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## Article

# Interpreting Initiatives

Michael D. Gilbert<sup>†</sup>

### INTRODUCTION

In 2011, in the shadow of an explosive referendum on collective bargaining rights,<sup>1</sup> voters in Ohio quietly confronted Issue 3.<sup>2</sup> Drafted by conservative groups and propelled to the ballot by 546,000 signatures,<sup>3</sup> the measure would amend the state constitution to read: “[N]o law or rule shall compel . . . any person, employer, or health care provider to participate in a health care system.”<sup>4</sup> The measure sought to undermine the “individual mandate,” a provision of the federal Affordable Care Act (ACA)<sup>5</sup> requiring Americans to purchase health insurance.<sup>6</sup> The

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<sup>†</sup> Associate Professor, University of Virginia School of Law. This paper was written for a symposium entitled *A More Perfect Union? Democracy in the Age of Ballot Initiatives* held at the University of Minnesota School of Law on October 26, 2012. For helpful input I thank attendees of that symposium and Ben Doherty, Ethan Leib, Caleb Nelson, Dan Ortiz, Richard Schragger, Glen Staszewski, and Ferras Vinh. Copyright © 2013 by Michael D. Gilbert.

1. See Rachel Weiner, *Issue 2 Falls, Ohio Collective Bargaining Law Repealed*, WASH. POST (Nov. 8, 2011, 9:38 PM), [http://www.washingtonpost.com/blogs/the-fix/post/issue-2-falls-ohio-collective-bargaining-law-repealed/2011/11/08/gIQAyZ0U3M\\_blog.html](http://www.washingtonpost.com/blogs/the-fix/post/issue-2-falls-ohio-collective-bargaining-law-repealed/2011/11/08/gIQAyZ0U3M_blog.html).

2. See Catherine Candisky, *Health-Care Mandate Liberty or Lawsuit ‘Orgy’? Issue 3 Debaters Differ*, COLUMBUS DISPATCH, Oct. 27, 2011, at 1A (“With less than two weeks until Election Day, Issue 3 has gotten scant attention and neither side apparently has funding for television advertising.”).

3. Jim Provance, *Obama Health Care Opponents File Petitions in Columbus*, TOLEDO BLADE, July 6, 2011, <http://www.toledoblade.com/State/2011/07/06/Obama-healthcare-opponents-file-petitions-in-Columbus.html>.

4. OHIO SEC. OF STATE, ISSUE 3: PROPOSED BALLOT INITIATIVE (2009), available at <http://www.sos.state.oh.us/SOS/upload/ballotboard/2011/3-language.pdf>

5. 26 U.S.C. § 5000A (Supp. 2011).

6. See Andy Kroll, *The Ohio Tea Party’s Big “Obamacare” Fail*, MOTHER JONES (Nov. 3, 2011, 2:00 AM), <http://www.motherjones.com/politics/2011/11/ohio-issue-3-obamacare-tea-party> (“An early pamphlet created by the Ohio Project, the grassroots group created to promote the amendment, focuses entirely on defusing ‘the new federal health care measure passed by Congress.’”).

proponents of Issue 3 extolled voters to “[p]rotect your health care freedom . . . and keep government out of your personal medical decisions.”<sup>7</sup> Ohioans approved the measure by a wide margin, with 66% voting in favor.<sup>8</sup>

Issue 3 cannot achieve its intended purpose because the Supremacy Clause stipulates that federal laws like the ACA trump state law.<sup>9</sup> By the time of the election, even supporters of the measure conceded that.<sup>10</sup> But at the state level it still has teeth. In addition to forbidding compulsory participation in a (state) health care system, Issue 3 forbade laws prohibiting “the purchase or sale of health care,” defined the term “health care system,” and added other provisions to the constitution.<sup>11</sup> That language begs many questions. Does Issue 3 render invalid the state’s ban on late term abortions? That ban, the argument goes, unlawfully prohibits “the purchase or sale of health care.”<sup>12</sup> Does Issue 3 affect state policies on workers compensation, child support, school immunizations, college coverage, and disease tracking?<sup>13</sup> All of those programs compel some actors to purchase health care or otherwise participate in the health care system.<sup>14</sup> The list of questions goes on. As one critic put it, Issue 3 “will breed an orgy of lawsuits.”<sup>15</sup>

Issue 3 is not unique, nor are the interpretive challenges it raises. Voters in dozens of states routinely use initiatives, some constitutional and some statutory, to address important issues ranging from taxes to abortion and eminent domain.<sup>16</sup> The task

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7. OHIO SEC. OF STATE, VOTE YES ON ISSUE 3 (2011), available at <http://www.sos.state.oh.us/SOS/upload/ballotboard/2011/3-argument-for.pdf>.

8. Weiner, *supra* note 1.

9. U.S. CONST. art. VI, cl. 2.

10. See Candisky, *supra* note 2 (“In the first public debate on Issue 3, both sides agreed that the proposed constitutional amendment would not exempt Ohioans from a requirement in the new federal health-care law that most Americans buy health insurance . . .”).

11. See OHIO SEC. OF STATE, *supra* note 4.

12. See Press Release, Innovation Ohio, IO Report: Why Conservatives Should Oppose Issue 3 (Oct. 26, 2011), <http://innovationohio.org/press/io-report-why-conservatives-should-oppose-issue-3>.

13. See MAXWELL J. MEHLMAN ET AL., INNOVATION OHIO, BAD MEDICINE: UNINTENDED CONSEQUENCES OF OHIO’S ISSUE 3, at 3–4 (Sept. 1, 2011), [http://69.195.124.74/~innovby5/wp-content/uploads/2011/09/IOReport\\_BadMedicine\\_0901.pdf](http://69.195.124.74/~innovby5/wp-content/uploads/2011/09/IOReport_BadMedicine_0901.pdf); see also Kroll, *supra* note 6 (discussing potential unintended consequences).

14. See MEHLMAN ET AL., *supra* note 13, at 3.

15. See Candisky, *supra* note 2.

16. These examples come from 2011 alone. See *Election 2011 Preview*, BALLOTWATCH (Initiative & Referendum Inst., L.A., Cal.), Oct. 2011, <http://>

of interpreting them routinely falls on courts.<sup>17</sup> That interpretive function is especially fraught in the context of direct democracy. Many initiatives are poorly drafted, and many judges are subject to reelection by the same voters who approved the initiatives.

This Article takes on the twin questions of how do, and how should, courts interpret initiatives? With respect to the first, judges almost universally claim that they seek “voter intent.”<sup>18</sup> Scholars reject this approach on the ground that such intent does not exist or cannot be ascertained.<sup>19</sup> In other words, judges are not doing—indeed, cannot do—what they say. But I suggest otherwise. We can understand the search for voter intent to be a search for the preferences of the median voter. That concept is concrete. Those preferences, though difficult to ascertain, did exist when the initiative passed.<sup>20</sup> This analysis clarifies the inquiry by uncovering an objective target for judges in these cases. It also may have explanatory power. Judges subject to reelection or reappointment have some incentive to consider the interpretation today’s median voter would favor, and today’s median may resemble the enacting median.

With respect to the second question, I develop the case for why judges should interpret initiatives consistent with the preferences of the median voter. Direct democracy is an explicitly majoritarian institution.<sup>21</sup> In 1912, Theodore Roosevelt proclaimed that the power of initiative and referendum would help ensure “the majority of the people do in fact, as well as theory, rule.”<sup>22</sup> It makes sense then, one might reason, to identify the plausible interpretations of an initiative and ask which one a majority of voters would have preferred. Under reasonable assumptions, a majority would have preferred the median voter’s favorite interpretation to all others.<sup>23</sup> That interpretation has an especially strong claim to being majoritarian and, therefore, is consistent with the purpose of direct democracy.

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[www.iandrinstitute.org/BW%202011-1%20Preview.pdf](http://www.iandrinstitute.org/BW%202011-1%20Preview.pdf).

17. See *infra* Part I (discussing how judges do and should interpret initiatives).

18. See *infra* Part I.A.

19. See *infra* Part I.

20. They existed under certain assumptions anyway. See *infra* Part II.

21. See *infra* notes 71–75 and accompanying text.

22. 17 THEODORE ROOSEVELT, *The Right of the People to Rule*, in THE WORKS OF THEODORE ROOSEVELT 151, 152 (Hermann Hagedorn ed., 1926).

23. See *infra* Part II.

I am not the first to suggest that judges focus on the median. Many scholars have argued that courts interpreting statutes do—or should—consider the preferences of the median legislator or of median committee members.<sup>24</sup> But the argument is much stronger where initiatives are concerned. Focusing on the median does not further the purpose of legislatures, but it *does* further the purpose of direct democracy.

To be clear, I do not argue that majoritarianism is “best” or socially optimal. Nor do I endorse direct democracy. I do not even “endorse” majoritarian interpretations. I am not advocating for a policy proposal but rather exploring ideas. I am trying to separate questions about the meaning of particular initiatives from normative judgments about the use of initiatives in general. If we focus just on meaning, and if we accept direct democracy’s majoritarian purpose, then we can develop a case for attending to the preferences of the median voter.

The analysis leads to some surprising conclusions. If judges confront an ambiguity in an initiative, and if they seek the majoritarian interpretation, then they should consider the views of all voters, including those who *opposed* the initiative.<sup>25</sup> Courts probably should not adopt the interpretation favored by an initiative’s drafters, even though they know the initiative best. Opinion polls might be helpful when interpreting initiatives. Lastly, we should not necessarily condemn judges for interpreting initiatives in a particular way because of electoral concerns. To the extent that they respond to today’s median voter, and to the extent that today’s median resembles the enacting median, such judges can be understood to act legalistically.

The paper concludes by connecting the question of interpretation to the question of constitutional review. Some prominent scholars fear that initiatives violate federal and state constitutions more often than ordinary legislation. Unchecked majorities, they worry, will stamp on the rights of minorities. They have responded by calling for a more searching judicial review of initiatives. Facilitating that kind of review probably would require greater judicial independence; judges subject to reelection or reappointment probably will not strike down popular initiatives on the constitutional margin. But greater independence implies less accountability, which in turn implies a

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24. See, e.g., McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705 (1992) (arguing for the use of positive political theory to interpret original legislative intent).

25. See *infra* notes 137–41 and accompanying text.

weaker incentive to respond to the median voter when interpreting ambiguities. So scholars may face a choice. To get the searching judicial review that initiatives may warrant they may have to sacrifice the majoritarian interpretations that initiatives deserve.

One clarification is in order. In this paper I focus only on judicial interpretation of initiatives, by which I mean plebiscites drafted by private individuals or groups and presented to the electorate for a vote. I include in that category indirect initiatives that were first presented to the legislature and then, after the legislature failed to approve them, presented to the electorate. I focus on both constitutional and statutory initiatives. I do not analyze referendums, by which I mean plebiscites involving laws that originated in the legislature.

### I. THE INTERPRETATION DILEMMA

For over a century Americans have used initiatives to make law at state and local levels,<sup>26</sup> but the attendant questions about interpretation long escaped scholars' notice. Professor Jane S. Schacter wrote the germinal article in 1995.<sup>27</sup> Her paper, like mine and most of the literature on the topic, divides the inquiry into two parts, one descriptive and one normative.

#### A. HOW DO JUDGES INTERPRET INITIATIVES?

Schacter began with the descriptive question, how do judges interpret initiatives? She examined fifty-three cases in which judges interpreted statewide statutory initiatives.<sup>28</sup> She found that in the "vast majority" of those cases, "courts declare[d] that their task is to locate the controlling popular intent behind the provision at issue."<sup>29</sup> Subsequent studies have generally supported her conclusion.<sup>30</sup> When faced with ambiguity in an initiative, courts ask what voters intended.

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26. See KENNETH P. MILLER, *DIRECT DEMOCRACY AND THE COURTS* 22–40 (2009) (describing the Populist inception of direct democracy and its development through the Progressive Era into the late twentieth century).

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

28. See *id.* at 114–17 (describing the criteria and geographic composition of the cases).

29. *Id.* at 117.

30. See, e.g., Sean Pager, *Is Busing Preferential? An Interpretive Analysis of Proposition 209*, 21 *WHITTIER L. REV.* 3, 12 (1999) ("When construing a constitutional provision enacted by initiative, the intent of the voters is the paramount consideration." (quoting *Davis v. City of Berkeley*, 794 P.2d 897, 900

What sources do courts use to ascertain voter intent? Schacter found that they rely heavily on the text of the initiative in question.<sup>31</sup> That is consistent with the common and sensible (but not irrefutable) claim that the language of a law provides the best evidence of the lawmakers' intentions.<sup>32</sup> They also consider other legal texts, such as related statutes and official ballot materials.<sup>33</sup> Those materials, which are prepared by the government and made available to voters before the election, typically contain the titles of the initiatives to be voted on, short summaries of them, their full texts, arguments by proponents and opponents, and so forth.<sup>34</sup>

Interestingly, courts do not often rely on media. They do not consider news reports regarding the initiatives, editorials, political advertisements supporting or opposing them, endorsements, or opinion polls.<sup>35</sup> Schacter found that paradoxical.<sup>36</sup> Most voters rely heavily on media—and little on legal text—when forming their intentions and deciding how to vote.<sup>37</sup> Yet courts seeking voters' intentions focus on text.

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(Cal. 1990)); Glenn C. Smith, *Solving the "Initiatory Construction" Puzzle (and Improving Direct Democracy) by Appropriate Refocusing on Sponsor Intent*, 78 U. COLO. L. REV. 257, 261 (2007) ("[Courts] seek to discern the intent of the 'legislators' (citizen voters) who enacted the law in question. . . . [I]nitiatory-construction commentators have discussed cases that confirm the point. Searching for voter intent . . . continues to be a staple of opinion writing in California."). *But see* Michael M. O'Hear, *Statutory Interpretation and Direct Democracy: Lessons from the Drug Treatment Initiatives*, 40 HARV. J. ON LEGIS. 281, 283 (2003) (reviewing cases interpreting drug treatment initiatives and concluding that Schacter "may have overemphasized the role of popular intent").

31. *See* Schacter, *supra* note 27, at 120–23 (noting an "almost exclusive focus" on "formal sources").

32. *See, e.g.*, Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 357–69 (2005) (detailing the debate between textualists and intentionalists as to the appropriate sources for discerning legislative intent).

33. *See* Schacter, *supra* note 27, at 120–23.

34. *See id.*

35. *See id.* ("With a single exception, the opinions studied never mentioned information provided to voters by the news media or by advertisements.").

36. *See id.* at 130–44 (noting this paradox "draws sharply into question the decipherability of mass electoral intentions").

37. *Id.* (providing evidence); *see* Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus"*, 50 UCLA L. REV. 1141, 1145–46, 1151–54, 1157–59 (2003) (explaining how and why voters in direct democracy use heuristic cues); *see also* Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 ELECTION L.J. 295, 296–99 (2005) (same); Press Release, Wash. Sec'y of State, Reed Asks Lawmakers to Trim

In summary, courts interpreting initiatives behave much like courts interpreting ordinary legislation.<sup>38</sup> In both settings, judges often state that they seek the intent of the lawmakers, whether legislators or voters. They then try to identify that intent by examining the text of the law and its legislative history—committee reports and related sources for ordinary legislation, official ballot materials for initiatives.<sup>39</sup>

Courts in both settings are subject to the same two-pronged criticism: group intent does not exist or cannot be ascertained. Various scholars have made the point in various ways,<sup>40</sup> but perhaps Max Radin, writing in 1930, stated it best:

A legislature certainly has no intention whatever in connection with words which some two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs.

. . . The chances that of several hundred men each will have exactly the same determinate situations in mind . . . are infinitesimally small. . . . Even if the contents of the minds of the legislature were uniform, we have no means of knowing that content . . . .<sup>41</sup>

Initiatives magnify the problems Radin identified. Voters far outnumber legislators, they have a weaker grasp on technical legal terms, and they are less likely to foresee the myriad situations to which a new law may apply.<sup>42</sup> That means they will have mixed intent, nonsensical intent, or no intent at all on

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Elections Costs (Jan. 6, 2012), available at [http://www.sos.wa.gov/office/news\\_releases.aspx](http://www.sos.wa.gov/office/news_releases.aspx) (describing a recent effort by Washington's Secretary of State to remove the text of initiatives from a distributed ballot pamphlet on the ground that "few people bother to read the entire text of a ballot measure").

38. See Jack L. Landau, *Interpreting Statutes Enacted by Initiative: An Assessment of Proposals to Apply Specialized Interpretive Rules*, 34 WILLAMETTE L. REV. 487, 497 (1998) (discussing the processes judges follow in interpreting initiatives and stating, "[t]he result is an interpretive methodology that identifies the same goal and proceeds in essentially the same manner as that used in interpreting legislatively enacted statutes").

39. *Id.* at 497–99.

40. See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION 16 (1997) (noting the search for legislative intent "does not square with some of the (few) generally accepted concrete rules of statutory construction"); Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

41. Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930).

42. See Schacter, *supra* note 27, at 126–30 (discussing these problems); see also *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 921 (1995) (Thomas, J., dissenting) ("[I]nquiries 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.").



many questions. Even if voters do have an intent, judges cannot possibly uncover it.

California provides a helpful example. In 1982, voters there approved an initiative that established a statutory definition of insanity.<sup>43</sup> Under the new law, sustaining an insanity defense required one to show that “he or she was incapable of knowing or understanding the nature and quality of his or her act *and* of distinguishing right from wrong.”<sup>44</sup> The conjunctive “and” made it harder to sustain an insanity defense—harder than it had been under the test in *People v. Drew*,<sup>45</sup> which the initiative supplanted, and harder than it had been under the test in *M’Naghten’s Case*,<sup>46</sup> which prevailed before *Drew*.<sup>47</sup> In *People v. Skinner*,<sup>48</sup> the Supreme Court of California interpreted the initiative. The court concluded that the initiative “was intended to . . . restore the *M’Naghten* test.”<sup>49</sup> Reaching that result required the court to correct a “draftsman’s error,”<sup>50</sup> replacing “and” with “or.” The notion that most voters understood—and understood in the same way—the tests in *M’Naghten* and *Drew*, the relationship between those tests and the language quoted above, and the possibility that courts would correct the “error” in the initiative is “strikingly implausible.”<sup>51</sup>

For reasons like that Schacter calls the search for voter intent “[i]ntractable” and “futile.”<sup>52</sup> Professor Glenn Smith calls voter intent an “illusory commodity.”<sup>53</sup> Professor Chris Goodman has written, “[i]t is truly a legal fiction to attempt to ascertain a common intent from the millions of people who vote in favor of a particular ballot measure.”<sup>54</sup> Even if such an intent

43. See *People v. Skinner*, 704 P.2d 752, 753 (Cal. 1985).

44. *Id.*

45. 583 P.2d 1318, 1329 (Cal. 1978), *superseded by statute*, CAL. PENAL CODE § 25 (West 1999), *as recognized in Skinner*, 704 P.2d at 754.

46. (1843) 8 Eng. Rep. 718 (H.L.) 719.

47. See *Skinner*, 704 P.2d at 754.

48. See *id.*

49. *Id.*

50. See *id.* at 758.

51. Schacter, *supra* note 27, at 141.

52. *Id.* at 123, 153.

53. Smith, *supra* note 30, at 263–64.

54. Chris Chambers Goodman, *Examining “Voter Intent” Behind Proposition 209: Why Recruitment, Retention, and Scholarship Privileges Should Be Permissible Under Article I, Section 31*, 27 CHICANO-LATINO L. REV. 59, 72 (2008). Of course, there are arguments to the contrary. See, e.g., Cathy R. Silak, *The People Act, the Courts React: A Proposed Model for Interpreting Initiatives in Idaho*, 33 IDAHO L. REV. 1, 4 (1996) (supporting the search for voter

existed, courts could not find it. As Professor Philip Frickey explained, “the only practical way to attempt to investigate [voters’] motive would be to invade the sanctity of the secret ballot.” Even then “one might well end up with equivocal . . . data.”<sup>55</sup>

All of that criticism begs an important question. If judges cannot ascertain voter intent, what should they do instead?

#### B. HOW SHOULD JUDGES INTERPRET INITIATIVES?

Scholars have called for new approaches to the interpretation of initiatives. Schacter, for example, would like courts to use an interpretive regime specially designed for them.<sup>56</sup> The regime would include “interpretive litigation,” which would allow litigants, intervenors, and amici curiae to “explore in depth and argue the merits of different plausible interpretations.”<sup>57</sup> She would also like courts to watch for “abuse” of the process.<sup>58</sup> Initiatives that are long, complex, full of jargon, characterized by “subliminally directed advertising,” or harmful to marginalized groups should, in her view, be interpreted narrowly.<sup>59</sup>

Frickey also proposed reforms. He called for a “three-part canonical inquiry to interpreting ballot propositions.”<sup>60</sup> First, courts should work especially hard to avoid interpretations of initiatives that cast doubt on their constitutionality.<sup>61</sup> Second, because direct democracy is “in derogation of republican government,” initiatives should be narrowly construed when they conflict with pre-existing laws.<sup>62</sup> And third, substantive canons such as the rule of lenity should be given extra force where initiatives are concerned.<sup>63</sup>

Other proposals abound. Professor Glen Staszewski argues that under certain circumstances courts should resolve ambiguities in initiatives consistent with the intent of their sponsors, not voters.<sup>64</sup> Some favor a “purposive or dynamic approach” to

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intent and proposing guidelines on how to discern it).

55. Philip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1996 ANN. SURV. AM. L. 477, 488–89 n.67.

56. See Schacter, *supra* note 27, at 152–64.

57. *Id.* at 155.

58. *Id.* at 157.

59. *Id.* at 156–59.

60. Frickey, *supra* note 55, at 522.

61. *Id.* at 512–17, 522.

62. *Id.* at 517–22.

63. See *id.* at 522–23.

64. See Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 433–35

interpreting initiatives.<sup>65</sup> Others argue that in order to encourage clear drafting, initiatives should be interpreted to the detriment of their drafters.<sup>66</sup> Still others argue for broad interpretations when initiatives address certain issues, such as redistricting, term limits, the advancement of marginalized groups, and narrow interpretations in other circumstances.<sup>67</sup> One paper argues that courts should look for the intent of “that voter who falls as far to the narrow side of center as the text allows.”<sup>68</sup>

I do not purport in the preceding paragraphs to capture all details of the proposed reforms. Nor will I work systematically through their pros, which may be substantial, and their cons.<sup>69</sup> Instead I will highlight what I believe to be a commonality of every proposal: they do not further direct democracy’s purpose.

Direct democracy is a fundamentally majoritarian institution. Defending direct democracy in a speech, Theodore Roosevelt thundered that “[n]o sane man who has been familiar with the government of this country for the last twenty years will complain that we have had too much of the rule of the majority.”<sup>70</sup> In 1893, J.W. Sullivan argued that direct democracy would facilitate governance in accordance with “the conscience

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(2003); see also Smith, *supra* note 30 (refining and expanding Staszewski’s proposal); cf. Ethan J. Leib, *Interpreting Statutes Passed Through Referendums*, 7 ELECTION L.J. 49, 49–51 (2008) (arguing that referenda, which “enable[] citizens to ratify or reject statutes passed by a legislature,” should be interpreted consistent with legislative intent).

65. Evan C. Johnson, Comment, *People v. Floyd: An Argument Against Intentionalist Interpretation of Voter Initiatives*, 45 SANTA CLARA L. REV. 981, 983 (2005).

66. See generally D. Zachary Hudson, Comment, *Interpreting the Products of Direct Democracy*, 28 YALE L. & POL’Y REV. 223, 224 (2009).

67. See Note, *Judicial Approaches to Direct Democracy*, 118 HARV. L. REV. 2748, 2766–68 (2005); see also Elizabeth Garrett, *Who Directs Direct Democracy?*, 4 U. CHI. L. SCH. ROUNDTABLE 17, 35 (1997) (suggesting that courts distinguish between “structural” and “legislative” initiatives and treat them differently).

68. Stephen Salvucci, Note, *Say What You Mean and Mean What You Say: The Interpretation of Initiatives in California*, 71 S. CAL. L. REV. 871, 884 (1998).

69. For criticism of proposed reforms, especially those of Schacter, Frickey, or both, see generally Landau, *supra* note 38, at 490; John Copeland Nagle, *Direct Democracy and Hastily Enacted Statutes*, 1996 ANN. SURV. AM. L. 535, 536; O’Hear, *supra* note 30, at 336; Smith, *supra* note 30, at 28; Note, *Judicial Approach to Direct Democracy*, *supra* note 67, at 2762. See also Frickey, *supra* note 55, at 492–94 (critiquing Schacter’s proposals).

70. ROOSEVELT, *supra* note 22, at 152.

of the majority.”<sup>71</sup> His book helped place direct democracy on the national agenda.<sup>72</sup> William Jennings Bryan, a leading advocate of direct democracy, argued that the initiative “is the most effective means . . . for giving the people absolute control over their Government.”<sup>73</sup> For him “the people” meant “the majority.”<sup>74</sup> The Populists who agitated for direct democracy believed a “majority of the people . . . could never be corruptly influenced.”<sup>75</sup>

I see no reason to believe that Schacter’s interpretive litigation, or that Schacter and Frickey’s narrow constructions, will vindicate the will of the majority. Nor were they intended to.<sup>76</sup> I see no reason to believe that giving extra force to substantive canons of construction will either. Sponsor intent may not align with majority will, and interpreting initiatives to the detriment of sponsors may undercut majority will. In short, none of the proposed reforms, laudable though they may be in many regards, comports systematically with the core purpose of initiatives, which is to effectuate the will of the majority.

Why might that be? The explanation, I believe, lies in a conflation. Scholars have mixed questions about the meaning of particular initiatives with normative judgments about the initiative process. Instead of determining the meaning of initiatives first and then making normative judgments about them,

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71. J.W. SULLIVAN, *DIRECT LEGISLATION BY THE CITIZENSHIP THROUGH THE INITIATIVE AND REFERENDUM* 7 (1892).

72. See RICHARD J. ELLIS, *DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA* 28 (2002) (“Arguably the single most important event in the birth of the initiative and referendum in America was the publication . . . of a small book with the awkward title *Direct Legislation by the Citizenship through the Initiative and Referendum*. So electric was its impact that the title page of the 1893 edition boasted that it was ‘the book that started the Referendum Movement.’”).

73. WILLIAM JENNINGS BRYAN, *THE PEOPLE’S LAW* 10 (1914).

74. See *id.* at 16–19 (discussing how simple majorities of voters decide whether initiatives take effect); see also MILLER, *supra* note 26, at 26 (“Bryan . . . believed that [the initiative power] should be made as robust as possible so that the majority could have its way.”).

75. THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 45 (1989).

76. Schacter described her approach as “metademocratic.” Schacter, *supra* note 27, at 153. It would “further a larger vision of democracy,” *id.*, by, for example, “infusing the initiative lawmaking process with norms favoring deliberation and discouraging abuses of the process.” *Id.* at 161. Frickey argued that interpretation in this area should attempt to achieve two goals: “respect for direct democracy” and “respect for public values—especially constitutional values, including the republican value of representative government.” Frickey, *supra* note 55, at 510.

they start with normative judgments that drive the determination of meaning. Schacter, for example, worries about information deficits on the part of voters, the lack of deliberation, and the ability of organized interest groups to abuse the initiative process.<sup>77</sup> Frickey was concerned with the lack of “robust” public consideration of initiatives and with strategic drafting and manipulation by sponsors.<sup>78</sup> Those general concerns influenced those scholars’ (and perhaps others’) views towards interpretation.

That approach can create at least two problems. First, the resulting prescriptions may be wrong. The initiative process is not always flawed or flawed in the same way. General interpretative techniques designed to mitigate a flaw, or a set of flaws, may be inapt for any particular initiative.<sup>79</sup> If they are sufficiently inapt sufficiently often, their costs will exceed their benefits. Second, even if the techniques mitigate problems, they come at a price: difficulty in assessing the process. Observers may not know whether to attribute the successes and failures of initiatives to the process itself—direct voting by the people—or to judges’ efforts to smooth the edges of the process with specialized interpretations. That could cloud the pros and cons of initiatives and stifle reforms.

The rest of the paper separates the two lines of analysis. Rather than considering ambiguities in initiatives with an eye towards general problems with the process, I consider them with an eye towards the *purpose* of the process. That purpose is to further majority will. And that raises a question: Can we ascertain the will of the majority and use it to resolve ambiguities in initiatives? Or is majority will, like voter intent, a rhetorically attractive but empty concept?

## II. MEDIAN DEMOCRACY AND MAJORITY WILL

This Part relates the notion of majority will to a technical concept, the “Condorcet winner.” I define that concept and explain why the Condorcet winner among a set of policy proposals has an especially strong claim to being the majoritarian social

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77. See Schacter, *supra* note 27, at 155–59. Many observers have expressed such concerns. See, e.g., Staszewski, *supra* note 64, at 412–35.

78. See Frickey, *supra* note 55, at 523 (arguing that his interpretive approach could help resolve those problems).

79. Schacter recognized this. See Schacter, *supra* note 27, at 160 (noting, for example, that a “universal rule of narrow construction applied to all initiative laws . . . would be flawed in important respects”).

choice. I also explain why Condorcet winners do not usually exist when legislators vote on legislation but plausibly do exist when voters vote on initiatives. In the initiative setting, the Condorcet winner will tend to be the proposal favored by the median voter. Readers already familiar with these ideas can skip to Part III.

In *The Strategic Constitution*, Professor Robert Cooter distinguishes between two systems for making collective decisions in a democracy.<sup>80</sup> The first system, which he calls bargain democracy, is characterized by representatives of the citizenry compromising with one another across policy issues.<sup>81</sup> When members of Congress engage in logrolling to pass a bill—you support my farm subsidies, I will support your environmental protections—they epitomize bargain democracy.

Bargain democracy has many potential advantages, including the ability to capture gains from trade. Just as a buyer and seller of goods both gain from a voluntary transaction—they must, otherwise they would not have engaged in it—buyers and sellers of votes gain too.<sup>82</sup> The Congressman who supports farm subsidies and the Congresswoman who supports environmental protections exchange votes with one another to enact their favorite policies. That makes them better off and, if they accurately represent their constituents, it can make society better off too.<sup>83</sup>

But bargain democracy has downsides, one of which is that it problematizes the concept of majority will. That is because bargain democracy usually fails to select from the menu of poli-

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80. See generally ROBERT D. COOTER, *THE STRATEGIC CONSTITUTION* 101–70, 361–63 (2000) [hereinafter COOTER, *STRATEGIC*] (distinguishing median democracy, which involves issue-by-issue decision-making, from bargain democracy, which involves decision-making across issues); Robert Cooter, *Constitutional Consequentialism: Bargain Democracy Versus Median Democracy*, 3 *THEORETICAL INQUIRIES L.* 1, 7 (2002).

81. See COOTER, *STRATEGIC*, *supra* note 80, at 361–63.

82. For the germinal analysis, see generally JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1965); see also Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 *U. PITT. L. REV.* 803, 831–36 (2006) (discussing potential consequences of logrolling).

83. Gilbert, *supra* note 82, at 836 (stating that “[i]f legislators accurately represent all of their constituents, then . . . legislators and citizens will generally experience the same effects from vote trading,” but noting that this is unrealistic because preferences vary and some constituents “will benefit from a particular vote trade while others will suffer harm”).

cy options the Condorcet winner—indeed, it usually *precludes the existence* of a Condorcet winner.

The Condorcet winner is the proposal that would defeat all other proposals in a head-to-head vote under a system of majority rule.<sup>84</sup> To illustrate, if legislators consider three alternative policy proposals, X, Y, and Z, and if a majority prefers X to Y and X to Z, then X is the Condorcet winner. A majority prefers X to all alternatives.

The Condorcet winner has normative appeal. As Professor William Riker wrote,

According to the first, “deeper” requirement of fairness and consistency, the Condorcet criterion, if an alternative beats (or ties) all others in pairwise contests, then it ought to win. This notion is closely related to the notion of equality and “one man, one vote,” in the sense that, when an alternative opposed by a majority wins, quite clearly the votes of some people are not being counted the same as other people’s votes.<sup>85</sup>

Riker’s second sentence is most important for my purposes. The Condorcet winner can be said to capture, in a concrete way, majority will. It is the only alternative that a majority prefers to all others. If a decision-making process fails to select the Condorcet winner, then majority will has not been actualized, because a majority would prefer the Condorcet winner.

To be clear, I am not arguing that the Condorcet winner is the *best* collective choice, only that it has special claim to being the *majoritarian* choice. Many scholars have argued along those lines.<sup>86</sup>

Under bargain democracy, there usually is no Condorcet winner. That is because bargain democracy involves multiple issues—you vote for my issue, I vote for yours—and in the

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84. See COOTER, *STRATEGIC*, *supra* note 80, at 41.

85. WILLIAM H. RIKER, *LIBERALISM AGAINST POPULISM* 100 (1982).

86. See, e.g., GERALD GAUS, *THE ORDER OF PUBLIC REASON* 329 (2011) (“Condorcet voting is often considered the most majoritarian way to choose among three or more alternatives.”); Gerald H. Kramer, *Some Procedural Aspects of Majority Rule*, in *NOMOS XVIII: DUE PROCESS* 264, 268 (J. Roland Pennock & John W. Chapman eds., 1977) (“When an alternative satisfies the Condorcet criterion, we can speak of the *majority* will . . . .”); cf. DUNCAN BLACK, *THE THEORY OF COMMITTEES AND ELECTIONS* 57–58 (1958) (“[T]he majority candidate who, in a direct vote against them, would defeat each of the others . . . . ought to be elected . . . . [T]he claims of the Condorcet criterion to rightness seem to us much stronger than those of any other.”); Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox*, 75 *VA. L. REV.* 971, 994–95 (1989) (“[I]t is reasonable to proceed, as does virtually the entire collective choice literature, under the assumption that a Condorcet winner is very desirable.”).

presence of multiple issues collective preferences are usually “intransitive,” which means they are circular.<sup>87</sup> Social choice theorists have offered general analyses of the problem.<sup>88</sup> Here I illustrate with an example.

Suppose three legislators are deciding whether to vote for three individual policy proposals, X, Y, and Z.<sup>89</sup> Suppose the policy proposals address unrelated matters. The first legislator supports X and X alone, the second supports Y and Y alone, and the third support Z and Z alone. Each feels so strongly about her favored policy that she would gladly accept either one of the disfavored policies to get it. So three packages of proposals—XY, XZ, YZ—would defeat the status quo in a head-to-head vote. Among the packages, however, there may be no Condorcet winner. One majority (legislators 1 and 2) might prefer XY to XZ, while another majority (legislators 1 and 3) prefers XZ to YZ, and a third majority (legislators 2 and 3) prefers YZ to XY. Their collective preferences run in circles, and consequently there is no Condorcet winner.

Readers unfamiliar with social choice theory might wonder if this circularity problem is common or the product of my stylized example. The answer is the former. As you increase the number of voters and issues to better approximate the real world, intransitivity becomes almost certain.<sup>90</sup>

Intransitivity does not condemn bargain democracy, and nor does it often occur. Structural mechanisms like agenda setting and stable bargaining among politicians can prevent legislatures from spinning their wheels, even if the underlying preferences of legislators are circular.<sup>91</sup> But intransitivity does

87. See COOTER, STRATEGIC, *supra* note 80, at 37–40.

88. For an accessible discussion with cites to the original work, see KENNETH A. SHEPSLE & MARK S. BONCHEK, ANALYZING POLITICS: RATIONALITY, BEHAVIOR, AND INSTITUTIONS 49–102 (1997).

89. For a fuller discussion, see Gilbert, *supra* note 82, at 833–36.

90. See COOTER, STRATEGIC, *supra* note 80, at 42 (“Voter preferences often form intransitive cycles when political choices occur in multiple dimensions.”); RIKER, *supra* note 85, at 121 (“[A]s the number of voters and alternatives increases, so do the number of profiles without a Condorcet winner.”); SHEPSLE & BONCHEK, *supra* note 88, at 101 (“In multidimensional spatial settings, except in the case of a rare distribution of ideal points (like radial symmetry) that hardly ever occurs naturally . . . . [T]here will be chaos—no Condorcet winner, anything can happen . . . .”). These conclusions follow from important papers, including Richard D. McKelvey, *Intransitivities in Multidimensional Voting Models and Some Implications for Agenda Control*, 12 J. ECON. THEORY 472 (1976).

91. See COOTER, STRATEGIC, *supra* note 80, at 43–46. These conclusions follow from important papers, including Kenneth A. Shepsle, *Institutional Ar-*



mean that in the context of bargain democracy we can only talk of majority will in a limited way.<sup>92</sup> Anytime legislation passes, we can say that a majority prefers that legislation to the status quo. But we cannot say that a majority prefers that legislation to *all alternatives*.

Now consider Cooter's second system for making collective decisions in a democracy, median democracy. This system is characterized by representatives of the citizenry, or even citizens themselves, making decisions issue-by-issue.<sup>93</sup> If members of Congress voted on a particular farm subsidy only, with no thoughts of past or future votes on other issues, and then did the same for a particular provision about the environment, that would epitomize median democracy.

Under median democracy, voters cannot capture gains from trade. Median democracy requires them, whether they are legislators or lay citizens, to decide each issue individually, with no opportunity to make concessions on one in exchange for favors on another.<sup>94</sup> But median democracy has an important upside: it can select a Condorcet winner, and under certain assumptions it will.

Consider this example. Three voters are choosing from three tax rates. The conservative voter prefers 5%, the liberal voter prefers 15%, and the moderate voter prefers 10%. As taxes go above or below a voter's ideal rate, that voter becomes less and less happy. The moderate is the median voter—one voter prefers a higher rate than she, and one prefers a lower rate. Her preferred rate, 10%, defeats each alternative rate 2-to-1 in a head-to-head vote.<sup>95</sup> The median voter's ideal point is the Condorcet winner.

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*rangements and Equilibrium in Multidimensional Voting Models*, 23 AM. J. POL. SCI. 23, 31–33 (1979).

92. See COOTER, STRATEGIC, *supra* note 80, at 42 (“Political philosophy typically justifies laws enacted in a democracy on the grounds that they represent the ‘will of the majority’ or the ‘intent of the people’s representatives.’ Given intransitive voting, however, these phrases make no sense. Intransitive voters have no collective ‘will’ because they contradict themselves.”).

93. See *id.* at 25–35, 361–63.

94. This can lead to problems. Voters must make decisions about a single issue even when they have non-separable preferences across issues, that is, even when their optimal decision on that one issue depends on what happens with other issues. For a discussion, see Dean Lacy & Emerson M.S. Niu, *A Problem with Referendums*, 12 J. THEORETICAL POL. 5, 6–8, 10–16 (2000).

95. The conservative and the moderate prefer 10% to 15%, the moderate and liberal prefer 10% to 5%.

The example can be generalized. When voters cast votes on a single policy issue (in the example, tax rates), and when voters have single-peaked preferences (the further policy moves from their preferred point, whether it is 5% or 10% or whatever, the less happy they become), then the median voter's ideal point is *always* the Condorcet winner.<sup>96</sup> A series of pairwise votes among the options—5% versus 10%, 10% versus 15%, and so forth—will lead inevitably to the selection of the policy that the median voter most prefers. Once selected, that policy cannot be defeated by an alternative. That result, well-known in political science, is the median voter theorem.<sup>97</sup>

The theorem explains why Cooter calls his second decision-making system median democracy.<sup>98</sup> Under that system, and when the conditions in the prior paragraph hold, policy on each issue will gravitate towards the median voter's ideal point.

The theorem leads to this important point. In the context of median democracy, we can talk about majority will in a rich fashion. After a complete series of votes, we cannot only say that a majority prefers the policy left standing to the status quo. We can say a majority prefers it *to all alternative policies*.<sup>99</sup>

When in the United States do we make collective decisions under a system of median democracy? When we vote on initiatives, or so one can reasonably argue.<sup>100</sup> On many issues voters plausibly have single-peaked preferences, and many initiatives are limited to a single issue. That may be because initiatives are more likely to pass when so limited. Adding extra issues can increase opposition, the argument goes, so initiative sponsors have an incentive to limit them to one.<sup>101</sup> In addition, most

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96. There is an additional requirement: there is a unique median. See PETER C. ORDESHOOK, *GAME THEORY AND POLITICAL THEORY* 162 (1986).

97. The theorem was developed in BLACK, *supra* note 86, at 56–57. For an accessible discussion, see COOTER, *STRATEGIC*, *supra* note 80, at 25–27.

98. See, COOTER, *STRATEGIC*, *supra* note 80, at 361.

99. I am still assuming that the conditions specified above are satisfied.

100. See COOTER, *STRATEGIC*, *supra* note 80, at 145 (“In general, direct democracy factors [i.e., separates] the issues, so the median voter should prevail.” (emphasis removed)).

101. See Thad Kousser & Mathew D. McCubbins, *Social Choice, Crypto-Initiatives, and Policymaking by Direct Democracy*, 78 S. CAL. L. REV. 949, 961 (2005) (“The addition of a second, third, or fourth dimension [to a ballot initiative] is political suicide because it increases the possibility of generating opposition.”). Of course, adding issues can also increase support. See Gilbert, *supra* note 82, at 831–36 (discussing logrolling in legislatures, the practice of combining provisions, each supported by a minority, into one bill supported by a majority).

states have a “single subject rule” which is designed to limit initiatives to a single issue.<sup>102</sup> Evidence suggests that the rule does, in fact, limit the scope of some initiatives.<sup>103</sup>

To summarize, bargain and median democracy are alternative systems for making decisions in a democracy. Each has pros and cons, and each has implications for majority will. Under bargain democracy, we have only a thin conception of majority will. We can state that a majority prefers every proposal that passes to the status quo, but we cannot state that a majority prefers a particular proposal to all others. Under median democracy, we have a thicker conception of majority will. There is a Condorcet winner, at least some of the time and maybe much of the time. The majority prefers that policy to all alternatives. To effectuate that policy, many argue, is to effectuate majority will. Voting on initiatives often epitomizes median democracy.

To be clear, the initiative process may not epitomize *ideal* median democracy. Eligible voters outnumber registered voters, and registered voters outnumber actual voters. Consequently, those who vote on initiatives may be unrepresentative of society.<sup>104</sup> Those who vote may lack full information about initiatives,<sup>105</sup> they may be fooled or manipulated by initiative sponsors or opponents,<sup>106</sup> and they may vote inconsistently with their own preferences.<sup>107</sup> Voters may approve initiatives that

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102. See Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 COLUM. L. REV. 687, 704–12 (2010).

103. See Michael D. Gilbert, *Does Law Matter? Theory and Evidence From Single Subject Adjudication*, 40 J. LEGAL STUD. 333, 345–46 (2011) (finding fewer subjects in ballot propositions that judges do not strike down on single subject grounds than in propositions they do, suggesting that the rule deters multidimensional propositions).

104. See, e.g., DAVID MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* 100–21 (1984) (providing evidence that only a non-representative subset of voters vote on initiatives).

105. See, e.g., *id.* at 127–44 (showing that initiatives and ballot pamphlets are difficult to read and that high percentages of voters report being confused by some initiatives); see also Craig M. Burnett et al., *The Dilemma of Direct Democracy*, 9 ELECTION L.J. 305, 307, 312–17 (2010) (providing evidence that significant numbers of voters knew nothing about the initiatives in the study and that some voters made “erratic” choices when voting).

106. See, e.g., SHAUN BOWLER & TODD DONOVAN, *DEMANDING CHOICES: OPINION, VOTING, AND DIRECT DEMOCRACY* 18 (1998) (describing how interest groups sometimes place propositions on the ballot that conflict with others on the ballot in order to “confuse voters” and make the ballot “so long that voters out of frustration and fatigue vote No on all measures”).

107. See, e.g., MAGLEBY, *supra* note 104, at 144 (reporting a survey showing three-quarters of voters on a rent control proposition in California failed to

are attractive as standalone policies but problematic when coupled with other policies.<sup>108</sup>

Those concerns are important in general but largely irrelevant for this paper. Recall that I am separating questions of interpretation from normative judgments about the initiative process, including judgments premised on the above concerns. Doing so leads to new insights about interpretation, which is my focus. As it turns out, however, those insights point to at least one new method for addressing some of the above concerns, as I explain in Part IV.

### III. VOTER INTENT REVISITED

With ideas from Part II in hand, I return to the question of interpreting initiatives. Recall that judges confronting ambiguities in initiatives seek, or claim to seek, to resolve them in accordance with voter intent. Scholars dismiss that. They argue that voters typically have different intents, or no intent at all, with respect to the often obscure and complicated questions that arise in litigation. That is clearly correct, but it may miss the point.

We need not understand judges to seek, literally, the intent of voters. Instead, we can understand them to be searching for the Condorcet winner. In other words, we can understand them to be asking this question: among plausible interpretations, which one would the voters who voted on the initiative have preferred to all others?<sup>109</sup>

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match their policy views on that subject with their votes); David Fleischer, *Prop. 8 by the Numbers*, L.A. TIMES, Aug. 3, 2010, at A15 (“Polling suggests that half a million people who opposed same-sex marriage mistakenly voted *against* the proposition. They were confused by the idea that a “no” vote was actually a vote *for* gay marriage.”).

108. See Lacy & Niou, *supra* note 94, at 12–13 (describing how separate votes on initiatives can lead to passage of a combination of initiatives that voters unanimously oppose). For an interesting, plausible example of the problems Lacy and Niou identify, see BOWLER & DONOVAN, *supra* note 106, at 118–19 (describing how, in 1908, Oregon voters simultaneously approved two ballot measures, one restricting fishing upstream on the Columbia River and the other restricting fishing downstream, and together closing much of the river to fishing despite the importance of fishing to the economy).

109. This is a version of imaginative reconstruction, where “the interpreter tries to discover ‘what the law-maker meant by assuming his position.’” WILLIAM N. ESKRIDGE, JR ET AL., LEGISLATION AND STATUTORY INTERPRETATION 226 (2d ed. 2006) (quoting Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 381 (1907)). Imaginative reconstruction does not necessarily have a clear objective. See *id.* at 227 (“It is not clear that imaginative reconstruction can avoid the . . . problems of specific intent theory . . . . Whose

To begin, my claim is positive and interpretive. I tentatively hypothesize that judges are already doing this, or at least that we can sensibly understand them to be trying to do this. They may not ask themselves the actual question posed in the prior paragraph, but they pursue other inquiries and use interpretive tools that tend to yield the same answer that they would have given *had* they asked the question. I have no hard evidence that this is true, but a few observations support it.

Consider first judges' language. When judges say they seek "voter intent"<sup>110</sup> or the "intent of the electorate,"<sup>111</sup> they might mean that they seek the actual intent of individual voters. That is what commentators think they mean, and that search is fruitless for the reasons discussed. But there is an alternative. They might mean that they seek the interpretation that voters, as a group, would have selected had the question been put to them. That seems consistent with their language, and that search is not fruitless, at least as a matter of theory. Had voters been asked to vote over the alternative interpretations, they would have settled on a particular one: the Condorcet winner.<sup>112</sup> That does not mean that all voters intended that interpretation to control, but it does mean no majority would have preferred an alternative interpretation.

Consider also the case of *Skinner*.<sup>113</sup> There the California Supreme Court made it easier to sustain an insanity defense by rewriting an initiative so that it said "or" instead of "and."<sup>114</sup> If the text generally provides the best evidence of voter intent (presuming intent exists), then one might argue that the decision was wrongheaded. As Chief Justice Bird wrote in dissent,

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intent should the interpreter reconstruct?"). Under my theory it does have a clear objective: to identify the Condorcet winner. For a Condorcet winner to exist, one must be able to situate the plausible interpretations on a single dimension—for example, narrower interpretations on one end, broader interpretations on the other—and voters must have single-peaked preferences over the plausible interpretations. As discussed, voters may not always have single-peaked preferences, but they probably have them some of the time, and they may have them often.

110. See *supra* Part I.A.

111. See, e.g., *Outfitter Props., L.L.C. v. Wildlife Conservation Bd.*, 143 Cal. Rptr. 3d 312, 316 (Cal. App. 2012) ("In interpreting statutory language adopted by voter initiative, our primary task is to determine the intent of the electorate . . .").

112. I assume voters vote on pairwise combinations—for example, A versus B, and then B versus C, and so forth—and discard proposals that lose.

113. *People v. Skinner*, 704 P.2d. 752 (Cal.1985).

114. *Id.* at 758.

“[t]here is nothing . . . that implies that the electorate intended ‘and’ to be ‘or.’ . . . [I]t is not within this court’s power to ignore the expression of popular will and rewrite the statute.”<sup>115</sup> But if I am right and judges seek Condorcet winners, then the decision may seem more palatable. The court concluded that “and” could be a draftsman’s error, so the language was ambiguous.<sup>116</sup> We can understand the court to have then sought the interpretation the median voter would have preferred. That there was no public outcry after *Skinner*, that prosecutors and defense lawyers “lauded the court” for its decision,<sup>117</sup> and that voters in the twenty-seven years since have not bothered to overturn it provides at least some evidence that the court’s guess about the median voter’s preferences was about right.<sup>118</sup> *Skinner* is just an anecdote, of course, but it is suggestive.

Finally, consider judges’ incentives. Many state courts judges, who are primarily responsible for ironing out ambiguities in initiatives, are subject to elections of one form or another. The median voter theorem predicts that in elections with two candidates, the one closest to the middle of the political spectrum—the median voter’s ideal point—will prevail.<sup>119</sup> One way judges can signal their proximity to the median voter is to resolve ambiguities in ways consistent with the median voter’s preferences.

Some judges do not compete against another candidate in their elections but rather face retention elections. In such elections, the incumbent judge, and that judge alone, appears on the ballot, and voters are asked whether they wish to retain him or replace him.<sup>120</sup> If a majority votes to replace, a new judge is selected.<sup>121</sup> Because there is only one candidate, the median voter theorem does not directly apply to retention elections, but

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115. *Id.* at 766 (Bird, C.J., dissenting).

116. *Id.* at 758.

117. Dan Morain, *Court Rewrites Insanity Defense Rule: Prosecution, Defense Advocates Both Praise Return to Earlier Standard*, L.A. TIMES, Sept. 17, 1985, at 3.

118. I am grateful to UVA’s excellent research librarian, Benjamin Doherty, for help in examining the history and (as it turns out non-existent) fallout of *Skinner*.

119. See COOTER, STRATEGIC, *supra* note 80, at 25–27 (“[T]he winning platform in certain conditions is the one favored by the citizen who is the median in the statistical distribution of political sentiment.”).

120. *E.g.*, *Judicial Retention Elections*, IOWA JUDICIAL BRANCH, [http://www.iowacourts.gov/Public\\_Information/About\\_Judges/Retention/](http://www.iowacourts.gov/Public_Information/About_Judges/Retention/) (last visited Apr. 4, 2013).

121. *Id.*

its logic is not irrelevant. A judge who interprets ambiguities consistent with the preferences of the median voter probably has a higher chance of being retained than a judge who fills gaps in politically extreme ways.

Appointed judges also may have an incentive to cater to the median. Although such judges are not directly accountable to the public, the person who appoints them, typically the governor, is.<sup>122</sup> The logic of the median voter theorem usually will compel gubernatorial candidates to align their positions with those favored by the median voter. They can do so by, among other things, selecting or promising to select judges who will interpret ambiguities consistent with the median's preference. That may give sitting judges who seek reappointment (or would-be judges who seek an initial appointment) some incentive to attend to the median.

No judicial selection method is perfect. In the election setting, voters often lack information about judicial candidates.<sup>123</sup> Judges, whether elected or appointed, sometimes may be better off catering to narrow interest groups than to the median voter.<sup>124</sup> Some judges may ignore their reelection or reappointment prospects when making official decisions.<sup>125</sup> Consequently, in-

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122. See, e.g., *Judicial Appointments*, OFF. OF GOVERNOR MARK DAYTON, <http://mn.gov/governor/appointments/judicial-appointments/> (last visited Apr. 4, 2013) (explaining that the Minnesota Commission on Judicial Selection recommends district court judge candidates to the governor for appointment).

123. Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 53–54, 59–72 (2003) (explaining that the vast majority of voters do not understand the candidates or issues, leading to high percentages of voter apathy in judicial elections).

124. For evidence that state judges sometimes respond to narrow interests, including political cronies and campaign contributors, rather than the median voter, see, for example, Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 215 & n.185 (1993) (“Successful [judicial] candidates would have obligations to their supporters and grudges against their opponents.”); Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 649–50 (2008) (explaining that campaign contributions may directly influence judges to rule in favor of contributors or indirectly by increasing the likelihood that judges who “share the interest groups’ preferences” stay in power); Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1063, 1064–65 (2010) (“[S]tudies have shown that elected judges disproportionately rule in favor of their campaign contributors.”).

125. Or they might pay close attention. See, e.g., Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind when It Runs for Office?*, 48 AM. J. POL. SCI. 247, 258 (2004) (finding evidence that some state judges increase prison sentences as their reelections approach).

terpreting initiatives consistent with the median voter's preferences may not be critical to state judges' careers. That does not undermine my argument. I do not claim that judges always interpret initiatives to satisfy the median. I simply claim that many judges have some incentive to attend to the median and that sometimes they may act on that incentive.<sup>126</sup>

To the extent career concerns make judges responsive to the median voter, they presumably make them responsive to *today's* median voter.<sup>127</sup> My claim is that we can understand judges to seek the preferred interpretation of the *enacting* median voter. The two do not necessarily differ, or differ much. Preferences on some issues may be stable, especially over short periods, and the time between enactment and interpretation is often short. But of course they can differ.

For that and other reasons, I do not claim, and I cannot show, that courts *are searching*, definitively, for the interpretation the enacting median voter would have preferred. My claim is that they are plausibly, perhaps unconsciously progressing towards this.

If I am right, then this analysis helps clarify, for scholars and perhaps for judges themselves, decades of judicial practice. When judges interpret initiatives, we need not understand them to be searching in vain for a clear and unified intent among thousands of scattered and heterogeneous voters. Instead, we can understand them to be searching for the unique interpretation that voters as a group would have selected had they been given the chance. When seen through this lens, voter intent is not an "illusory commodity"<sup>128</sup> but a concrete and tractable concept.

This might give pause to scholars who have proposed new approaches to the interpretation of initiatives. If the conventional approach—seeking voter intent—is not fatally flawed, then perhaps new approaches are unwarranted. On the other

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126. That incentive is not entirely accidental; judicial elections were designed in part to make judges more accountable to the public. *See generally* Nelson, *supra* note 124, at 224 ("Since all officials tended to act out of self-interest, the trick was to align their interests with those of the people."); Shugerman, *supra* note 124, at 1067–68 (explaining that supporters of judicial elections wanted to check the legislative and executive branches and make the judiciary more responsive to the defense of the peoples' constitutional rights).

127. Judges may even respond to tomorrow's median if they think they can forecast where public sentiment will lie when their reelection or reappointment date arrives.

128. Smith, *supra* note 30, at 263–64.



hand, the evidence for my theory might be unpersuasive, or even if it is persuasive one might argue that searching for the preference of the median voter is not desirable. Or perhaps it is so difficult as to be pointless or, because it vests judges with discretion, dangerous. The next Part addresses some of those issues.

#### IV. THE CASE FOR THE CONDORCET WINNER

This Part addresses the normative question, how *should* courts interpret initiatives? The answer I explore is simple, at least as a matter of theory: give ambiguous initiatives the interpretation the median voter—by which I mean the median among those who voted on the initiative—would have preferred. If my hypothesis in Part III is correct and we can understand judges to be doing this already, or struggling towards it, then this is a justification of existing practice. If my hypothesis is wrong, then it is an exploration of a new idea, albeit one consistent with the language courts already use to describe their approach to the problem. It is also consonant with the purpose of the institution, and therein lies the heart of the argument.

Direct democracy is a fundamentally majoritarian institution. Earlier in the paper I provided quotes from political figures to support that statement.<sup>129</sup> Language from legal scholars and judges supports it too. Professor Julian Eule, a prominent scholar of direct democracy, wrote: “Majoritarian democracy . . . is the core of our constitutional system. . . . [T]he plebiscite certainly seems to have a strong claim to being its most treasured instrument.”<sup>130</sup> In 1919, the Supreme Court of Washington stated that citizens adopted direct democracy “because they had become impressed with a profound conviction that the Legislature had ceased to be responsive to the popular will.”<sup>131</sup> I

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129. See *supra* Part I.B.

130. Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1513 (1990); see also Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 7 (1978) (“[Reviewing initiatives] involve[s] the difficult task of balancing the statutory rights of minorities against the majority’s desire to implement its will.”); Eule, *supra*, at 1514 (criticizing direct democracy and stating: “The gap between the will of the majority and the voice of the legislature, it turns out, is there by constitutional design.”). To be clear, and notwithstanding the quote in the text, Eule did not believe the federal Constitution itself is especially majoritarian in character. See *id.* at 1522–30 (explaining how the Constitution “filters” and limits majority will).

131. State *ex rel.* Mullen v. Howell, 181 P. 920, 922 (Wash. 1919).

could provide many more quotes from many more sources.<sup>132</sup> Stating that direct democracy is designed to be majoritarian is not controversial.

The rest of the argument follows from that premise. If direct democracy aims to empower the majority, then one might reason that courts should interpret the products of direct democracy in majoritarian-empowering ways. To do otherwise would undercut the institution. Judges are supposed to review initiatives for constitutionality, and perhaps review them with special care,<sup>133</sup> but few would argue that they should undercut the institution that produces them.<sup>134</sup> Doing so could put pressure on judges who stand between democratic majorities and the interpretations those voters preferred. It could also prevent voters from reaping all of the benefits—and observing and paying all of the costs—of direct democracy.

That second argument merits closer attention. As discussed, scholars have suggested new methods for interpreting initiatives.<sup>135</sup> Some of their suggestions are motivated by a desire to mitigate common (or at least commonly perceived) problems with direct democracy.<sup>136</sup> Even if their proposals would mitigate those problems, they may come at a cost: they may make it harder to assess the institution. Observers may not know whether to attribute the successes and failures of initiatives to the initiative process itself or to the process in combination with judges using specialized interpretive techniques. Without a clear picture of the process, it may be difficult to understand and reform it. Separating the question of interpretation from normative judgments about the process would yield

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132. See, e.g., *Evans v. Romer*, 854 P.2d 1270, 1286 (Colo. 1993), *aff'd by Romer v. Evans*, 517 U.S. 620 (1996) (noting that an initiative deserved “great deference” from courts because its support “by a majority of voters” constituted “an expression of popular will”); MILLER, *supra* note 26, at 90 (stating that Justice Black once told then-Solicitor General Thurgood Marshall that his challenge to an initiative had less force because initiatives “let[] the people of the State—the voters of the State—establish their policy, which is as near to a democracy as you can get”).

133. See Eule, *supra* note 130, at 1558 (calling for a “hard judicial look” for initiatives).

134. Frickey may be understood to have taken that position. He argued for narrow construction of initiatives on the ground that they are “in derogation of republican government.” See Frickey, *supra* note 55, at 522. But I do not think he understood himself to take that position. He argued that none of his proposals “seem[] insufficiently respectful of direct democracy because, under each of them, the core purposes of the electorate are protected.” *Id.* at 523.

135. See *supra* Part I.A.

136. See *supra* notes 76–77 and accompanying text.

the opposite virtue and vice. It may not mitigate problems with the process, but it may make those problems plain. That approach may facilitate accurate assessments and reforms, and that outcome may be better for those concerned about direct democracy's problems than the alternative.

If judges want to interpret initiatives in majoritarian ways, then a natural approach would be to search among plausible interpretations for the one that the median voter among those who voted on the initiative would have preferred. To select a different interpretation would undermine majority will by producing a result that a majority of those who voted on the original initiative would, if they could, immediately vote to change.

I can strengthen this line of reasoning with an analogy. Suppose that two initiatives appear on the ballot at the same time. Like the initiative in *Skinner*, suppose that both address the insanity defense, but one says "and" (hard to sustain an insanity defense) and the other says "or" (easier to sustain an insanity defense). As sometimes happens, suppose a majority prefers both proposals to the status quo, and both pass.<sup>137</sup> Because of the conflict in language, both cannot take effect. In this situation, courts in many states follow the highest vote rule, which directs them to give force to the initiative that received the greatest number of affirmative votes and to invalidate the competing measure.<sup>138</sup> The logic is simple: as the Supreme Court of Colorado wrote, "the recipient of the greatest popular support[] will be given effect" because it expresses "the predominant will of the people."<sup>139</sup> Put differently, courts should choose the initiative that "the people" prefer, which is the one that received more votes.<sup>140</sup>

Now suppose that instead of two initiatives, there is only one on the ballot. It passes, and it has a genuinely ambiguous provision. There are good reasons to believe "and" means "and,"

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137. See Michael D. Gilbert & Joshua M. Levine, *Less Can Be More: Conflicting Ballot Proposals and the Highest Vote Rule*, 38 J. LEGAL STUD. 383 (2009) (discussing and providing examples of conflicting initiatives that pass simultaneously).

138. *Id.* at 387–89.

139. *In re Interrogatories Propounded by the Senate Concerning House Bill 1078*, 536 P.2d 308, 314 (Colo. 1975).

140. See *id.* The highest vote rule does not always achieve its intended result. See Gilbert & Levine, *supra* note 137, at 389 ("Contrary to intuition, the highest vote rule can thwart majority will by enacting voters' second-choice proposal (or worse) instead of their first."). For a model explaining why that is so, see *id.* at 389–93.

and there are good reasons to believe “and” means “or.” Which interpretation should courts choose? The analogy to the prior scenario with two initiatives seems strong. If one agrees that courts in that prior scenario are right to seek among the competing initiatives the one that a majority prefers, then perhaps courts should do the same here.

This discussion leads to an important point: if courts want majoritarian interpretations, they should focus on the median among *all* voters, including those who opposed the initiative in question. That may seem counterintuitive, but in fact it is essential, because doing otherwise would thwart majority will. The following example shows why.

In 2004, voters in Michigan approved Proposal 2, a constitutional initiative prohibiting same-sex marriage.<sup>141</sup> The key language of the proposal reads: “[T]he union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.”<sup>142</sup> The last phrase, “for any purpose,” was the subject of a recent decision of the Supreme Court of Michigan.<sup>143</sup> The question the court faced was whether that phrase prohibits public employers from providing health insurance benefits to employees’ same-sex domestic partners.<sup>144</sup>

Suppose that Michigan had only five voters, and suppose one could arrange them from left to right, where Voter 1 had the most liberal views of same-sex relationships and Voter 5 had the most conservative views. Suppose that Voters 3, 4, and 5 voted in favor of Proposal 2, giving it the majority it needed to become law. Suppose that Voter 3 understood the disputed language to ban same-sex marriage but not to prohibit the health insurance benefits. Voter 4 understood the language to ban same-sex marriage *and also* to prohibit the benefits. If a court interpreting the language focused on the median voter among only those who approved the law, it would select the interpretation favored by Voter 4. But that would be anti-majoritarian. A majority, Voters 1, 2, and 3, would prefer Voter 3’s interpreta-

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141. For a discussion of Proposal 2 and the problems initiatives like it raise, see generally Glen Staszewski, *The Bait-and-Switch in Direct Democracy*, 2006 WIS. L. REV. 17 (2006).

142. See MICH. CONST. art. I, § 25.

143. See Nat’l Pride at Work, Inc. v. Governor of Mich., 748 N.W.2d 524, 532 (Mich. 2008).

144. *Id.* at 529.

tion. Voter 3 is the median among all voters, and her preferred interpretation is the Condorcet winner.

This leads to an important point: courts should be wary of the interpretation favored by an initiative's drafters, even if those drafters understand the initiative best. Drafters, one might suppose, typically have strong feelings on the subject of the initiative and relatively extreme views. Otherwise they would not incur the costs necessary to place an initiative on the ballot. Their views may differ substantially from the median voter's. After Proposal 2 passed in Michigan, one of its authors argued that the initiative's broad language not only prohibited same-sex marriage, it prohibited benefits for same-sex partners.<sup>145</sup> That might have reflected the author's sincere understanding of the initiative from the outset. But as the five-voter illustration makes clear, that understanding, if adopted by courts, could be anti-majoritarian.

This discussion gives rise to an important limiting principle. When I suggest that courts give ambiguous initiatives the interpretation the median voter would prefer, I mean the interpretation the median voter would prefer *among plausible interpretations*. I do not suggest that courts, upon encountering any ambiguity, should seek to replace it with the median voter's ideal interpretation. Ambiguities are ubiquitous; different judges can in good faith find ambiguities in many circumstances. Replacing all ambiguities with the median voter's ideal point would be radical. Nearly every initiative garnering majority support, no matter its text and purpose, could be transformed by judicial interpretation into the policy most favored by the median. That could eviscerate the meaning of, and the ability of actors to rely on, legal language.<sup>146</sup>

My position is more modest. I suggest that courts, upon encountering an ambiguity, should identify all plausible interpretations of the language in question. That universe will depend on the exact arguments made by the parties, the text of the initiative, the ballot pamphlets and other extrinsic aids judges consult, and judges' varying philosophies. I make one observation in that regard: if a majority of those who voted on the ini-

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145. See Staszewski, *supra* note 141, at 19.

146. Notwithstanding the decision in *Skinner*, which rewrote the initiative in question but provoked little public response, I believe, and I think most others do too, that some actors rely in important ways on legal language some of the time. See *supra* notes 43–51 and accompanying text. Interpreting initiatives without the limiting principle I discuss would undermine their ability to do that.

tiative would have preferred the status quo that prevailed beforehand to a particular interpretation, then that interpretation is not plausible. Once courts have winnowed the field to plausible interpretations, and regardless of how they have done so, *then* I suggest that they should search among those interpretations for the one the median voter would have preferred.

That leads to the practical question: how are courts supposed to identify the median's preferred interpretation? My principal goal is to uncover a coherent objective for courts interpreting initiatives, not to chart a precise course for achieving it, but I do have one comment and one suggestion. The comment is that identifying a coherent objective could lead to helpful innovations by lawyers and litigants. Providing a target could lead to new approaches and arguments that help judges to strike that target. The suggestion pertains to evidence. Courts could augment their analysis by permitting litigants to introduce, and by taking seriously, opinion polls. Returning to Michigan's Proposal 2, a poll conducted shortly before the election showed that while half of respondents favored a ban on gay marriage, over sixty percent of them opposed denying benefits to public employees' same-sex partners.<sup>147</sup> That suggests that an interpretation of Proposal 2 that only banned gay marriage and left benefits intact would have aligned more closely with the median voter's preference.<sup>148</sup>

Opinion polls have weaknesses. In the Michigan example, the poll was taken close to the time of the vote,<sup>149</sup> but others may not be, raising questions about whether they capture the views of the *enacting* median voter. More generally, polls may raise more questions than answers, and that in turn may give judges discretion subject to abuse.<sup>150</sup> If on average polls do more

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147. See *Nat'l Pride at Work, Inc.*, 748 N.W.2d at 547–48 (Kelly, J., dissenting) (discussing those polls).

148. See *id.* Many interpreters focused on voter intent in the conventional (and many scholars would argue fanciful) sense may have reached the same proposed result: gay marriage is banned but employee benefits remain. See, e.g., *id.* at 552. That buttresses my descriptive claim in Part III insofar as it suggests that decisions rooted in voter intent can be understood, and understood with greater precision, as decisions aimed at majority will. The Supreme Court of Michigan did not adopt the proposed interpretation. See *id.* at 543 (majority opinion) (holding that Proposal 2 forbids the provision of benefits to same-sex domestic partners).

149. See *id.* at 547 (Kelly, J., dissenting) (noting that Michigan poll was taken in August 2004).

150. Cf. Schacter, *supra* note 27, at 144–45 (arguing that permitting judges to consider extrinsic sources, such as media, when interpreting initiatives

harm than good, then perhaps judges should never use them, even if they could help in some cases. Because of those complications I do not argue that courts should give decisive weight to polls. I just suggest that if courts seek the interpretation preferred by the enacting median, polls may sometimes help.

Polls may have another virtue. Recall that those who vote on initiatives are not necessarily representative of all voters, let alone society at large.<sup>151</sup> They may lack complete information about initiatives, and they may be confused or even deceived.<sup>152</sup> Many observers criticize direct democracy on those grounds.<sup>153</sup> Using opinion polls to resolve ambiguities in initiatives could mitigate those problems. Poll respondents may be more representative of society than the subset of voters who voted on the initiative, and pollsters could—I repeat, could—frame issues more clearly than initiative sponsors.

Those ideas raise interesting and hard questions, such as whether citizens who did not vote on an initiative should have any influence in determining its meaning. I take no position on that. I only note that polls could be used for multiple ends.

I conclude with an observation and a qualification. The observation is about judges. Earlier I noted that state judges, because of their accountability, may have an incentive to interpret initiatives consistent with the preference of today's median voter. Ordinarily we would condemn judicial decisions that result from political calculations,<sup>154</sup> but when it comes to the interpretation of initiatives that reaction may be unjustified. This Article suggests that majoritarian interpretations are not only consistent with the language courts have long used to describe their inquiries, they also further the purpose of initiatives. In those respects at least, majoritarian interpretations can be understood to be legalistic, especially when today's median resembles the enacting median. So political pressures, and judg-

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could make the search for voter intent even less determinate).

151. See *supra* note 104 and accompanying text.

152. See *supra* notes 104–07 and accompanying text.

153. See, e.g., CRONIN, *supra* note 75, at 196–222 (criticizing direct democracy on various grounds).

154. See, e.g., Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 696–97 (1995) (“[T]o the extent majoritarian pressures influence judicial decisions because of judges’ electoral calculations, elective judiciaries seem, at least at first glance, irreconcilable with one of the fundamental principles underlying constitutionalism.”).

es' submissions to them, are not necessarily antithetical to law. We can understand them to promote law.

As for the qualification, I am not the first to propose that courts consider the median voter when contemplating the meaning of legal language. Many scholars have argued that courts interpreting statutes do—or should—consider the preferences of the median legislator or of median committee members.<sup>155</sup> However, I am, to my knowledge, the first to make this argument in the context of initiatives, and in that context the argument has special force. Legislators passing statutes epitomize bargain democracy, and in bargain democracy there is no special reason to focus on the median. Political bargaining leads to statutes, or individual provisions of statutes, that favor one interest or another; you get your environmental protections, and I get my farm subsidies. When faced with ambiguities in such provisions, courts may focus, as a default, on the preferences of the median legislator, but we cannot say that such a focus furthers the purpose of the institution or produces Condorcet winners. In direct democracy, on the other hand, we can make exactly these arguments.

#### V. AN INTERPRETATION/REVIEW PARADOX?<sup>156</sup>

In addition to interpretation, legal scholars have focused on another aspect of direct democracy: judicial review.<sup>157</sup> How, they ask, should courts review the constitutionality of initiatives? One school of thought, championed by Professors Julian Eule and Derrick Bell, holds that because of their majoritarian character initiatives are especially likely to infringe on the rights of protected minorities.<sup>158</sup> Many observers outside of the legal academy have expressed that same concern.<sup>159</sup> Eule and

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155. See, e.g., McNollgast, *supra* note 24, at 721–25.

156. The tradeoff identified in Part V is an instantiation of a general thesis I have developed in separate work. See Michael D. Gilbert, *Judicial Independence and Social Welfare*, 112 MICH. L. REV. (forthcoming 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1885104](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1885104).

157. Of course, the two issues are linked. To determine whether an initiative complies with the Constitution, judges must first determine what the initiative means. For discussion of this relationship, see generally Frickey, *supra* note 55.

158. See Eule, *supra* note 130, at 1548–58; see generally Bell, *supra* note 130 (discussing instances of minority rights infringement through direct democracy).

159. See, e.g., Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245, 245 (1997) (“One question persistently haunts the use of direct democracy: when citizens have the power to legislate issues directly,



Bell would mitigate it by having courts review initiatives with heightened scrutiny.<sup>160</sup>

Eule and Bell have their critics, but for present purposes suppose they are right that initiatives deserve heightened scrutiny. Or suppose that initiatives deserve only *equivalent* scrutiny, that is, the same level of scrutiny that laws passed through ordinary legislative channels receive.<sup>161</sup> That position is less controversial. Either case may give rise to a paradox.

Judges who are accountable to voters, as many state judges are, may hesitate to give initiatives the scrutiny they deserve. As Eule wrote, “[J]udicial protection is most needed in the face of voter measures motivated by popular passion or prejudice. Yet it is precisely when electorally accountable judges stand up to such efforts that they are most at risk.”<sup>162</sup> That concern is not entirely hypothetical. Otto Klaus, a former member of California’s Supreme Court, once stated that ignoring the political consequences of judicial decisions is “like ignoring a crocodile in your bathtub.”<sup>163</sup> He admitted that his vote to uphold the constitutionality of a particular initiative may have been influenced by his upcoming retention election.<sup>164</sup> More generally, empirical studies suggest that politics plays a role when judges review initiatives.<sup>165</sup>

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will the majority tyrannize the minority?”).

160. See Bell, *supra* note 130, at 22–28; Eule, *supra* note 130, at 1548–73; see also Mihui Pak, *The Counter-Majoritarian Difficulty in Focus: Judicial Review of Initiatives*, 32 COLUM. J.L. & SOC. PROBS. 237, 239 (1999) (calling for strict scrutiny for all initiatives).

161. See, e.g., Mark Tushnet, *Fear of Voting: Differential Standards of Judicial Review of Direct Legislation*, 1996 ANN. SURV. AM. L. 373, 375–76 (1996) (arguing against differential standards of review for initiatives).

162. Julian N. Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. COLO. L. REV. 733, 739 (1994) (footnote omitted); see also Frickey, *supra* note 55, at 508 (“When the same entity both enacts the law and periodically elects the judges, however, judges are not only subject to after-the-fact discipline or replacement for their interpretations, but also are likely to be unusually deferential in the first place.”).

163. Paul Reidinger, *The Politics of Judging*, A.B.A. J., Apr. 1, 1987, at 52, 58.

164. See Philip Hager, *Kaus Urges Reelection of Embattled Court Justices*, L.A. TIMES, Sept. 28, 1986, at 3.

165. See, e.g., Gilbert, *supra* note 103, at 346–50 (finding some evidence that judges’ political views correlate with their decisions to uphold or invalidate initiatives when reviewing them for compliance with the single subject rule); John G. Matsusaka & Richard L. Hasen, *Aggressive Enforcement of the Single Subject Rule*, 9 ELECTION L.J. 399, 401 (2010) (finding the same result, albeit without variables that control for law).

Given those concerns, some scholars and institutional designers might like to make state judges more independent.<sup>166</sup> Such judges are often responsible for reviewing initiatives for compliance with both state and federal constitutions, and greater independence may be the best way to ensure that initiatives get the proper level of scrutiny.<sup>167</sup> But that change might have a paradoxical effect. The same independence that empowers judges to review initiatives might, by breaking the electoral connection, reduce their incentive to resolve ambiguities in initiatives consistent with the median voter's preference. What we gain in proper review we might lose, or more than lose, in interpretation.

The flipside, of course, is that the relatively dependent state judges we have, even if they fail to deliver searching review, might compensate for that shortcoming. The same dependence that hinders their constitutional review might facilitate desirable interpretations.

In short, I believe that we face an important and underappreciated choice. We can design a judiciary that gets interpretation right or that gets constitutional review right, but we probably cannot design a judiciary that gets both right.

#### CONCLUSION

This paper has offered a new view of judicial interpretation of initiatives. It has shown that judges plausibly do—and arguably should—attempt to interpret initiatives consistent with the preferences of the enacting median voter. Developing those ideas led to a variety of insights that deserve attention in their own right, perhaps more attention than I have given them here. But much of the virtue of the work may lie elsewhere. The main contribution may simply be clarity and concreteness. There is no such thing as voter intent, conventionally understood, but there is such a thing as a median voter. That voter's preferred interpretation has an especially strong claim to being the majoritarian interpretation. That set of ideas presents judges, for the first time, with an explicit and defensible target in these cases.

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166. See, e.g., Frickey, *supra* note 55, at 508.

167. Cf. *id.* (noting that elected judges are “politically situated far differently” than federal judges when reviewing controversial ballot measures).