P.2d 262 (Cal. 1991)	Proposition 115 (Crime Victims' Justice Reform Act)	Whether new hearsay provisions of Proposition 115 authorized finding of probable cause at preliminary hearing based on testimony of someone without personal knowledge of case
DaFonte v. Up-Right, Inc.	828 P.2d 140 (Cal. 1992)	Proposition 51 (tort reform)	Whether third party could be held liable for noneconomic damages attributable to parties with statutory immunity from liability
Yoshisato v. Superior Court	831 P.2d 327 (Cal. 1992)	Propositions 114 and 115 (criminal sentencing)	Whether contrary provisions enacted in Propositions 114 and 115 amending criminal statute, both dealing with death penalty special circumstances, should both be given effect where Proposition 114 received more votes
<i>In re</i> Littlefield	851 P.2d 42 (Cal. 1993)	Proposition 115 (Crime Victims' Justice Reform Act)	Whether discovery statute authorized court to order defense counsel to disclose to prosecution address of defense witness, and if so, whether court could sanction counsel for refusal

CASE NAME	CITATION	INITIATIVE AT ISSUE	INTERPRETIVE QUESTION
People v. Jones	857 P.2d 1163 (Cal. 1993)	Proposition 8 (criminal sentencing)	Whether Proposition 8 required that prison sentence be enhanced both for prior conviction and for prison term imposed for current conviction
People v. Myers	858 P.2d 301 (Cal. 1993)	Proposition 8 (criminal sentencing)	Whether convictions in other states must have all elements of "serious offense" crime in California to be used for penalty enhancement
Gerken v. Fair Political Practices Comm'n	863 P.2d 694 (Cal. 1993)	Proposition 73 (campaign finance)	Whether, once provision of Proposition 73 had been declared unconstitutional, any provision remained that was severable and operative so as to prevent Proposition 68, a competing campaign reform initiative, from being enacted
Grant v. United States	509 A.2d 1147 (D.C. 1986)	Mandatory Minimum Sentencing Initiative of 1981	Whether defendant established eligibility for sentencing under "addict" exception to mandatory minimum sentencing statute
Backman v. United States	516 A.2d 923 (D.C. 1986)	Mandatory Minimum Sentencing Initiative of 1981	Whether term "narcotic" included cocaine for purposes of criminal sentencing exemption for narcotic addicts
Abrams v. United States	531 A.2d 964 (D.C. 1987)	Mandatory Minimum Sentencing Initiative of 1981	Whether phrase "while armed with" in statute imposing mandatory minimum sentence upon anyone convicted of crime of violence while armed with pistol or firearm required proof that accomplice had actual, personal possession of pistol or firearm during crime
Smith v. United States	554 A.2d 1155 (D.C. 1989)	Mandatory Minimum Sentencing Initiative of 1981	Whether statute's enhanced penalty provisions applied to first-time offenders

CASE NAME	CITATION	INITIATIVE AT ISSUE	INTERPRETIVE QUESTION
Lemon v. United States	564 A.2d 1368 (D.C. 1989)	Mandatory Minimum Sentencing Initiative of 1981	Whether, pursuant to statute dealing with repeat armed offenders, mandatory minimum sentence applied only if defendant was armed with firearm during commission of both predicate and second offenses
Lucas v. United States	602 A.2d 1107 (D.C. 1992)	Mandatory Minimum Sentencing Initiative of 1981	Whether initiative's mandatory penalty enhancements for prior convictions applied where prosecution failed to comply with separate legislature-enacted law requiring that pretrial information list all prior convictions on the basis of which prosecutor would seek penalty enhancement
North Shore Vocational Regional Sch. Dist. v. City of Salem	471 N.E.2d 104 (Mass. 1984)	Proposition 2½ (unfunded mandates)	Whether Proposition 2½, limiting state and local taxation and expenditures, impliedly repealed earlier law requiring that cities appropriate funds to regional school districts
Town of Norfolk v. Department of Env'tl. Quality Eng'g	552 N.E.2d 116 (Mass. 1990)	Proposition 2½ (unfunded mandates)	Whether Proposition 2½, exempting cities and towns from state regulations resulting in imposition of additional costs, applied to activities engaged in by private businesses, where municipality voluntarily engaged in those activities
Boston Water & Sewer Comm'n v. Metropolitan Dist. Comm'n	562 N.E.2d 470 (Mass. 1990)	Proposition 2½ (unfunded mandates)	Whether Boston Water and Sewer Commission was city or town within meaning of Proposition 2½ and thus eligible for certain tax limitations outlined in that statute
City of Worcester v. Governor	625 N.E.2d 1337 (Mass. 1994)	Proposition 2½ (unfunded mandates)	Whether various statutes and administrative rules and regulations were "unfunded mandates" within meaning of Proposition 2½
People v. Johnson	364 N.W.2d 654 (Mich. 1985)	Proposal B (eligibility for parole)	Whether Proposal B, stating that persons convicted and sentenced for certain crimes shall not be eligible for parole until they have served minimum term imposed by court, was applicable to those with fixed or life sentences

CASE NAME	CITATION	INITIATIVE AT ISSUE	INTERPRETIVE QUESTION
<i>State ex rel. Union Elec. v. Public Serv. Comm'n</i>	687 S.W.2d 162 (Mo. 1985)	Proposition 1 (electricity rate regulation)	Whether Proposition 1 intended to create forfeiture for utility company in event of abandoned construction
<i>Swan v. Montana Dep't of Revenue</i>	755 P.2d 1388 (Mont. 1988)	Initiative 81 (alcohol regulation)	Whether restaurant could be fined for unlawful "liquor" transaction involving wine where initiative amended definition of liquor in alcoholic beverage code to exclude "table wine"
<i>State v. Gallant</i>	764 P.2d 920 (Or. 1988)	Crime Victims' Bill of Rights	Whether shoplifting was "crime involving dishonesty" within meaning of evidence rule
<i>SDDS, Inc. v. State</i>	481 N.W.2d 270 (S.D. 1992)	Measure 1 (waste-disposal facility siting)	Whether phrase "unless the Legislature enacts a bill approving the siting . . . of such facility" referred to legislature's actual passing of bill or to entire process of legislative enactment, gubernatorial approval, and referendum
<i>In re Estate of Thompson</i>	692 P.2d 807 (Wash. 1984)	Initiative 402 (estate taxation)	Whether effective date of initiative dealing with estate taxes was 30 days after election (pursuant to initiative provisions in state Constitution) or later date provided in text of initiative itself
<i>Hi-Starr v. Liquor Control Bd.</i>	722 P.2d 808 (Wash. 1986)	Initiative 171 (alcohol regulation)	Whether specific language of liquor licensing initiative prohibited Liquor Board from adopting additional rule, not contemplated in act, in order to further act's purposes
<i>Estate of Turner v. Washington State Dep't of Revenue</i>	724 P.2d 1013 (Wash. 1986)	Initiative 402 (estate taxation)	Whether estate was required to pay Washington estate tax although it was not required to pay any federal estate tax
<i>City of Tacoma v. State</i>	816 P.2d 7 (Wash. 1991)	Initiative 62 (state taxing power)	Whether initiative limiting relationship between taxing power of state and local services prohibited transfer of services traditionally handled by state without reimbursement or transfer of any new services without reimbursement

CASE NAME	CITATION	INITIATIVE AT ISSUE	INTERPRETIVE QUESTION
Bird-Johnson Corp. v. Dana Corp.	833 P.2d 375 (Wash. 1992)	Initiative 97 (Model Toxics Control Act)	Whether Model Toxics Control Act created implied right of action for contribution for recovery of remedial action costs
Washington Fed'n of State Employees v. Office of Fin. Management	849 P.2d 1201 (Wash. 1993)	Initiative 207 (state Personnel Board)	Whether initiative dealing with authority of state Personnel Board to generate salary and classification plans impliedly repealed authority of Office of Financial Management to "amend or alter" state salary schedules