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SOLVING THE “INITIATORY CONSTRUCTION” PUZZLE (AND IMPROVING DIRECT DEMOCRACY) BY APPROPRIATE REFOCUSING ON SPONSOR INTENT

GLENN C. SMITH*

This Article synthesizes and critiques a dozen years of scholarship about judicial construction of legislation passed by voter initiative. The Article then makes a comprehensive case for an alternative approach: an appropriately enhanced focus on the intent of initiative sponsors. More specifically, the Article validates, through analysis of recent California decisions, a longstanding scholarly consensus that the prevailing judicial search for “the intent of the voters” is seriously flawed. The Article provides the first synthesis to date of reform proposals offered by “initiatory-construction” scholars; the discussion contends that these proposals collectively fail four key evaluation criteria. Building on the 2003 work of an author who pointed to the value of examining sponsor intent, this Article argues that the earlier author was on the right track but gave an incomplete defense and erred in the reform proposal he advocated. This Article explains how an appropriately enhanced sponsor-intent focus points the way to meaningful procedural reforms improving both the interpretation of initiatives and the processes of direct democracy.

Whether cause for dismay or celebration, direct democracy—the process millions of Americans routinely use to adopt important state laws outside the more familiar domain of representative lawmaking—continues to grow in importance and impact. Each year direct democracy places on electoral ballots a broad range of important public-policy controversies,¹ which can trigger high-profile Supreme Court cases.²

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1. See Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 396–97 (2003) (describing issues

The spending of millions of dollars to draft, qualify for the ballot, and campaign about voter initiatives fuels a sophisticated “initiative industry.”³ Elected officials who feel stymied in the traditional legislative process use direct democracy to curry voter favor.⁴ And adoption of crucial public policies by initiative obligates many judges to engage in *initiatory construction*, the coined term that this Article employs for interpreting and applying laws passed by voter initiative after they survive constitutional challenges. The substantial case law interpreting initiative-passed statutes has, in turn, spawned an extensive scholarship about initiatory construction.

Given all these indicators of direct democracy’s significance, it ought to be of special concern that, according to the clear consensus of initiatory-construction scholarship, the dominant approach courts use to construe initiative-passed legislation is fundamentally bankrupt. Students of initiatory construction have consistently shown that courts earnestly search for an “intent of the voters” that does not exist and against which the processes and dynamics of direct democracy militate. Explicit in the analysts’ conclusions, and implicit in the many creative reform proposals they have put forward, is a general agreement that the broken initiatory-construction process is in urgent need of repair. Juxtaposed against evidence of direct democracy’s importance, the scholarship suggests a cruel irony: voters, public officials, private advocates, and judges devote extravagant time and attention to consideration of initiatives with big implications for personal liberty, political equality, and fiscal stability, with no guarantee that the resulting laws will be correctly interpreted or faithfully implemented.

considered by voters during the 2000 elections as “school vouchers, physician-assisted suicide, same-sex marriage . . . , gun control, campaign finance reform, bilingual education, gambling, medical use of marijuana, . . . sentencing for drug offenders, . . . tax reform and environmental policy” (citations omitted)).

2. See, e.g., *Gonzales v. Oregon*, 126 S. Ct. 904 (2006) (challenge to Attorney General policy contradicting Oregon right-to-die law passed by voter initiative); *Gonzales v. Raich*, 545 U.S. 1 (2005) (commerce-clause-based challenge to federal Controlled Substance Act’s right to preempt “medical marijuana” laws passed by voter initiative in California and other states); *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997) (constitutional challenge to Arizona initiative requiring use of English language by state officials); *Romer v. Evans*, 517 U.S. 620 (1996) (due-process-based challenge to Colorado’s anti-gay-rights Amendment 2).

3. See, e.g., Elizabeth Garrett, *Who Directs Direct Democracy?*, 4 U. CHI. L. SCH. ROUNDTABLE 17, 20–21 (1997).

4. California Governor Arnold Schwarzenegger’s backing of voter initiatives in a bid for political advantage, see, e.g., Mark Martin, *Governor Says He Will Call Special Election; Remark Counters Compromise Moves Toward Legislature*, S.F. CHRON., Mar. 15, 2005, at B8, is but one example of political officials seeking to ensconce favored policies through direct democracy. See, e.g., *infra* note 50 (juvenile-crime initiative offered by former California Governor Pete Wilson after legislature refused to pass similar bill).

Initiatory construction and those who study or engage in it are now at a very interesting crossroad. The consistent consensus about defects has remained fundamentally unchallenged for long enough to merit confidence. Yet, more than ten years of proposing and critiquing is long enough to have demonstrated the basic unworkability of the numerous reform proposals. It is high time for a new approach.

Fortunately, the legal community does not have to look to exotic places for relief. Rather, a promising alternative lies dormant in the initiatory-construction scholarship: an *appropriately* enhanced concern for the intent of initiative *sponsors*. As this Article elaborates, such a sponsor-intent redirection would concentrate judicial attention on the persons and entities likely to have formed a detailed, useful intent and jibe with the structural and practical realities attending the relationship between voter and sponsor. An appropriate refocusing on sponsor intent would also avoid the deficiencies in the remedies proposed in the initiatory-construction scholarship to date. Of greatest importance to those who take a dim view of direct democracy, refocusing on sponsor intent would provide a new rationale for reforming the processes of initiative design and deliberation in ways reformers have long championed but too infrequently accomplished. Such reforms would also reduce incentives for abuse of the present system by initiative sponsors.

Part I of this Article synthesizes major facets of the consensus emerging from more than a decade of initiatory-construction scholarship. Part II highlights an under-noticed feature of initiatory construction: judicial disparagement and differential treatment of initiative sponsors as compared to their analogous counterparts in the legislative arena, the legislators. Part III groups the various initiatory-construction reform proposals into four categories and offers the first detailed comparative evaluation of their merits and limitations in terms of several evaluation criteria. Part IV argues that the appropriate remedy is an enhanced focus on sponsor intent and demonstrates that the only commentator to propose this option to date has gone astray in his specific recommendations. Part V explores how an *appropriately reconceived* focus on sponsor intent could inform the design of optimal reforms for the deliberative procedures used for initiatives. Part VI suggests two further ways in which additional scholarship could advance the cause of an appropriately enhanced focus on sponsor intent.

I. AN UNREALISTIC FOCUS ON UNKNOWABLE VOTER INTENT

Initiatory construction was once the forgotten corner of direct-democracy scholarship.⁵ That changed in 1995 with the publication of Professor Jane Schacter's article analyzing "a set of fifty-three decisions . . . that represents ten years of published decisions by the highest courts in the jurisdictions that permit voters to enact statutory law through the initiative."⁶ Since Schacter's article, initiatory construction has been the subject of much serious study and comment—by a wide variety of professional academics,⁷ judges and "players" in the initiative and legislative processes,⁸ and law students.⁹

This Part summarizes the impressive consensus among initiatory-construction scholars about how courts interpret voter-passed legislation. The discussion also notes recent judicial opinions in California (the court system deciding the lion's share of initiatory-construction cases) confirming and updating the lessons of the previous scholarship. Subpart A explores how courts equate initiatory with statutory construction and overwhelmingly search for the intent of the voters—the legislators of the disputed initiatives—by examining the "formal" sources normally con-

5. Before the current era of initiatory-construction scholarship, only a few prescient law-student authors called attention to the very real difficulties courts faced in applying an ever-growing number of complicated and controversial initiative-passed laws in concrete factual contexts. See Kara Christenson, Note, *Interpreting the Purposes of Initiatives: Proposition 65*, 40 HASTINGS L.J. 1031 (1989); Christopher A. Coury, Student Note, *Direct Democracy Through Initiative and Referendum: Checking the Balance*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 573 (1994); Elizabeth McNellie, Note, *The Use of Extrinsic Aids in the Interpretation of Popularly Enacted Legislation*, 89 COLUM. L. REV. 157 (1989); Stephen H. Sutro, Comment, *Interpretation of Initiatives by Reference to Similar Statutes: Canons of Construction Do Not Adequately Measure Voter Intent*, 34 SANTA CLARA L. REV. 945 (1994).

6. Jane Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 110 (1995).

7. See Philip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1996 ANN. SURV. AM. L. 477 (1996); Garrett, *supra* note 3; John Copeland Nagle, *Direct Democracy and Hastily Enacted Statutes*, 1996 ANN. SURV. AM. L. 535 (1996); Michael M. O'Hear, *Statutory Interpretation and Direct Democracy: Lessons From the Drug Treatment Initiatives*, 40 HARV. J. ON LEGIS. 281 (2003); Staszewski, *supra* note 1; Leroy J. Tornquist, Essay, *Direct Democracy in Oregon—Some Suggestions for Change*, 34 WILLAMETTE L. REV. 675 (1998).

8. See Craig B. Holman & Robert Stern, *Judicial Review of Ballot Initiatives: The Changing Role of State and Federal Courts*, 31 LOY. L.A. L. REV. 1239 (1998); Jack L. Landau, *Interpreting Statutes Enacted by Initiative: An Assessment of Proposals to Apply Specialized Interpretive Rules*, 34 WILLAMETTE L. REV. 487 (1998); Cathy R. Silak, *The People Act, the Courts React: A Proposed Model for Interpreting Initiatives in Idaho*, 33 IDAHO L. REV. 1 (1996).

9. See Richard Frankel, Note, *Proposition 209: A New Civil Rights Revolution?*, 18 YALE L. & POL'Y REV. 431 (2000); Stephen Salvucci, Note, *Say What You Mean and Mean What You Say: The Interpretation of Initiatives in California*, 71 S. CAL. L. REV. 871 (1998); Note, *Judicial Approaches to Direct Democracy*, 118 HARV. L. REV. 2748 (2005).

sulted for fathoming the intentions of professional legislators. Subpart B synthesizes the clear agreement among scholars that the search for voter intent is a fool’s errand. Subpart C points out errors in the dominant judicial methodology by highlighting several recent opinions propounding an especially unrealistic version of voter intent.

A. *Equating Statutory and Initiatory Construction*

Professor Schacter’s study demonstrates that judges typically equate initiatory construction with statutory interpretation. They seek to discern the intent of the “legislators” (citizen voters) who enacted the law in question.¹⁰ A recent survey of drug-treatment-initiative cases from California and Arizona confirms Schacter’s finding.¹¹ And although no other commentator has conducted a comprehensive case survey, other initiatory-construction commentators have discussed cases that confirm the point.¹²

Searching for voter intent and equating statutory and initiatory construction continues to be a staple of opinion writing in California. For example, the California Supreme Court focused on voter intent in several recent cases.¹³ One of these opinions even contains a vivid warning that California courts construing voter initiatives should avoid interpreting “in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less.”¹⁴ Three of the opinions also emphasize that judicial interpreters should subject initiatives to the same interpretive rules that they apply to legislator-passed statutes.¹⁵ Numerous decisions from California appellate courts follow suit.¹⁶

10. Schacter, *supra* note 6, at 117–20.

11. O’Hear, *supra* note 7, at 320 (supporting Schacter’s finding that “courts employ the same approaches to interpreting initiatives as they do to interpreting conventional statutes”).

12. See, e.g., Staszewski, *supra* note 1, at 418; Cury, *supra* note 5, at 577 (discussing focus on voter “understanding” in *Raven v. Deukmejian*, 801 P.2d 1077 (Cal. 1990)).

13. See, e.g., *People v. Thomas*, 109 P.3d 564, 569 (Cal. 2005) (decision on youth sentencing attributed to “the voters of this state”); *Robert L. v. Superior Court*, 69 P.3d 951, 955 (Cal. 2003) (describing Court’s task as “simply to interpret and apply the initiative’s language so as to effectuate the electorate’s intent” (citation omitted)); *Horwich v. Superior Court*, 980 P.2d 927, 931 (Cal. 1999) (focusing on “the electorate’s intended goal” in passing a certain proposition); *Hodges v. Superior Court*, 980 P.2d 433, 437 (Cal. 1999) (“we are obliged to interrogate the electorate’s purpose . . .”).

14. *Hodges*, 980 P.2d at 437.

15. *Robert L.*, 69 P.3d at 955 (“In interpreting a voter initiative . . . we apply the same principles that govern statutory construction.” (citation omitted)); *Horwich*, 980 P.2d at 930 (“guiding principles” of statutory construction “apply equally to the interpretation of voter initiatives”).

16. Judicial statements emphasizing voter intent appeared in four California appellate cases decided within a three-month period in 2005. *Silicon Valley Taxpayers Ass’n v. Santa Clara County Open Space Auth.*, 30 Cal. Rptr. 3d 853, 862 (Ct. App. 2005) (“[W]e apply the

Professor Schacter's case survey also establishes that judges devote much attention to "formal" sources of interpretation, such as the text of the enacted initiative, information provided to voters in ballot pamphlets, and "other statutes, including statutes related to the one being construed and statutes in effect before the enactment of the one being construed; any legislative history available for such other statutes; judicial decisions; administrative regulations, rulings [and] . . . canons of statutory construction."¹⁷ Judges generally ignore the "informal" sources on which voters typically rely to learn about initiatives; Schacter defines these as "nonlegal, nongovernmental sources" such as how "media and advertising" portray initiatives during the campaign to enact them.¹⁸ Schacter calls this mismatch between what judges and voters focus on "[t]he Paradox of the Inverted Informational Hierarchy."¹⁹ The more recent study of drug-treatment-initiative opinions confirms the focus on "formal sources" to the exclusion of "informal" ones,²⁰ as do commenta-

same principles [in interpreting Proposition 218 that] we apply when interpreting a statute."); *Tain v. State Bd. of Chiropractic Examiners*, 30 Cal. Rptr. 3d 330, 335 (Ct. App. 2005); *Armijo v. Miles*, 26 Cal. Rptr. 3d 623, 636 (Ct. App. 2005); *Knight v. Superior Court*, 26 Cal. Rptr. 3d 687, 693 (Ct. App. 2005).

17. Schacter, *supra* note 6, at 120.

18. *Id.* at 120, 111.

19. *Id.* at 130.

20. O'Hear, *supra* note 7, at 320. Professor O'Hear does add an important "nuance that is . . . implicit in [Schacter's] findings." *Id.* at 321. As O'Hear observes:

[T]he search for "intent" occurs against a backdrop of public values that shape the interpretive analysis. Courts identify the purposes implicit in the initiatives and consider those purposes in light of the competing purposes embodied in other statutes While such an objective does not necessarily represent a rejection of intent, it does suggest that something more is going on than an inquiry into actual voter preferences.

Id.

Professor O'Hear's purpose-informs-intent caveat should not make observers of the initiatory-construction process overly sanguine. On legitimacy grounds, it ought to be, and most judicial rhetoric and scholarly commentary assumes that it is, troubling if judges say one thing and do another. (Such a "judicial wink" approach to construction is objectionable, as Professor Schacter has observed, because it "conceals the limitations of popular lawmaking" and "leaves the law to be covertly created by judges." Schacter, *supra* note 6, at 151-52.) Further, on pragmatic grounds, it seems likely that some initiatory-construction judges are not in on the joke; thus, regularly reciting a dubious doctrinal formulation is likely to mislead a substantial number of initiative construers. Indeed, O'Hear's survey of drug-treatment-initiative cases indicates some unsatisfactory judicial resolutions by courts flying under the voter-intent flag. Finally, O'Hear's insight may have limited reach. As he recognizes, the cases he reviewed may be "idiosyncratic," O'Hear, *supra* note 7, at 321. The drug-treatment initiatives effected a targeted alteration in the well-known and well-established manner in which the criminal-justice system deals with a discrete category of cases. Meaningful and accurate purposive analysis may be less reliable in the many initiative contexts in which the scope and depth of intended change is larger and more uncertain.

Nevertheless, Professor O'Hear's cogent observation that some initiatory-construction courts may leaven a predominantly intentionalist approach with purposive season-

tors analyzing judicial decisions not included within either the Schacter or O’Hear studies.²¹

More recent California cases again bear out the pattern. For example, in *Horwich v. Superior Court*,²² the California Supreme Court held that Proposition 213, an initiative passed to limit tort recovery for uninsured motorists, did not preclude the *parents* of an uninsured motorist from seeking non-economic damages in a wrongful-death action. While not examining any informal sources, the Court considered the following formal ones: the “Findings and Declaration of Purpose” stated in the initiative text; several sections of Proposition 213 language; the failure of the initiative language to follow the practice of previous damage-limitation laws specifically referencing wrongful death; statutory construction canons such as the whole-act rule, the rule against surplusage, and the rule to avoid absurd results; arguments in favor of the Proposition appearing in the ballot pamphlet; the explanation of the neutral “legislative analyst”; and the fact that previous California liability decisions do not erect an “absolute” rule on wrongful-death defendants asserting defenses.²³ Other California Supreme Court decisions, as well as intermediate appellate decisions, show a similar use of formal interpretive sources and a failure to credit informal sources.²⁴

B. Scholarly Consensus that Voter Intent Is Illusory

The initiatory-construction literature over the last ten-plus years also reflects a substantial consensus that voter intent is an illusory commod-

ing provides another justification for the enhanced focus on *sponsor* intent proposed by this Article. As noted later, *see infra* text accompanying note 161, one justification for an enhanced focus on sponsor intent is that it would help provide additional helpful evidence of initiative *purposes*.

21. See, e.g., Nagle, *supra* note 7, at 537–41; Silak, *supra* note 8, at 24; Sutro, *supra* note 5, at 959, 959–60 n.68.

22. 980 P.2d 927 (Cal. 1999).

23. See *id.* at 930–36.

24. See, e.g., Robert L. v. Superior Court, 69 P.3d 951, 955–61 (Cal. 2003) (“ordinary meaning” of proposition’s language; departure from language of comparable previous provisions; technical-vs.-ordinary-words canon; “whole act” rule; findings and declarations section; statements in ballot materials by initiative supporters and legislative analyst; canon to avoid absurd results); *Hodges v. Superior Court*, 980 P.2d 433, 437–39 (Cal. 1999) (findings and declarations section; statements in ballot materials by proposition supporters and opponents and legislative analyst; canon to avoid absurd results); *Silicon Valley Taxpayers Ass’n v. Santa Clara County Open Space Auth.*, 30 Cal. Rptr. 3d 853, 863–64, 867–69 (Ct. App. 2005) (plain meaning of text; canon regarding narrow construction of exceptions; preamble and title of proposition; comparison to existing common-law definition; proponent statements in ballot pamphlet); *In re Brent F.*, 30 Cal. Rptr. 3d 833, 834–36 (Ct. App. 2005) (plain meaning of initiative text; prior judicial interpretation of related statutory section; rule that specific legislation trumps more general enactment).

ity. The initiatory-construction literature reflects three primary bases on which to doubt that initiative voters will ever form the kind of detailed, meaningful intent necessary for accurate initiative interpretation.

First, the literature harnesses substantial macro- and micro-level empirical evidence demonstrating that voters are unlikely to understand lengthy and complicated initiative texts²⁵ or “ballot pamphlet” explanations.²⁶ Initiatory-construction commentators also cite survey data more broadly indicating that voters do not feel comfortable or informed about initiatives.²⁷ These voter attitudes apply both to highly controversial initiatives and to “less controversial but more common propositions.”²⁸ Data indicate that voter uncertainty reduces levels of voter participation—especially for voters with lower education levels and socio-economic status.²⁹ Survey data even confirm that an appreciable percentage of voters end up voting “contrary to stated intentions.”³⁰

A second dimension of the consensus is anecdotal. Commentators have collected numerous examples of voter behavior that seems ill-informed, counter-intuitive, or self-defeating. For example, initiatory-construction commentators note the likelihood that California’s anti-affirmative-action Proposition 209 only passed because “[m]any voters who supported the measure did not associate it with the end of measures designed to help members of racial minorities.”³¹

25. See, e.g., Sutro, *supra* note 5, at 955 n.44 (citation omitted) (California election in 1988 included 13 initiatives over 5000 words long; 1990 election included 4 initiatives ranging from 9,735 words to 15,633 words).

26. See, e.g., Silak, *supra* note 8, at 31 (“a recent voters’ pamphlet in California ran 159 pages, and averaged forty-five words per sentence . . .”); *id.* (“Studies suggest a reading level comparable to a third-year college student would be needed for most voters’ pamphlets.” (citing DAVID MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 36, 138–39 (1984))).

27. See, e.g., Silak, *supra* note 8, at 30 n.179 (majority of voters surveyed in four western states agreed that initiatives “were ‘so complicated that one cannot understand what is going on’” (citing THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 74 (1989))); *id.* at 30 (“As many as one-third of voters say they . . . either vote at random or abstain from voting at all on a measure.” (citing MAGLEBY, *supra* note 26, at 187)).

28. See Sutro, *supra* note 5, at 952 n.31 (quoting MAGLEBY, *supra* note 26, at 129 and CRONIN, *supra* note 27, at 74) (study of highly publicized nuclear-power initiative in which only “between 10 and 33 percent of the voters were well enough informed to make educated judgments”; “35 percent or more” of voters not aware of “less controversial but more common propositions”).

29. See Staszewski, *supra* note 1, at 418–19.

30. See Sutro, *supra* note 5, at 952 n.31 (citing CRONIN, *supra* note 27, at 74).

31. Frankel, *supra* note 9, at 447 (citing evidence from opinion poll questions and extrapolations from exit polls). Similar anecdotes from outside California include a 1991 Washington State abortion initiative whose near-defeat was attributed to voter confusion, see Sutro, *supra* note 5, at 952 n.34, and a 1992 Arizona ballot proposition (altering the State Mine Inspector’s term of office), which voters approved despite the complete irrelevance of mining

A third facet of the consensus against meaningful voter intent focuses on the many ways in which direct democracy’s procedures and dynamics militate against the formation of sophisticated voter intent. Many initiatory-construction commentators note that, unlike the legislative process, initiative sponsors do not usually feel the need to consult other political officials or the voters who elected them when developing and planning initiative proposals.³² The process by which initiatives are then qualified for the ballot emphasizes quick, unthinking voter signatures rather than sophisticated public education and discussion.³³ The election campaign is mostly conducted through simplistic, and, at times, misleading, slogans in short, emotional advertisements and in media “sound bites.”³⁴ Ballot pamphlet materials are general and thematic and are often as simplistic and emotional as the ad campaigns.³⁵ At most, voters accurately read “heuristic” cues, such as the positions of interest groups, political parties, or individual political officials and develop a “general” or “rough” sense of what an initiative seeks to do.³⁶

C. Especially Implausible Judicial Attributions of Voter Intent

As initiatory-construction scholars have recognized, courts often draw highly detailed and implausible conclusions about the intent of initiative voters. The much-analyzed decision in *People v. Castro*³⁷ is a paradigmatic example of the California Supreme Court attributing a particularly refined intent to “the people” who adopted the proposition in question (California’s Proposition 8 “Victims’ Bill of Rights”). The *Castro* plurality attributed to voters an intent “to restore trial court discretion” over whether to admit evidence of prior felony convictions in a later criminal trial “and to reject the rigid, black letter rules of exclusion”

issues to the vast majority of the state, see Cury, *supra* note 5, at 582.

32. See, e.g., Frankel, *supra* note 9, at 439; Nagle, *supra* note 7, at 541 (“[V]oters lack the power to bargain about the scope or language of a proposed [initiative] measure.”); Sutro, *supra* note 5, at 949 n.22.

33. See, e.g., Garrett, *supra* note 3, at 20; Staszewski, *supra* note 1, at 425.

34. See, e.g., Silak, *supra* note 8, at 29–30; Staszewski, *supra* note 1, at 427–29.

35. See, e.g., Cury, *supra* note 5, at 587–88 (examples from 1992 California and Arizona ballot pamphlets); Silak, *supra* note 8, at 31 (citing MAGLEBY, *supra* note 26, at 138–39); Sutro, *supra* note 5, at 954 n.42 (quoting CRONIN, *supra* note 27, at 82).

36. See Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and “Disclosure Plus,”* 50 UCLA L. REV. 1141, 1149–59 (2003); see Cury, *supra* note 5, at 593 (distinguishing between allowing voters to “approve understandable general policies” and expecting them to master “details”); Sutro, *supra* note 5, at 593 (voters may understand “purpose” of initiatives, but that “does not mean . . . voters are able to advance judgments on the origins of a word, phrase, or sentence”).

37. 696 P.2d 111 (Cal. 1985).

created by later state court decisions.³⁸ In part, the plurality credited voters with sophisticated knowledge about, and a desire to work harmoniously with, existing admissibility rules in the California Evidence Code.³⁹ *Castro* also attributed to voters arcane knowledge about the interaction between two different subsections of Proposition 8.⁴⁰

More modern California courts have continued in the *Castro* tradition. In *Hi-Voltage Wire Works, Inc. v. San Jose*,⁴¹ the California Supreme Court concluded that the voters who enacted Proposition 209, an anti-affirmative-action proposition: (1) understood the twists and turns in federal civil-rights cases from *Weber* through *Bakke*; (2) “intended to reinstitute the interpretation of the Civil Rights Act and equal protection that predated *Weber*”; but (3) “[p]lainly . . . intended to preserve outreach efforts to disseminate information about public employment, education, and contracting not predicated on an impermissible classification.”⁴² Anyone familiar with the excruciating intricacies of affirmative-action jurisprudence knows that it is “plainly” unlikely that California’s non-lawyer voters made the fine distinctions the *Hi-Voltage Wire Works* court attributed to them.

Even more recent examples of unrealistic voter-intent attribution can be found in the California Supreme Court cases of *Robert L. v. Superior Court*⁴³ and *People v. Thomas*.⁴⁴ *Robert L.* required the court to determine whether sentence-enhancement provisions in an initiative relating to gang violence and juvenile crime applied to every misdemeanor and felony or only to “wobblers” (i.e., “public offenses that are punishable, in the alternative, as a misdemeanor or a felony,” as officials see fit).⁴⁵ The majority’s decision that the sentence-enhancement scheme was broadly applicable makes sense in light of the general anti-youth-crime goal of initiative sponsors. Parts of the rationale by which the *Robert L.* majority reached its logical holding, however, border on the absurd. The court attributes to voters (1) a highly sophisticated appreciation of subtle departures from the textual language used in related legal provisions and (2) knowledge of statutorily defined or “commonly understood” criminal-law terms, but not arcane “[legal term[s] of art of recent vintage.”⁴⁶ *Thomas* in turn attributed to California voters the view

38. *Id.* at 117.

39. *See* Silak, *supra* note 8, at 51 (citing *Castro*, 696 P.2d at 115).

40. *See id.*

41. 12 P.3d 1068 (Cal. 2000).

42. *Id.* at 1083, 1085.

43. 69 P.3d 951 (Cal. 2003).

44. 109 P.3d 564 (Cal. 2005).

45. *Robert L.*, 69 P.3d at 953.

46. *Id.* at 956.

that “the trial court’s discretionary authority under Penal Code section 1170.19, subdivision (a), to commit a minor to the Youth Authority applies only when the minor meets the eligibility requirements of Welfare and Institutions Code section 1732.6.”⁴⁷ The electorate developed this specific intent, the court found, even though “[r]esolving this issue require[d] the interpretation and cross-referencing of five statutes from two different codes.”⁴⁸

II. THE LACK OF FOCUS ON SPONSOR INTENT

When construing initiatives, courts do not devote to fathoming the intent of the sponsors of these measures the significant energies they routinely devote to discerning the intent of ordinary *legislation* drafters. In fact, at times, courts overtly disparage sponsor intent. This contrasts markedly with the treatment typically afforded to legislative drafters.

Initiatory-construction decisions evince disinterest in sponsor intent in two main ways. First, some initiatory-construction courts overtly assert the independent *irrelevance* of sponsor intent. For example, the 2003 *Robert L.* opinion specifically upbraided an appellate court it largely affirmed for analyzing the history of “failed legislative efforts” undertaken by the sponsors of Proposition 21.⁴⁹ Even though the appellate court explained why the past legislative background was highly relevant,⁵⁰ the *Robert L.* Supreme Court majority declared that the inferior court had “go[ne] too far.”⁵¹ California’s highest court emphasized that it “has never strayed from [its] pronouncement . . . that ‘legislative antecedents’ ‘not directly presented to the voters . . . are not relevant to our inquiry.’”⁵² Second, other courts more subtly signal the irrelevance of

47. *Thomas*, 109 P.3d at 565.

48. *Id.* at 568.

49. *Robert L.*, 69 P.3d at 957.

50. *Robert L. v. Superior Court*, 109 Cal. Rptr. 2d 716, 721 (Ct. App. 2001). The appellate court argued that “it is useful to understand the historical underpinnings” of Proposition 21 because it “traces it [sic] roots back to former Governor Pete Wilson.” *Id.* The court went on to explain: “In 1998, then-Governor Wilson sponsored a legislative crime package designed to overhaul the juvenile justice system and crack down on juvenile offenders. That legislation was defeated, but it was repackaged and put on the ballot as Proposition 21.” *Id.* (citations omitted). The court asserted: “By studying the defeated legislation, we can gain valuable insight into how the framers of Proposition 21 intended that initiative to operate.” *Id.*

51. *Robert L.*, 69 P.3d at 957.

52. *Id.* at 958 (citations omitted). The Court concluded: “Thus, to the extent the Court of Appeal, in ascertaining the voters’ intent, relied on evidence of the drafters’ intent that was not presented to the voters, we decline to follow it. Instead, we look to the materials that were before the voters.” *Id.* This aversion to sponsor-intent indicators follows in the tradition of *Taxpayers to Limit Campaign Spending v. Fair Political Practices Committee*, 799 P.2d 1220 (Cal. 1990), a leading California decision much discussed by the initiatory-construction litera-

sponsor intent as a separate interpretive source by referring to sponsors and voters as an undifferentiated entity and attributing to voters an intent that is only likely to have been possessed by sponsors. The 1999 *Horwich* ruling illustrates this subtler brand of sponsor denigration by indiscriminately attributing to the drafters of Proposition 213 and “the voters who enact[ed] it” an awareness of how previous California statutes limited wrongful-death recovery.⁵³ Of course, detailed past-case awareness only makes sense when ascribed to drafters.⁵⁴

However courts choose to express their disinterest about sponsor intent, it stands in marked relief to how judges handle the intent of the drafters of ordinary legislation. True, state courts do at times refuse to rely on indicators of the intent of *legislative sponsors or supporters* because they have special reasons to doubt that legislators relied on it in voting to enact a statute. Many other statutory-construction cases, however, indicate a more routine reliance on a wide variety of drafter-intent sources.⁵⁵ Courts engaging in statutory construction often do not inquire into the likelihood of legislator reliance—even when the realities of legislative dynamics suggest that they should. And there is simply no analogue in statutory construction to the routine initiatory-construction practice of refusing to credit key statements of sponsor intent, such as the press releases or background papers that sponsors produce to explain and champion their initiatives, because the communications were not included in the official voter pamphlet.⁵⁶

ture. As the *Taxpayers* court stated: “[t]he opinion of drafters . . . who sponsor an initiative is not relevant since such opinion does not represent the intent of the electorate and we cannot say with assurance that the voters were aware of the drafters’ intent.” *Id.* at 1232 n.10 (citations omitted). A number of lower California decisions follow suit. *See, e.g., Knight v. Superior Court*, 26 Cal. Rptr. 3d 687, 690 (Ct. App. 2005) (ignoring alleged intent of proponents because even “[i]f this were the intention of the proponents . . . , the electorate was not given the opportunity to vote on that undisclosed objective”).

53. 980 P.2d 927, 934 (Cal. 1999) (quoting *In re Harris*, 775 P.2d 1057, 1060 (Cal. 1989)). A number of other decisions reflexively equate sponsors and voters. *See, e.g., Hodges v. Superior Court*, 980 P.2d 433, 437 (Cal. 1999) (“It is not clear that *anyone*—either the sponsors of the measure or the voters—intended to protect [manufacturers] from products liability claims . . .”); *People v. Castro*, 696 P.2d 111, 116–17 (Cal. 1985).

54. The Court acknowledged this implicitly by referring in the immediately following sentence only to “the drafters of Proposition 213” and not the voters. *Horwich*, 980 P.2d at 934–35.

55. *See, e.g., In re Dannenburg*, 104 P.3d 783, 793 (Cal. 2005) (relying on wider historical circumstances of the bill’s enactment); *In re J.W.*, 57 P.3d 363, 370–71 (Cal. 2002) (relying on Senate Judiciary Committee and Senate Finance Committee analysis of Senate Bill amending California Family Code § 7895); *Maben v. Superior Court*, 63 Cal. Rptr. 439, 442 (Ct. App. 1967) (relying on Legislative Counsel’s bill digest, attesting to change in law).

56. For example, in *Martin v. Szeto*, 84 P.3d 374, 377 (Cal. 2004), the California Supreme Court interpreted California Code of Civil Procedure section 1021.7 by looking to statements in a letter from the bill’s sponsors to the Governor and a recounting of the bill’s history by the ACLU’s Legislative Director.

Indeed, it is in states allowing sponsors to make arguments in official voter pamphlets that the lack of parity between initiatory construction and statutory construction becomes especially obvious. Ballot-pamphlet states such as California ignore the long-accepted assumption that statements by legislation supporters (especially sponsors!) are entitled to greater weight than statements by opponents.⁵⁷ California courts routinely discuss the views of initiative sponsors and opponents as a package, as though they are of equal significance.⁵⁸ California courts also accord substantial significance to what official government analysts say about the scope and intent of initiatives,⁵⁹ even though these officials have no connection to, or duty to speak accurately on behalf of, initiative sponsors. To the extent that initiatives seek to challenge the legal status quo in which these “neutral” officials are invested, initiatory-construction courts following the California practice may be stacking the deck *against* sponsor intent.

III. PROPOSALS FOR IMPROVING INITIATORY CONSTRUCTION: A CRITICAL EVALUATION

Despite very ingenious and sincere efforts by initiatory-construction commentators to go beyond merely pointing to a problem, scholars have split significantly on how to respond to the incoherence of voter intent. All of the divergent reform proposals have serious theoretical and practical problems. Perhaps because of these deficiencies, no reform proposal has been adopted in the years since initiatory-construction scholars began showing the bankruptcy of the current method of determining voter intent.

This Part engages in the first synthesis and comparative critique of the last ten-plus years of proposals to improve initiatory construction. Subpart A delineates four relevant criteria for evaluating the reform pro-

57. See, e.g., *Bankamerica Corp. v. United States*, 462 U.S. 122, 139 (1983); WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* 303, 307 (2000) [hereinafter 2000 ESKRIDGE, FRICKEY & GARRETT] (noting importance of “*explanatory statements by the sponsors or floor managers of legislation*”).

58. See, e.g., *Robert L. v. Superior Court*, 69 P.3d 951, 959–60 (Cal. 2003) (relying on fact that opponents of initiative “specifically made the voters aware that Proposition 21 would enhance the punishment of gang-related misdemeanors”); *Hodges*, 980 P.2d at 438 (indiscriminately discussing “[t]he arguments for and against the measure”); *People v. Skinner*, 704 P.2d 752, 758 (Cal. 1985) (noting failure of “arguments for or against Proposition 8” to mention insanity-defense provision).

59. See, e.g., *Horwich*, 980 P.2d at 932; *Armijo v. Miles*, 26 Cal. Rptr. 3d 623, 637 (Ct. App. 2005) (relying on Legislative Analyst explanation of Proposition 22 emphasizing marriage, not domestic partnership); *Knight v. Superior Court*, 26 Cal. Rptr. 3d 687, 695–96 (Ct. App. 2005) (same).

posals. Subpart B then identifies, analyzes, and ultimately finds deficient four different categories of reforms.

A. *Criteria for Evaluating the Reform Proposals*

This Article evaluates the initiatory-construction reform proposals in terms of four criteria: 1) the extent to which the proposal seems likely to remedy, in a proportionate way, key aspects of the generally agreed upon problem, 2) the extent to which the proposal necessarily assumes the inferiority of direct democracy, 3) whether the proposed judicial task is manageable, and 4) whether the proposed judicial task is legitimate.

1. Remediating Key Problem Aspects in a Proportional Way

Constitutional-law doctrines provide several useful tools for assessing the validity of governmental remedial measures. Two related tools are especially helpful in evaluating the initiatory-construction reform proposals: the extent to which a remedial action actually reduces a real problem,⁶⁰ and the existence of “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”⁶¹ To the extent that reform proposals proportionally solve the problems created by initiatory-construction courts looking in the wrong place and finding voter intent at an unrealistically specific level, they gain validity. By contrast, a proposal is ineffective if it either over-responds or under-responds, and, especially, if it remediates at an unacceptable cost.

2. Not Disparaging Direct Democracy

Both substantively and practically, proposed remedies gain by not requiring their adopters to embrace any particular viewpoint about the validity of direct democracy.

60. For example, in applying First Amendment and Fourteenth Amendment jurisprudence, courts ask whether governmental means actually further governmental interests that are at least legitimate. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 681–82 (7th ed. 2004) (summarizing basic equal-protection and substantive-due-process analysis); *id.* at 1131–35 (summarizing levels of means/end scrutiny for content-based and content-neutral speech regulation).

61. *City of Boerne v. Flores*, 521 U.S. 507, 520, 530 (1997) (“The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.” (citations omitted)).

Use of *Boerne*’s standards to inform this evaluation criterion is not intended to endorse the Court’s application of them in *Boerne* or its progeny.

Scholars and other commentators have subjected the initiative process to a sustained and extensive critique on a variety of theoretical and practical grounds⁶²—including the lack of core deliberative and accountability-promoting features attributed to the republican form of government, which emphasizes policymaking by elected legislatures.⁶³ But the literature also abounds with extensive and recent rejections of the view that direct democracy's failings should consign it to second-class status. Some extol direct democracy's virtues.⁶⁴ Others do not elevate direct democracy so much as dispute the precepts behind the view that representative legislation is meaningful.⁶⁵ There is not now, and may never be, consensus on the question of direct democracy's comparative validity. Thus, proposals locating themselves on one side of the skirmish are vulnerable to all the substantive arguments from the other.

Proposals that do not disparage direct democracy also have a significant practical advantage, given that state-court judges hear the vast

62. Staszewski, *supra* note 1, at 397–98 n.8 (citing articles and concluding: "Some advocate the outright abolition of initiative lawmaking on constitutional grounds; some advocate increased regulation of the procedures by which proposed measures are enacted; and others advocate more stringent judicial review of successful ballot measures.").

63. Others see direct democracy as failing populist principles. *See, e.g.,* O'Hear, *supra* note 7, at 287 n.41 (citing and quoting articles by Professors Sherman Clark and Richard Collins).

64. For example, one author argues that direct democracy has "been an important impetus for both procedural and substantive reforms"—including "some of the turning points in American legal history." Note, *supra* note 9, at 2765 (specifying "women's suffrage, the abolition of the poll tax, the establishment of the eight-hour work day, and campaign finance regulations" (quoting Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI.-KENT L. REV. 707, 708 (1991))). The author also collects examples and assessments of direct democracy as an important "mechanism to promote the rights of the powerless and the dispossessed" and to serve as a "safety valve" in checking "dysfunctional" electoral government. *Id.* at 2763–65; *see, e.g.,* Coury, *supra* note 5, at 573 (linking direct democracy to checking and balancing regular governmental procedures).

65. A number of commentators question the importance or primacy of republican deliberation. For example, Professor Tushnet asks whether deliberation serves any value if it does not improve the underlying quality of the decision. *See* Mark Tushnet, *Fear of Voting: Differential Standards of Judicial Review of Direct Democracy*, 1996 ANN. SURV. AM. L. 373, 381–83. Tushnet further argues that deliberative processes "reinforce hierarchies that direct legislation is partly designed to overcome." *Id.* at 383.

A still different mode of frequent attack is to value deliberation but doubt that the normal legislative process exhibits it predictably or meaningfully, when compared to direct democracy. *See, e.g.,* Landau, *supra* note 8, at 516–21 (arguing that similar deliberative problems attend state legislation, although not necessarily with the same frequency as with direct democracy); O'Hear, *supra* note 7, at 327 n.305 (differences between direct democracy and representative lawmaking "may be particularly unimportant in smaller states with fewer legislative resources"); Tushnet, *supra* at 379 ("One can, of course, readily compile anecdotes demonstrating distortions in campaigns for direct legislation. But for each anecdote there is another showing how representative bodies adopt important legislation with deliberation of no better quality.").

bulk of initiatory-construction challenges.⁶⁶ Many state judges are elected initially or are at least subject to reelection or recall.⁶⁷ Thus, “as a practical matter, elected judges considering a popular initiative must face the same voters who enacted it to keep their judicial seats.”⁶⁸ These judges may be especially reluctant to act in ways appearing to interfere with the popular will.⁶⁹ Even state judges not facing immediate electoral accountability could be disinclined to swim upstream against a strong current of support for direct democracy from their state’s officials and voters. Some state judges could encounter state constitutional provisions seeming to require strong judicial loyalty to the initiative process.⁷⁰

In sum, a separate and critical consideration for evaluating proposals to respond to the deficiencies of initiatory construction is that they not require judicial implementers to take an anti-direct-democracy stance or become judicial “profiles in courage.”

66. See Garrett, *supra* note 3, at 35 (explaining why state-judge attitudes are “important”). Professor Staszewski’s suggestion that litigants could bypass state courts by raising federal claims and seeking “liberal application” of supplemental jurisdiction to permit federal courts to engage in initiatory construction as well, see Staszewski, *supra* note 1, at 454–55 n.227, does not ultimately offer a useful end-run. First, the vast majority of initiatory-construction disputes only call for *construction* of initiatives under state law, not rulings as well on their federal constitutional *validity*. Second, even if federal judges took jurisdiction over an initiatory-construction case, they would end up applying the same pro-direct-democracy “law of the state,” unless they disingenuously bent that law (which would raise its own set of legitimacy issues). Finally, lower federal courts would likely be affected by the United States Supreme Court’s reverential intonings in *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976), and later cases that direct democracy represents the will of the people and is comparable to the New England town meeting “as both a practical and symbolic part of our democratic processes,” *id.* at 672–73; see Staszewski, *supra* note 1, at 415–17 (discussing *City of Eastlake* and later cases).

67. See ROBERT A. CARP, RONALD STIDHAM & KENNETH L. MANNING, JUDICIAL PROCESS IN AMERICA 102 (2004) (“The election of judges . . . is the norm in the states.”); *id.* at 104–105 (describing how even judges appointed initially by “merit selection” can face contentious retention votes).

68. Gerald F. Uelmen, *Handling Hot Potatoes: Judicial Review of California Initiatives After Senate v. Jones*, 41 SANTA CLARA L. REV. 999, 1000 (2001), quoted in Staszewski, *supra* note 1, at 454 n.227.

69. See Silak, *supra* note 8, at 35 (noting state judicial awareness that voters are invested in direct democracy); Staszewski, *supra* note 1, at 454–55 n.227 (paraphrasing late California Supreme Court Justice Otto Klaus: “[R]eviewing controversial cases is like having a crocodile in the bathtub while shaving—although one attempts to ignore the threat of voter reprisal for such decisions, one always knows it is there.”).

70. See Jaysen Oldroyd, *Utah at the Crossroads: The Role of the Judiciary in Initiative and Severability Law after Gallivan v. Walker*, 17 BYU J. PUB. L. 367, 377 (2003) (analyzing Utah Supreme Court decision that voters have “fundamental right” under Utah Constitution to enact laws by initiative).

3. Manageability

To borrow from another domain of constitutional law, any proposal to alter the current approach to legal decision making should envision “judicially discoverable and manageable standards.”⁷¹ Any reform proposal is in serious trouble if it leaves judges and those who must deal with them to guess the appropriate decisional criteria or have no confidence that they can be applied with minimal objectivity and rigor.

4. Legitimacy

This criterion relates in part to the manageability criterion; asking judges to do something unmanageable makes the judicial enterprise “illegitimate” because decisional results will vary and appear arbitrary. But carving out the legitimacy of the proposed judicial role as a separate concern underlines the reality that some judicial assignments, even if clearly manageable, could be illegitimate for other reasons.

Legitimacy has long been a patently relevant criterion for evaluating the judicial role in construing legislative statutes. Statutory-construction methodologies enabling judges to ignore or even depart from the will of the people’s representatives raise a host of concerns, including jeopardizing majority rule and disordering the separation of powers. That is why the legitimacy of the judicial role figures prominently in scholarly commentary⁷² and in judicial writing, both in statutory-construction opinions and elsewhere.⁷³ Concerns might be even weightier when an initiatory-construction methodology would lead judges to countermand “the will of the people” themselves.⁷⁴ As noted by one prominent scholar of both

71. *Baker v. Carr*, 369 U.S. 186, 217 (1962). Invocation of *Baker* does not assert the validity of the Court’s subsequent applications of *Baker* to nonjusticiable-political-question claims.

72. See, e.g., WILLIAM N. ESKRIDGE, PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 687 (2001) [hereinafter 2001 ESKRIDGE, FRICKEY & GARRETT] (citing Oliver Wendell Holmes’s insistence in *THE COMMON LAW* 41, 44 (1881), “that in a ‘government of laws, not men’ legal standards must be external to the decisionmaker”); Amanda L. Tyler, *Continuity, Coherence and the Canons*, 99 NW. U. L. REV. 1389 (2005).

73. See, e.g., *United States v. Locke*, 471 U.S. 84, 95 (1985) (Marshall, J.) (adhering rigidly to statutory deadline because “the fact that Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do”); *People v. Davis*, 938 P.2d 938, 949 (Cal. 1997) (Kennard, J., dissenting) (“Judges are constrained by the law. . . . [O]ur guideposts in interpreting the Three Strikes law [passed both by the legislature and by voter initiative] must be the usual principles of statutory construction that apply in every case, not our projections of the hopes and fears that led to the statute’s enactment.”).

74. This is not to argue that there *is* a deeply meaningful public will, or that it is likely to

legislative and initiatory construction, initiative interpreters still need to show “respect for . . . the people as lawmakers.”⁷⁵

B. The Initiatory-Construction Reform Proposals: Synthesis and Comparative Evaluation

It facilitates analysis of the varying reform proposals emerging from the decade-plus of initiatory-construction scholarship to group them into four categories.⁷⁶ First, several commentators envision courts continuing to search for voter intent but doing so with a wider range of materials and more extensive judicial fact-finding processes. Second, a leading legislation scholar and initiatory-construction commentator posits that courts should bring more categorical skepticism to interpreting initiatives than they do to interpreting legislation. The third category urges selective skepticism of proposals based on substantive or process distinctions. The fourth and most ambitious and ambiguous approach would empower courts in post-enactment litigation to provide a substitute for the missing deliberation.⁷⁷

1. Expansion of the Voter-Intent Search

In the most well-developed iteration of this approach,⁷⁸ after examining initiative texts and “official extrinsic materials” distributed to vot-

reveal coherent and detailed popular intentions. Rather, it is merely to note that current initiatory-construction modes assume that it is highly legitimate to follow popular will.

75. Frickey, *supra* note 7, at 510.

76. This Article withholds consideration of Professor Staszewski's proposal to subject initiative sponsors to federal administrative-rulemaking procedures until Part IV.

77. Even though it appears that courts could avoid the error of searching for voter intent by rejecting intentionalism in favor of textualism, initiatory-construction scholars have correctly resisted this move. Sole reliance on a purely textual approach to fathoming the wishes of initiative sponsors (as opposed to also using non-textual means for ascertaining sponsor intent) would be unwise for several reasons. First, a shift to textualism is practically unlikely in the substantial number of states in which intentionalism is the reigning approach for statutes and initiatives. (Adopting a different, more restrictive textual regime only for initiatives would imply disparagement of direct democracy and therefore encounter the earlier-cited difficulties.) More important, the numerous valid objections lodged against textualism for statutes—*see, e.g.*, 2000 ESKRIDGE, FRICKEY & GARRETT, *supra* note 57, at 230–36 (the inherent malleability of statutory words and the canons of construction used to apply them; the unlikelihood that text alone can meaningfully capture the nuances of drafter intentions and purposes; and the “alarming” risk of “sever[ing] the connection between democracy and the rule of law” when textualism ignores how law enactors “seek to solve a social problem in the face of disagreement”)—are equally applicable to voter-adopted legislation.

78. *See* Silak, *supra* note 8, at 37–38. Two earlier student authors also endorsed enhanced-voter-intent searches. *See* McNellie, *supra* note 5, at 176–79; Frankel, *supra* note 9, at 439–43.

ers, courts would consult a potentially wide array of unofficial sources, such as “news reports, the transcripts of any recorded debates between proponents and opponents of the initiative, campaign literature from both sides, editorials by news media, and advertising.”⁷⁹ During litigation over initiative meaning, courts could also access “printed material” or “videotaped material, [including] television reports or commercials,” presented as attachments to affidavits.⁸⁰ To assist their analysis of this expanded material, courts would likely use “social science expert witness opinions,” such as a “political scientist who had been a keen observer of a particular political controversy . . . [and who] might be called as an expert witness to provide context . . . as to the perceived problem to be corrected.”⁸¹ Courts would ultimately develop “a hierarchy of such [extrinsic] aids that they will rely upon for initiatives.”⁸²

Proposals that judges expand their search for voter intent respond directly to one aspect of the consensus critique of current initiatory construction; the proposals focus judges on the sources voters more likely use.⁸³ More fundamentally, however, expanded-voter-intent approaches run against the grain of the initiatory-construction literature by searching even more elaborately for the *detailed, specific* voter intent that scholars argue is nonexistent. The dynamics and data canvassed in Part I indicate that, when voters consult advertisements, editorials, and the like, they probably do no more than “grasp the broad purpose of an initiative measure and vote either to approve or reject a general policy.”⁸⁴ Lack of control over initiative drafting, lack of meaningful discussion during the election campaign, the low probability that advertisements will traffic in “the arcane, albeit potent, details” of the initiatives they tout or disparage,⁸⁵ and many other factors, make it unrealistic to expect the kind of specific intent in which most initiatory-construction lawsuits traffic.

79. Silak, *supra* note 8, at 40.

80. *Id.* at 40–41.

81. *Id.* at 41. In appropriate cases, such as a case requiring judges to understand the intent behind a property-tax initiative, recourse could be made to knowledgeable “representatives of state agencies who have studied certain issues.” *Id.*

82. *Id.* at 40.

83. *See id.* at 38 (“Because the voters’ intent was developed after exposure to a variety of material . . . the court must be willing to, and indeed must seek out, the evidence of what the voters’ considered before voting.”).

84. Staszewski, *supra* note 1, at 409 (“[J]udicial inquiry into the media accounts and advertising that actually influenced the voters is unlikely to yield any unbiased or determinate answers to the interpretive questions facing courts.”); *see supra* text accompanying notes 25–36.

85. O’Hear, *supra* note 7, at 334 (quoting Schacter’s concern that “[b]road[,] visceral appeals” of initiative advertisements “forcefully distract the electorate from the arcane, albeit potent, details”).

Thus, expanded-voter-intent-search proposals risk exacerbating the basic problems of current initiatory construction while gaining very little in return, which makes them highly disproportionate as remedies.⁸⁶ Little would be gained from such proposals because recourse to “informal” intent sources would rarely reveal a *general* voter intent *not already discernible from the formal sources now readily consulted* by initiatory-construction courts.⁸⁷ Certainly, an expanded voter-intent search would have yielded little in *People v. Castro*, the initiatory-construction decision cited by the most prominent advocate of expanded voter intent to illustrate the validity of her approach.⁸⁸ *Castro* involved exactly the kind of question on which voters are *unlikely* to have formed a specific intent using *any* set of sources.⁸⁹ And *Castro* is precisely the kind of case in which the voters’ generic intent (a general get-tough-on-crime attitude) is easily read from the initiative text and other “formal” sources.⁹⁰

86. Expanded-voter-intent-search proposals could be disproportionate in other ways. For example, Silak’s initial focus on erroneous official voter-intent indicators, rather than unofficial and more accurate sources, might cause courts to fail to access or fully credit unofficial sources. Furthermore, Silak’s broad definition of relevant unofficial materials might also cause courts to lose their way, producing a less accurate reading of voter intent than if they focused on a narrower range of especially relevant materials.

87. One of Silak’s three case studies does indicate the value of looking at an initiative’s “legislative history” beyond what is contained in the “official extrinsic” documents. See *Missourians for Honest Elections v. Mo. Elections Comm’n*, 536 S.W.2d 766 (Mo. Ct. App. 1976) (specific *issue* directly and repetitively addressed in campaign materials likely to have been seen by voters, but not suggested in initiative text). However, the difficulty with this example is that it is so atypical.

88. Silak, *supra* note 8, at 48–56 (discussing and critiquing *People v. Castro*, 696 P.2d 111 (Cal. 1985) (plurality opinion)).

89. Silak admits implicitly that no detailed rummaging through expanded voter-intent sources could hope to establish any such intent by millions of California voters. Indeed, Silak argues that the plurality should have credited the voters’ “general expression of intent” for a “broad reform of procedures and the desire to achieve more criminal convictions.” Silak, *supra* note 8, at 54–55.

90. It was not necessary to consult “the advertising campaign waged by the proponents and opponents, [or] the transcripts of any debates that took place,” *id.* at 54, to find this broad intent. Instead, it appeared in the Proposition’s preamble (and in the “Victims’ Bill of Rights” title!), as well as the ballot pamphlet argument that is “official extrinsic evidence” routinely consulted by California courts. *Id.* at 52.

The same critique applies to another Silak case study, *In re Estate of Olson*, 557 P.2d 302 (Wash. 1976). As Silak explains, the initiative in *Olson* “for the first time recogniz[ed] in Washington the form of joint ownership of property known as joint tenancy with right of survivorship.” Silak, *supra* note 8, at 58. The initiative clearly indicated that the new tenancy right could be created “through a variety of documentary means,” and the Washington State legislature apparently understood this manifest meaning in passing later legislation broadly authorizing such. Yet a majority of the Washington State Supreme Court recognized only one means—a writing—to create the joint tenancy. *Id.* at 58–59. Given the situation as she laid it out, it is hard to understand Silak’s statement that “[a] greater focus on the intent of the people in passing the joint tenancy initiative . . . might have resulted in [a contrary ruling] and an avoidance by the Supreme Court of an overly technical interpretation.” *Id.* at 59. No sophisti-

Expanded-voter-intent searches certainly would not run afoul of the second evaluation criterion. Far from disparaging direct democracy, they appear to treat it preferentially by employing heroic measures to ascertain the intent of voter-legislators. Yet, expanded-voter-intent proposals fare very poorly in terms of judicial manageability. First, there would be the question of how courts would develop priorities among the substantially expanded universe of material to which proponents direct judicial attention.⁹¹ A second concern is how courts would assess the persuasiveness of individual pieces of alleged voter-intent evidence, even if they knew how to prioritize them.⁹² Proponents of expanded-voter-intent searches might respond that this is why initiatory-construction courts need recourse to experts, but that brings up a third worry about judicial manageability—how courts pursuing an expanded search for voter intent would resolve a “battle of the experts” over topics, such as voter behavior and media perceptions about which courts are especially likely to be at sea.

Finally, expanded-voter-intent proposals raise serious legitimacy concerns by allowing, or at least appearing to allow, courts to base initiatory construction on factors that seem so arbitrary and subjective that they amount to judges “substituting their will” for that of the people. One prominent proponent asserts that the inevitable suspicion of judicial usurpation arising when judges restrict the scope of initiatives will be reduced “if it becomes obvious to the public and the media that the court system is engaging in a careful examination of the ‘legislative history’ concerning the initiated act.”⁹³ Yet it is hard to credit this account of a public more sanguine about initiatory-construction decisions because

cated voter-intent search seemed necessary for a proper ruling. The majority merely needed to consult the design and language of the initiative itself.

91. Silak attempts to address this concern by analogizing to the Uniform Act on legislative interpretation that applies in Idaho and other states. She notes, for example, that “the Uniform Act recognizes that ‘written or printed materials that are not legislative materials’ can be given some weight” by courts interpreting statutes, but she specifies that “[t]he weight to be given would be secondary.” Silak, *supra* note 8, at 40 & n.223. Silak then assures that “[i]n the same manner, the courts could develop a hierarchy of such aids that they will rely upon for initiatives.” *Id.* at 40. Yet the analogy seems strained because Silak envisions a substantially larger universe of sources to sort out, many of which do not have a ready analogue in statutory construction.

92. These do not seem to be the kinds of questions about which judges have substantial expertise and familiarity. *Cf.* Landau, *supra* note 8, at 524–25 (criticizing, for example, Professor Schacter for committing courts to assess “information deficits” relating to media coverage yet failing to “explain how any judge may identify such a state of affairs . . . [or] on what basis a court must decide the extent to which voters were likely confused[,] . . . the extent to which the voters even attempted to read [relevant materials], or the extent to which they relied . . . on reductive media coverage”).

93. Silak, *supra* note 8, at 42.

their authors analyzed videotapes of campaign ads and heard from professors and politically interested “expert” officials. It seems more plausible that observing a court engaged in a wide-ranging expedition among alleged voter-intent indicators would heighten, not soften, the perception of the public and its leaders that the judge is playing substitute lawmaker.⁹⁴

2. Generic Skepticism through More Stringently Applied Interpretive Canons

A second, very different reform approach would apply standard interpretive canons in a generally more skeptical manner during initiatory construction.⁹⁵ First, courts would subject initiatives to a “heightened” version of “the canon counseling that, if plausible, statutes should be interpreted to avoid constitutional invalidation.”⁹⁶ Second, courts would turn the canon against implied repeals of existing laws into a “general working presumption in favor of narrow construction when [laws adopted through direct democracy] are in tension with pre-existing law.”⁹⁷ Third, judges would apply more “specialized substantive canons,” such as the rule of lenity, with “somewhat more force” to initiative-passed laws than to those adopted by legislatures.⁹⁸

Generic skepticism would remedy the problem of misreading voter intent in one sense—by turning judicial attention away from unreliable extrinsic voter-intent indicators. Yet the approach would frustrate attempts to find meaning when narrowness, caution, and skepticism are inconsistent with the impulse behind adoption of a particular initiative.⁹⁹

94. It does not help that Silak points to *Idaho Schools for Equal Educational Opportunity v. Evans*, 850 P.2d 724 (Idaho 1993), as an example. *Evans* does not refer to the typical initiatory-construction case in which initiative terms intend to have a *fixed* meaning and it is the court’s job to ascertain it. Rather, the *Evans* court sought to clarify an admittedly amorphous constitutional concept intended to evolve over time.

95. See Frickey, *supra* note 7, at 510–526. A distinct brand of heightened skepticism scrutiny has been a staple of scholarship about direct democracy. As Professor Staszewski has noted, “a number of commentators” have urged more searching judicial review of initiatives *during constitutional review* of successful initiatives. Staszewski, *supra* note 1, at 398 n.12. The most discussed of these is the heightened-scrutiny proposal of the late Professor Julian Eule. See Julian Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503 (1990). Eule’s proposal did not necessarily apply to judicial construction of initiatives apart from constitutional review.

96. Frickey, *supra* note 7, at 512.

97. *Id.* at 522.

98. *Id.* at 522–23.

99. See Nagle, *supra* note 7, at 549–50 (explaining how Frickey approach would undercut broad remedial purposes if used to determine retroactivity of the CERCLA environmental-protection statute).

Generic skepticism could fail to serve accurate intent finding by, at times, emphasis-

Many scholars point out that initiatives are often adopted to push the constitutional envelope, or to broadly reject the status quo in favor of significant legal, political, or social change. As a result, for a potentially large number of initiatory-construction disputes, generic skepticism could amount to a disproportionately overbroad remedy and might be “too high a price to pay.”¹⁰⁰

For example, a critic of generic skepticism analyzed its impact on *Calik v. Kongable*.¹⁰¹ *Calik* disputed whether, in seeking to provide treatment and diversion from lengthy prison sentences for nonviolent drug offenders, Proposition 200 nevertheless allowed relatively short jail time as part of a sentence of “probation,” as permitted generally in Arizona.¹⁰² In *Calik* the court found the preexisting general law inapplicable in cases covered by the drug-treatment proposition.¹⁰³ The critic argued that the generic-skepticism approach would have led to a different, “incoherent” result because:

[An enhanced presumption against altering existing law] would . . . mandate minimal displacement of preexisting law. Since preexisting probation law provided for the possibility of jail, . . . Proposition 200 should be interpreted to permit jail. As the *Calik* court observed, though, such a holding would make the new law incoherent. Because jail is expressly precluded for a violation of probation, permitting jail upon conviction would mean that a defendant who did not violate probation might receive harsher treatment than one who did. Indeed, a defendant sentenced to jail would actually have an incentive to violate the terms of probation in order to avoid jail.¹⁰⁴

Ultimately, the commentator suggests that skeptical treatment of initiatives in conflict with existing law may “produce an incoherent legal regime that no reasonably deliberating legislature would accept.”¹⁰⁵

Generic skepticism in construing initiatives is also premised on a fundamental dissatisfaction with direct democracy. True, generic skepticism’s proponent presents the approach as a “balanced” response to direct-democracy deficiencies that manages to “respect” direct democracy

ing complicated initiative texts that, as Part I indicates, voters are not especially likely to understand. The Frickey approach would raise legitimacy concerns to the extent that it would lead courts away from the will of “the people as lawmakers.”

100. O’Hear, *supra* note 7, at 337.

101. 990 P.2d 1055 (Ariz. 1999) (discussed in O’Hear, *supra* note 7, at 317).

102. O’Hear, *supra* note 7, at 317.

103. *Calik*, 990 P.2d at 1060.

104. O’Hear, *supra* note 7, at 324–25; *see also id.* at 324 (applying Frickey approach to another case and concluding that the resulting “odd disparity” serves “[n]o theory of punishment or drug rehabilitation”).

105. *Id.* at 325.

and “the people as lawmakers.”¹⁰⁶ Still, generic skepticism is premised on the view that direct democracy lacks fundamental republican deliberative requisites and is “more likely than legislative lawmaking to produce ambiguous statutory text.”¹⁰⁷ And generic skepticism would require judges to visibly treat the fruits of direct democracy as second-class products (by subjecting them to expanded across-the-board caution), thus running afoul of the practical realities likely to retard the actual implementation of such a plan.

Compared to enhanced-voter-intent proposals and other proposals, broad skepticism in construing initiatives fares relatively well on the judicial manageability and legitimacy criteria. The three tools courts would wield are tools with which judges are intimately familiar. Some new manageability concerns would arise from judges having to make nuanced assessments about just how high to “heighten” the avoidance canon or how much additional “force” should be used with respect to other specialized canons, such as the rule of lenity. Still, these judgments are in the mainstream of typically manageable and legitimate judicial activity.¹⁰⁸

3. Selective Skepticism on Substantive or Procedural Grounds

One approach in a third (selective skepticism) category would use several substantive criteria to “distinguish between different types of popularly enacted statutes, giving deference when popular participation in the lawmaking process is likely to enhance the legitimacy or operation of the law.”¹⁰⁹ This proposal would employ selective skepticism for initiatives when the initiatives “disempower[] discrete and insular minori-

106. Frickey, *supra* note 7, at 523 (arguing that his approach protects “the core purposes of the electorate”).

107. *Id.* at 481.

108. See Landau, *supra* note 8, at 528 (“Frickey’s proposal thus requires only ‘subtle’ differences in interpretive approach that result in judicial scrutiny only ‘somewhat’ more demanding . . .”).

Professor O’Hear also criticizes Professor Frickey for suggesting that his generic skepticism regime “would not preempt ‘clear text’ or ‘evident, core purposes.’” O’Hear, *supra* note 7, at 323–34. Professor O’Hear points out that, at times, the text may be unclear, a purpose may not be evident, and there may be conflict between text and purpose. *Id.* Yet, these difficulties seem typical of the problems that courts routinely confront in statutory construction and do not suggest special concerns about manageability or legitimacy.

109. Note, *supra* note 9, at 2766. The proponent of this approach also suggests enhanced skepticism when an initiative “serves to circumvent the legislature” (as opposed to “[a] referendum [that] serves to affirm or reject the decision of a duly elected legislature”). *Id.* at 2768.

ties,” “directly interfere[] with the public fisc,” or “conflict with the commands of other statutes.”¹¹⁰

Another approach would hinge selective skepticism on process grounds—when there is reason to believe that “troubling structural inequalities” in the direct-democracy process have “increase[d] the risk of abuse” by “highly organized, concentrated, and well-funded interests.”¹¹¹ The proponent of this approach broadly envisions that “litigants and courts would be required to develop factors for distinguishing” when participants have “abused” the initiative process.¹¹² To assist this factor analysis, the proponent identifies the following as “‘danger signals’ that increase the risk”: when initiative texts are characterized by “length, complexity, [or] confusing wording”; when materials provided to the voter evince “obscurity about the effect of an affirmative vote”; when proposition proponents engage in “heavy advertising (especially when coded with race-based or similar symbols)”; and when “propositions explicitly or implicitly target[] . . . socially subordinated groups.”¹¹³

Compared to across-the-board skepticism about initiative-passed legislation, proposals to selectively discriminate against the fruits of direct democracy are still problematic, albeit somewhat less so, on the proportional remediation and disparagement criteria. Selective skepticism could warp initiatory construction through artificial narrowing and is based on a view that direct democracy is selectively deficient. Still, the damage would be mitigated because the proposals by definition apply to a smaller category of potential initiatives.¹¹⁴

110. *Id.* at 2767–68. The author implies that skeptical treatment should also be afforded to initiatives protecting the interests of entrenched political officials, such as legislators, and propositions, such as anti-environmental initiatives, favoring narrow social segments instead of “confer[ring] diffuse social benefits.” *Id.* at 2766–67.

111. Schacter, *supra* note 6, at 156–57.

112. *Id.* at 159.

113. *Id.* A third commentator proposes greater skepticism on another process ground: when initiatives seek to amend state constitutions, as opposed to merely enacting new statutory laws. This approach would “adopt a heavy presumption that proposals that are hard to classify should be considered as legislative initiatives and therefore susceptible to subsequent modification by the legislature.” Garrett, *supra* note 3, at 35. Because the scope of application of Professor Garrett’s interesting proposal would be significantly more limited than the other “selective skepticism” proposals, this section does not further analyze it.

114. In the absence of detailed empirical research, it is impossible to quantify the size of the initiative categories potentially affected by the different selective-skepticism proponents. But from both a quantitative and qualitative standpoint, Professor Schacter’s approach seems the more disparaging. Her narrow-construction proposal emerges from an extensive cataloguing of direct democracy’s failures. *See* Schacter, *supra* note 6, at 123–47. And because her critique of direct democracy’s failures suggests that initiatives would often be adopted in a process fraught with real dangers of manipulation and abuse, her narrow-construction remedy would quite often be invoked.

By contrast, the Harvard Note’s proposal to make substantive distinctions among ini-

Where selective skepticism seems significantly more problematic than generic skepticism is on the manageability and legitimacy scales. Selective skepticism would require courts to make distinctions and administer criteria that are by no means judicially manageable and legitimate.¹¹⁵ Even the most seemingly objective ground put forth by the proponent of selective skepticism on substantive grounds, whether an initiative “directly interferes with the public fisc,” is fraught with difficult characterizations inevitably raising open-ended policy questions. It is even more doubtful that judges could discover and manage objective standards for determining whether an initiative “advances” or retards minority rights, or is pro- or anti-environment.

Indeed, the call for judges to assess whether a given initiative campaign showed the “danger signals” of abuse and manipulation takes unmanageability to a higher plane. Even the more objective signals already identified, such as the length and complexity of an initiative’s text, may not accurately register abuse.¹¹⁶ And, even if judges adopt arbitrary word-count limits or linguistic complexity indices—standards easily evadable by initiative proponents as venal as this proponent assumes—judges would have to make many difficult judgments. Still less imaginable are the standards judges would use to fulfill the open-ended mandate to “develop” additional abuse-detecting devices not specified.

These problems with judicial manageability lead directly into the legitimacy concern. In administering both the substantive and procedural distinctions urged by reform proponents, courts would enter policymaking waters that many judges, public officials, and members of the public would see as illegitimate. Lack of reliable guidelines would at least create the perception, if not the reality, that judges are simply expressing their personal policy preferences.¹¹⁷

tiatives seems less disparaging for two reasons. First, the Note author has a more nuanced view of direct democracy’s pros and cons. *See supra* note 64 (quoting Note author’s view that direct democracy has provided important, positive legal change). Second, it seems likely that a lower percentage of initiatives would fit into the skepticism-worthy substantive categories of the Note author.

115. Commendably, the proponent of selective skepticism admits that the proposed fix “is not a tidy one” and that “[r]easonable jurists may disagree about what treatment to give a certain law.” *Id.* at 2768.

116. As Professor O’Hear points out, because initiative sponsors lack many of the devices legislative proponents have for making their intent known, their desire to spell out details in the lengthy texts might indicate responsible lawmaking, not irresponsible public hoodwinking. O’Hear, *supra* note 7, at 332–33. O’Hear also argues that “slogans and soundbites” are not necessarily “insidious” means of communicating about technically complex subjects in a mass media age. *Id.* at 333–34.

117. *See* Tushnet, *supra* note 65, at 375–76 n.14 (“A judge who disapproves of the substance of the direct legislation will identify a defect of deliberation, invoke a higher standard of review than would be applied to the same law adopted by a legislature, and strike the statute

The proponent of selective skepticism based on substantive criteria seeks to defuse this legitimacy concern by likening the value judgments required by his proposal to those “the judiciary already incorporates . . . into existing jurisprudence.”¹¹⁸ The only authority cited for this suggestion is the famous “footnote 4” from the *Carolene Products* decision, which justifies stricter scrutiny for “legislation that targets underrepresented groups” such as racial minorities.¹¹⁹ But the equal-protection jurisprudence following *Carolene Products* only applies to laws targeting minorities facially or by obvious effect. Asking judges to go substantially beyond that and identify laws more diffusely “disempowering” to minorities would assign judges a fundamentally different task and expose them to the charge of result-oriented policymaking.¹²⁰

That calls for selective skepticism ultimately require much more than typical judicial judgment is amply illustrated by California’s notorious anti-affirmative-action Proposition 209. Most observers would call the Proposition anti-minority, thus qualifying for heightened skepticism under substance-based selective skepticism. Yet, Proposition 209 proponents argued that it served the interests of minorities by, among other things, removing a stigma caused by the perception that “unqualified” minority citizens gained preferential benefits they could not have earned in legitimate competition.¹²¹ It is one thing for a voter or policy advocate to reject this argument, and quite another for a court to do so. Similarly, the proposal to employ selective skepticism based on process failures would obligate judges to determine whether the advertisements employed by Proposition 209 proponents were of a “heavy” volume and, if so, whether that represents abuse of direct democracy or necessary expenditures by proponents urging a position out of official favor. Judges

down. A judge who approves of the legislation on the merits will identify a structural concern that direct legislation seeks to cure, invoke a lower standard of review, and uphold the statute.”).

118. Note, *supra* note 9, at 2767.

119. *Id.* at 2766 n.99 (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)).

120. Professor Schacter’s reductionist argument that “all interpretive rules require value-laden line drawing by judges,” Schacter, *supra* note 6, at 160, is similarly unconvincing in this context. Her proposal calls for a quite different order of line-drawing—demanding subtle, controversial judgments about the validity and impacts of political processes.

121. In their ballot-pamphlet argument for Proposition 209, proponents contended in relevant part:

Proposition 209 will stop the terrible programs which are dividing our people and tearing us apart. People naturally feel resentment when the less qualified are preferred. . . . Let’s not perpetuate the myth that “minorities” and women cannot compete without special preferences. . . .

California Secretary of State 1996 General Election Website, Argument in Favor of Proposition 209, <http://vote96.ss.ca.gov/Vote96/html/BP/209yesarg.htm> (last visited Sept. 27, 2006).

would also be committed to determining whether the arguments of Proposition 209 proponents were “coded with race based or similar symbols”—a task that judges and others are likely to see as illegitimately “political.”

4. Judicially Expanded Deliberation During Initiatory-Construction Litigation

Under this proposal, judges would use initiatory construction litigation to “compensate for some of [direct democracy’s typical] informational deficits and create a structure for the deliberation that was absent from the process that produced the initiative.”¹²² Reflecting the belief that “the adjudicative process can act as a complementary adjunct to the direct lawmaking process,” this proposal envisions litigants and other interested parties engaging in a more “in depth” identification of initiative meanings.¹²³ The court would then “assign meaning to the contested provision with the benefit of this extended exploration and the court’s own knowledge of the legal context in which the initiative is situated.”¹²⁴ Thus, in many (if not most) initiatory-construction contexts,¹²⁵ judges would act to “maximize[] procedural opportunities for participation by a range of interests”;¹²⁶ at a minimum, “[i]n addition to liberally granting applications for intervention and for amicus curiae participation, courts should consider appointing pro bono representation for unrepresented, or even unorganized, interests.”¹²⁷

It is by no means clear whether and how this proposal would resolve the ambiguities of initiative meaning.¹²⁸ As one critic has pointed out, the proposal “d[oes] not explain how [expanded] hearings [would] differ from the hearings that routinely occur concerning the proper construction

122. Schacter, *supra* note 6, at 155.

123. *Id.*

124. *Id.*

125. As with Professor Frickey’s proposal, Schacter’s would not formally apply across-the-board, but would seem to have a practically sweeping application. To be subject to Schacter’s rule, an initiative must have terms that are arguably “ambiguous.” *Id.* at 155 (which is likely to be true in a large percentage of cases). The initiative must also have been adopted by a process displaying “informational and deliberative deficits,” *id.* at 156; yet Schacter states that such deficits “characterize[] the direct lawmaking process generally,” *id.* at 159.

126. *Id.* at 156.

127. *Id.* Schacter admits that “[t]he judicial process is not a perfect substitute for a more robustly deliberative initiative process,” but argues that litigation “can go some distance toward ameliorating the informational and deliberative deficits suggested by [her] study.” *Id.*

128. Ultimately, whether the proposal would in fact respond to the problems noted by initiatory-construction authors can only be assessed with more elaboration than the author of this admittedly “preliminary” proposal provided. See O’Hear, *supra* note 7, at 336 (“[O]ne cannot tell even what the terms of the debate would be.”).

of initiatives”); the critic’s own experience as a state judge suggests that current initiatory-construction hearings “frequently include extended briefing from the parties, intervenors and amici regarding the legal and political context, as well as competing interpretations, of the enacted measures.”¹²⁹ More fundamentally, the critic worries that “[h]olding a hearing would, at best, inform the court that the voters were confused about the effect of the measure that they nevertheless enacted into law,” yet “do nothing to inform the court about the correct way to interpret the law.”¹³⁰

The call for judicially-expanded deliberation when an initiative goes to court raises serious concerns under the remaining evaluation criteria, primarily because “[i]n effect [the proposal] transform[s] the court into an alternative political forum, where different interest groups can compete for the heart and mind, not of the voters, but of the judge . . . [who] would then engage in a far-ranging consideration of public values in order to resolve interpretive problems.”¹³¹ This substitution of policymakers implies fundamental disparagement—if not a basic abandonment—of direct democracy.¹³²

Nor is it at all clear that judges are institutionally capable of managing an authentically aggressive pro-deliberative litigation process.¹³³ Among the challenging issues confronting judges embarked upon a post-enactment deliberative expansion would be balancing the mandate for “liberal” intervention against the basic need to make litigation manageable; determining which interests are “unrepresented, or even unorganized” and who is a proper representative of these interests; and ascertaining what, if any, additional measures are needed to “maximize[] procedural opportunities for participation.”¹³⁴ And, if judicially expanded deliberation is conditional upon a judge’s prior determination that “informational deficits” caused initiative texts to be ambiguous,¹³⁵

129. Landau, *supra* note 8, at 525–26.

130. *Id.* at 526.

131. O’Hear, *supra* note 7, at 330.

132. Whatever its legitimacy as a logical proposition, initiatory-construction judges might legitimately doubt that the public or its officials would be placated by an assurance that “initiative lawmaking is . . . an ongoing, multi-institutional process that necessarily involves voters at one point and courts at another.” Schacter, *supra* note 6, at 156.

133. See Garrett, *supra* note 3, at 33 (“Schacter’s strategy . . . may require courts to make judgments for which they are not well-suited or to oversee processes that are beyond their competence . . .”).

134. As noted earlier, see *supra* text accompanying notes 126–27, Professor Schacter’s proposal requires due judicial consideration of all of the quoted concepts.

135. As noted earlier, see *supra* note 125, it is not clear whether an individual finding is necessary, or whether judges are generally to assume that informational deficits led to ambiguities.

the proponent is open to the criticism that “she again failed to give any clues as to how effectively to give content to such terminology.”¹³⁶

IV. THE LARGELY OVERLOOKED SPONSOR-INTENT ALTERNATIVE

This Part develops in detail the case that initiatory-construction deficiencies can be solved by looking in a fundamentally different direction: the intent of initiative *sponsors*. This alternative has been largely ignored by initiatory-construction commentators, with the exception of Professor Glen Staszewski, whose 2003 article argued that sponsor intent is the key factor for understanding initiatory meaning and that sponsors should be made to employ federal-administrative-rulemaking procedures to form and express their intent.¹³⁷

This Part briefly summarizes Professor Staszewski’s important, but limited, rationale for refocusing on sponsor intent¹³⁸ and explains why it is not surprising that previous commentators ignored the sponsor-intent alternative. The Part then goes beyond Staszewski’s exploratory work, by providing a multi-faceted justification for valuing sponsor intent more highly in the initiatory construction equation. Finally, the Part highlights serious methodological and practical problems with the rulemaking paradigm Staszewski proposes for implementing an expanded sponsor-intent refocus.¹³⁹

A. *The Sponsor-Intent Insight*

Professor Staszewski correctly argues that focusing on sponsor intent would provide a “more straightforward and effective” solution to present initiatory-construction woes than the “flawed, incomplete, or impracticable” reform proposals found in previous commentaries.¹⁴⁰ Focusing on sponsor intent would match the realities of the modern initiative process and provide a useful corrective for the present fruitless search for detailed intent from a group (voters) that is extremely unlikely

136. Landau, *supra* note 8, at 525 (critiquing Schacter’s other proposal for preventing process abuse); see O’Hear, *supra* note 7, at 336 (commenting that Schacter’s pro-deliberative proposal is “devoid of substantive guidance”).

137. See Staszewski, *supra* note 1, at 422–32, 447–59.

138. To be precise, Staszewski emphasizes the relevance of the intent of “initiative proponents,” a term he defines “to include the registered sponsors of ballot measures, their hired consultants, and those who voluntarily draft and promote measures on their behalf.” Staszewski, *supra* note 1, at 420 n.106. Part V of this Article proposes a narrower definition.

139. As a result, initiatory-construction reformers must look outside Staszewski’s model for the “appropriate” refocusing on sponsor intent that this Article advocates. Part V establishes the outlines of a proper focal adjustment.

140. Staszewski, *supra* note 1, at 399, 412.

to develop it. As a host of initiatory-construction commentators has recognized, at each phase of the initiative process (drafting, ballot qualification, electoral advocacy, etc.) “initiative proponents [act as] the driving force” behind the initiatives.¹⁴¹ Unlike voters, sponsors usually do have a sophisticated understanding and detailed strategic intent.¹⁴² Refocusing on sponsor intent would therefore “allow courts to continue utilizing an intentionalist methodology”¹⁴³—that is, an approach that seeks first and foremost to interpret texts in a manner consistent with the “intentions” of the relevant lawmaker—but with more promising results.

An enhanced sponsor-intent focus would also legitimize the second facet of most initiatory-construction case law, the judicial reliance on “formal” legal sources identified by Professor Schacter and confirmed by others.¹⁴⁴ Because many initiative sponsors are “professionals and repeat players” in the political process,¹⁴⁵ they are capable of understanding the “legal context” surrounding a proposed initiative and “the technical legal jargon that is used in the text.”¹⁴⁶ This means, as Professor Staszewski puts it, that “[i]f . . . courts were expressly to acknowledge that their use of formal legal sources of interpretive guidance was designed to convey the meaning intended by initiative proponents, rather than the meaning intended by the voters,” much of the unreality of present initiatory-construction decisionmaking “would largely disappear.”¹⁴⁷

For example, correcting the focus of initiatory construction would render plausible the unreal intent assumptions made by the California Supreme Court in *People v. Castro*.¹⁴⁸ This Article noted earlier how the *Castro* plurality credited voters with a knowledgeable desire to preserve various California Evidence Code rules and arcane knowledge

141. *Id.* at 421 (citing several direct-democracy experts); *see id.* at 431 (discussing “the dominant role played by the initiative proponents in direct democracy”); *id.* at 420 & n.106 (citing articles by Professors Frickey, Garrett, and Schacter for the proposition that “[i]nitiatives] are conceived, drafted, sponsored, and promoted by identifiable individuals or groups that favor a specific policy proposal”).

142. *See id.* at 433 (“[Sponsors] draft the language of proposed ballot measures and typically have sufficient expertise to understand the legal landscape into which their measures will fit.”).

143. *Id.* at 400.

144. *See id.* at 434.

145. Nagle, *supra* note 7, at 545.

146. Schacter, *supra* note 6, at 128; *see, e.g.*, Frickey, *supra* note 7, at 519 (initiative sponsors are “active participants” and “frequent ‘players’ in the repeat game of direct democracy” who can be expected to pay attention to legal decisions and behave accordingly); Sutro, *supra* note 5, at 971 n.127 (initiative drafters “undoubtedly . . . will be familiar with any judicial significance a proposed initiative’s words may contain”).

147. Staszewski, *supra* note 1, at 434.

148. 696 P.2d 111 (Cal. 1985).

about the interaction of initiative provisions.¹⁴⁹ Attributing this knowledge to the sponsors of the initiative is much more plausible.¹⁵⁰

A focus on sponsor intent seems preeminently logical—especially in light of the parallel to using drafter intent in statutory construction. This raises the question of why previous courts and commentators have largely missed it. The answer is interesting because it points to deep-seated attitudes that must be addressed if the sponsor-intent insight is to achieve its full reform potential.

Some commentators may simply be reflexively following the judicial fixation on voter intent.¹⁵¹ For many others, however, the failure to draw the parallel to sponsor intent may instead reflect a very dim view about sponsors based on the consensus critique of direct democracy's deficiencies canvassed in Part I.¹⁵² The direct-democracy literature regularly portrays initiative sponsors as hiding their true intent behind disingenuously titled texts of inordinate length and impenetrable content, engaging in deceptive and simplistic campaigns for voter approval, and even opposing the initiatives of others with "Trojan Horse" alternative initiatives.¹⁵³ Commentators who have debunked voter intent based in part on misbehaving sponsors would be naturally loathe to credit their intent.

Sponsor suspicion abounds in the writings of several key initiatory-construction commentators. As noted above, Professor Schacter's study "strongly suggests" that "the informational dynamics of direct lawmaking . . . create opportunities for *strategic abuse* of the process" by initiative sponsors.¹⁵⁴ Schacter further speaks in terms of sponsors "construct[ing] a desired—but largely phantom—popular intent" through such devices as deliberately using legal terminology with which the elec-

149. See *supra* text accompanying notes 37–40.

150. This is not to say that the *Castro* result faithfully accords with *sponsor* intent, when all the relevant intent indicators are properly weighed. See Silak, *supra* note 8, at 51–52 (criticizing *Castro* majority as interfering with strong victim-rights intent behind Proposition 8). Rather, the point is that, by either ignoring sponsor intent or by lumping sponsors in with voters, the *Castro* majority was not even required to confront hard evidence about the strategic intention of sponsors.

151. See, e.g., Sutro, *supra* note 5, at 974 ("The voter is the law-maker; the drafter and proponents of the initiative are not.").

152. The occasional negative comments about direct democracy by judges, see, e.g., Silak, *supra* note 8, at 29–30 n.174 (quoting Professor Julian Eule relating a California judge's comment that an allegedly "fraudulent" initiative "was no more misleading than any other initiative"), may indicate that other judges secretly share this dim view.

153. As one initiatory-construction scholar noted: "Some sponsors of these ballot measures might not have had a serious hope of passing their propositions, but introduced their measures anyway in an attempt both to confuse voters (in part, by cluttering the ballot) and to solicit 'No' votes on all the related proposals." Coury, *supra* note 5, at 586.

154. Schacter, *supra* note 6, at 154 (emphasis added).

torate is unfamiliar so they can “have an unseemly private dialogue of sorts with the courts.”¹⁵⁵ The most prominent proponent of an enhanced search for voter intent portrays sponsors as “deliberately” seeking to “mislead the electorate” through unclear initiative language.¹⁵⁶ Other initiatory-construction commentators take similar tacks, describing sponsors as having “extreme views” and purposes that may be “withheld” from voters,¹⁵⁷ or “hav[ing] one view about the meaning of the language of an initiative but [presenting] another view to the general public.”¹⁵⁸

Even Professor Staszewski has a basically negative view of the sponsors whose intent he nevertheless finds to be the relevant focus. His suspicion of sponsors is evident in his statement that “much of [the initiative proponents’] discourse with the electorate is conducted in a simplistic, partisan, and sometimes misleading fashion.”¹⁵⁹ Staszewski’s dim view of sponsors is also subtly implicit in his argument that the current rules of initiatory construction “privilege” sponsor views, by reflexively attributing to voters the sponsor views presented in ballot-pamphlet arguments.¹⁶⁰ In reality, initiative sponsors whose intent is often ignored and whose ambit for establishing intent is seriously constricted are unlikely to feel “privileged” relative to legislation drafters. (How many legislation drafters would rather be held to a few hundred words in which to make their case and explain their intent?) Still, the language is revealing; it relates to other more problematic assumptions explored in detail below.

In sum, the strong suspicion of courts and commentators about initiative sponsors underlines the importance of developing the full case for an enhanced sponsor focus and crafting appropriate procedures for clarifying sponsor intent while improving direct democracy in the process. The remaining portions of this Article focus on that task.

B. *A Comprehensive Case for Refocusing on Sponsor Intent*

Professor Staszewski’s defense of an enhanced focus on sponsor intent, although persuasive, is incomplete. First, an enhanced focus on sponsor intent should actually *reduce* the sponsor abuses that concern

155. *Id.* at 128.

156. Silak, *supra* note 8, at 36.

157. *See* Sutro, *supra* note 5, at 949 n.22, 975.

158. Frankel, *supra* note 9, at 440.

159. Staszewski, *supra* note 1, at 428; *see, e.g., id.* at 421 (“[I]nitiative proponents typically represent particular special interests and are increasingly multimillionaires who seek to influence public policy on their pet issues”; they also are “unelected and not sworn to uphold the Constitution”).

160. *See id.* at 432–33.

initiatary-construction scholars. Second, beyond legitimizing the intentionalist methodology dominating current initiatory construction, a focus on sponsor intent would highlight the most relevant source for two less popular, but extant alternatives. Third, refocusing on sponsor intent properly accounts for the reality of the sponsor/voter relationship and harmonizes it with several well-known models employed in analogous legal domains. Fourth, recognizing the value of taking *appropriate* account of sponsor intent provides a new rationale for reforming the processes of initiative design and deliberation in ways reformers have long championed but too infrequently accomplished. Finally, an appropriately enhanced judicial focus on sponsor intent would score comparatively well on the evaluative criteria employed in Part III—thereby avoiding the major problems posed by the reform proposals of other initiatory-construction scholars.

1. Reducing Sponsor Abuse

Although the idea may be counterintuitive, the best way to reduce the risk of sponsor abuse is to give appropriately enhanced credence to sponsor intent. Under the present initiatory-construction approach, sponsors know that almost everything they say during an initiative campaign will not, to paraphrase the famous Miranda warning, be used against them in a court of law. This creates a structure in which unethical proponents can, without fear, present one message in initiative texts and ballot-pamphlet arguments and quite another in campaign materials and other public statements. By contrast, if initiative proponents had to be concerned that the arguments and characterizations that now get expressed in other extrinsic materials might be used by courts, they would have a greater incentive to ensure that these extrinsic communications are accurate and consistent with their strategic design.

2. Serving the Other Two Approaches Used by Modern Initiatory-Construction Courts

Beyond legitimizing the dominant “intentionalist” model for initiatory construction, appreciating the dominant role of initiative sponsors would also legitimize other important, but less-frequently-used initiatory-construction approaches.

The first of these alternatives is “purposivism,” which distills “reasonable” purposes from the legislative work product and then seeks the

interpretation most fully consonant with the attributed purposes.¹⁶¹ To the extent that initiatory-construction courts consider an initiative’s implicit purposes, its sponsor is a far more fruitful source from which to determine them.

Recognizing the importance of initiative proponents also legitimizes initiatory construction via the textualist approach.¹⁶² Textualism’s central assumption, that legislators use statutory words to reflect a common “ordinary and natural” meaning in light of the overall legal corpus,¹⁶³ makes sense when the legislators are knowledgeable “insider” sponsors, rather than unknowledgeable voters.¹⁶⁴ An enhanced sponsor focus even serves the variant of “soft textualism” (i.e., examining legislator intentions to *confirm* an interpretation suggested by resort to the relevant text¹⁶⁵); initiative proponents would again be the ones likely to have specific legislative intentions.

3. Harmonizing Sponsor/Voter Dynamics with Other Appropriate Legal Models

Recognizing that the primary role of initiative sponsors likely gives *them* the detailed legal understanding and strategic intent makes it possible to harmonize the sponsor/voter relationship with several other well-known and well-accepted legal models.

These models involve a delegation of authority, whether official or de facto, from those ultimately enacting positive law to individuals or entities with greater presumed expertise. All models also involve a de facto placing of trust—sometimes willingly and sometimes begrudgingly,

161. See LINDA D. JELLUM & DAVID CHARLES HRICK, *MODERN STATUTORY INTERPRETATION: PROBLEMS, THEORIES, AND LAWYERING STRATEGIES* 99–101 (2006). As one scholar has noted, initiatory-construction courts at times are guided by their sense of the core purposes behind the enactments in question. See *supra* note 21.

162. See Silak, *supra* note 8, at 56–59 (analyzing textualist approaches of courts in Missouri and Washington). Silak criticizes overly textual interpretations of initiatives, as does the author of this Article. See *supra* note 77. However, some courts will likely continue textualist approaches, and it is preferable that these courts have the proper tools and conceptual basis for doing so.

163. See, e.g., 2001 ESKRIDGE, FRICKEY & GARRETT, *supra* note 72, at 770–71.

164. Cf. Staszewski, *supra* note 1, at 434 (citing Schacter’s rejection, *supra* note 6, at 149–50, of textualism “because the legal terms of art commonly used in ballot measures are often meaningful only to a small elite community of lawyers, judges, and knowledgeable observers”).

165. See, e.g., *Griffin v. Oceanic Contractors Inc.*, 458 U.S. 564, 569–72 (1982) (construing textual language based on plain meaning but then consulting legislative history to “confirm” statutory understanding); see 2000 ESKRIDGE, FRICKEY & GARRETT, *supra* note 57, at 223–27 (discussing the “soft plain meaning rule”).

sometimes permanently and sometimes episodically—in law drafters to act in the name of the ultimate law adopters.

Professor Staszewski makes an important contribution to the initiatory-construction scholarship by highlighting a comparison that has escaped the notice of other commentators: the analogy between administrative-agency rulemakers and initiative sponsors. As Staszewski notes, both agency rulemakers and initiative proponents serve as “unelected lawmakers” exercising delegated legislative power in a de facto fourth branch of government.¹⁶⁶ Of course, one major difference between legislative delegation of lawmaking authority to administrative rulemakers and voter delegation of lawmaking authority to initiative sponsors is that rulemakers can enact binding law without approval of their principals, whereas initiative sponsors cannot. This distinction is better accounted for by several other models. For example, in some states legislative advisory committees can review promulgated administrative rules and suspend their operation until the legislature acts.¹⁶⁷ Another model including but transcending administrative experts is when reform laws written by expert bodies or commissions (or outside interest groups) are blessed with only minimal investigation or understanding by elected legislators.

At this point in the discussion, it is not important to choose among these models.¹⁶⁸ Rather, what is significant is that under *none* of these models would courts reject authoritative information about the intent of those who originated and refined the lawmaking proposals and instead focus only on the intent of the legislators ultimately acquiescing in (or adopting) the outside-expert work. This is so even when rules only become law when the legislature assents (or fails to override). Under all of the models, recourse to indicators of drafter intent usually occurs with minimal concern for whether the ultimate legislators were aware of or understood the intent; courts appear to either assume legislator knowledge, or recognize that a desire to avoid dwelling in details is implicit in the delegations of authority and trust implicit in these arrangements.¹⁶⁹

166. See Staszewski, *supra* note 1, at 434, 400, 437–38, 441 n.192. Staszewski cites two other similarities between administrative rulemakers and initiative sponsors. First, both forms of lawmaking deviate from the deliberative procedures that the U.S. Constitution requires for lawmaking by elected officials. See *id.* at 400–01. The notion that this deviation makes rulemaking and direct democracy “inherently suspect” is criticized below. See *infra* text accompanying notes 174–78. Second, both forms of lawmaking raise a “concern that elected officials will punt on difficult choices facing the polity and shift responsibility for the most controversial issues of public policy to less accountable actors.” Staszewski, *supra* note 1, at 401. Staszewski’s valid point puts a premium on the procedural reforms to improve the direct-democracy process that this Article advocates.

167. See 2001 ESKRIDGE, FRICKEY & GARRETT, *supra* note 72, at 1140–41.

168. Part V addresses the various implications flowing from model selection.

169. See, e.g., 2000 ESKRIDGE, FRICKEY & GARRETT, *supra* note 57, at 305 (noting Su-

In sum, *all* of the possible models justify a similar and enhanced focus on sponsor intent by initiatory-construction courts.¹⁷⁰

4. Justifying Procedural Reforms in the Name of Appropriately Enhanced Sponsor Intent

An enhanced sponsor-intent focus could provide a significant impetus to the ongoing effort to reform the procedures of direct democracy. As explained more fully in Part V, an enhanced sponsor-intent focus would provide useful ordering principles for analyzing and prioritizing proposed reforms. The need to provide reliable information about sponsor intent to initiatory-construction courts suggests that a high value should be placed on reforms that are most likely to register and refine sponsor intent in an efficient manner. Crediting the logic of enhanced sponsor intent would thereby create an important new rationale for use by direct-democracy reformers.¹⁷¹

5. Eliminating the Problems Associated with Previous Reform Proposals

Compared to the reform proposals analyzed in Part III, an appropriately enhanced focus on sponsor intent would score well on all four evaluation criteria canvassed earlier.

First, Part IV.A noted that a nuanced focus on sponsor intent would proportionally solve the major problems with the current initiatory-construction approach. The illusory hunt for voter intent would be replaced by a bona fide search for an intent that is likely to be present and helpful. And Schacter’s “paradox,” i.e., the erroneous search for voter intent via “formal sources” not well matched to voter knowledge and re-

preme Court reliance on “statements by a nonlegislative drafter of legislation” despite concerns about accessibility, accuracy in representing congressional intent, and risk of exaggeration).

170. Of course, legislators adopting laws drafted and conceived by their individual legislator colleagues or legislative committees often make a similar *de facto* delegation of authority and trust to their more expert colleagues. Especially on complicated or specialized legislation, the idea that individual legislators read and understand texts and committee reports is widely recognized as a necessary fiction.

Still, other institutional and political realities not found in the initiative-sponsor/voter relationship limit the transferability of the legislative-drafter/legislative-enactor model. Rank-and-file legislators and legislative sponsors move fluidly from one role to the other, speak the same language, share a basic stake in system maintenance, and are subject to interlocking incentives to treat each other with minimal fairness.

171. Professor Staszewski’s article recognizes this implicitly, by first arguing that a sponsor-intent focus is relevant and then proceeding to defend his reform model as a necessary procedure for advancing a sponsor-intent focus. *See supra* text accompanying note 137.

liance,¹⁷² disappears when canons and assumptions about strategic intent within the overall legal landscape are applied to initiative sponsors, who are likely to possess the requisite knowledge and intent. As long as the reform proposals selected for registering and refining sponsor intent focus on an appropriate range of materials for court consultation, the sponsor-intent alternative would directly and proportionally remedy consensus problems.

Second, an enhanced sponsor-intent focus would not require disparaging direct democracy. True, it would de-emphasize one partner in direct democracy (voters) and enhance emphasis on another (sponsors). But unless one falsely equates direct democracy with voter *intent*, as opposed to voter *assent* to the details developed under a de facto delegation of authority, no message of disparagement need be taken. At most, judges implementing an enhanced sponsor-intent focus would need to emphasize in their opinions that they are searching for the accurate *intent* of those on whom voters relied in order to faithfully serve the *will* of the people themselves.

Finally, an enhanced sponsor-intent focus would be manageable and legitimate, so long as the range of potential sponsor-intent indicators is well calibrated. It would not seem an unmanageable stretch for courts to substitute “initiative drafter” for “legislative drafter,” and apply standard interpretive canons and assumptions to a new kind of sponsor. True, on rare occasions when sponsors are unsophisticated grass-roots gadflies, assumptions of knowledge, professionalism, and strategic intent could be unwarranted. Courts would have to make some mildly “political” judgments in assessing these outliers. Given the high professionalism that occasions most modern initiative drives, however, in most cases courts could reasonably assume that initiative sponsors are as sophisticated and system-savvy as elected officials. (In fact, often the initiative sponsors *are* elected officials!) At base, measured judicial interpretation of sponsor intent where the proposed enactment is an initiative would usually be as legitimate as interpretation of sponsor intent where the proposed enactment is legislation.

C. *Avoiding Lock-Step Implementation of the Federal Rulemaking Model*

Unfortunately, Professor Staszewski’s important addition to the initiatory-construction scholarship falls short at the critical phase of proposing logical, workable means for redirecting the focus of initiatory con-

172. See Schacter, *supra* note 6, at 130.

struction. This part explains how two basic errors cause several flaws in his reform proposal. Ironically, both sets of errors render Staszewski’s proposal vulnerable to the same charge that he accurately levels at his predecessors: the proposals are “intriguing reforms,” but “the willingness and ability of courts to implement [them] is . . . open to question.”¹⁷³

1. An Overly Zealous Commitment to Republican (Legislative) Deliberation

Professor Staszewski pitches his tent in the camp of initiatory-construction scholars who emphasize the importance of the deliberative process and republican checks on abuse of power associated with an idealized version of the legislative process. Like many others, Staszewski uses “the fundamental lawmaking characteristics set forth in the federal Constitution” as the “baseline requirements of republican lawmaking”¹⁷⁴ from which to view all other lawmaking models. This is certainly a plausible position. But it required Staszewski to confront what one initiatory-construction scholar called “a respectable body of academic writing suggesting a different conception of republican values and of the relationship between the initiative power” and United States Constitution requirements.¹⁷⁵ (His over-reliance on the republican/deliberative critique also practically diminishes the real-world attractiveness of Staszewski’s proposal, by inviting opposition from courts and commentators who do not share his anti-direct-democracy point of view.)

Without engaging in extended swordplay on the substantive merits, two examples will help to underscore Staszewski’s extensive republican/deliberative commitment, and the errors it promotes. One measure of Professor Staszewski’s zeal comes in Part III.A of his article, in which the author pursues an intricate, but ultimately circular argument about “The Constitutionally Suspect Nature” of direct democracy.¹⁷⁶ Staszewski presumes the validity *to the states* of Article I deliberative requirements. Yet, after briefly noting recent scholarship suggesting that neither the Constitution’s Guarantee Clause nor the intent of the Framers creates a constitutional barrier to direct democracy at the state level, Staszewski offers no rebuttal. He relies instead on the softer claim that “direct democracy is in serious tension” with constitutional structures.¹⁷⁷ Yet, because Staszewski failed to explain why the federal government’s

173. Staszewski, *supra* note 1, at 411.

174. *Id.* at 439.

175. Landau, *supra* note 8, at 508.

176. *See* Staszewski, *supra* note 1, at 435–40.

177. *Id.* at 439 n.190.

structural minima are even *relevant* to states, he fails to establish the existence of any “tension.” Ultimately, he merely asserts the policy position that states “should” improve the deliberateness of direct democracy.”¹⁷⁸

A similar error compounds Staszewski’s other basis for finding direct democracy legally suspect. Although correctly identifying the power of the analogy between direct democracy and administrative lawmaking, Staszewski incorrectly assumes that *federal* constitutional skepticism about the delegation of legislative power to non-elected administrative officials applies to *state laws* propounded by non-elected initiative proponents through direct democracy. Staszewski relies on the fact that “state courts have uniformly adopted their own versions of the nondelegation doctrine.”¹⁷⁹ He notes that “[a] number of state courts, including California, Oregon, and Washington, specifically consider whether the lawmaking process contains adequate procedural safeguards when assessing the validity of delegations of authority to administrative agencies.”¹⁸⁰ Yet, Staszewski fails to account for the fact that the constitutions of these three safeguard-requiring states, among others, contain provisions expressly authorizing direct democracy and that these provisions predate the modern embodiment of state nondelegation doctrines. The natural conclusion is that these and other direct-democracy constitutions long ago reconciled nondelegation concerns with lawmaking by initiative.

2. A Problematic Fixation on the Federal-Administrative-Rulemaking Process

Perhaps because he sees republican deliberation and nondelegation as “baselines” applicable to direct democracy, Professor Staszewski assumes that Federal Administrative Procedure Act (“APA”) notice-and-comment procedures (including full-scale judicial review)¹⁸¹ should be applied wholesale to those who make law via initiative. This fixation with APA rulemaking as the only relevant deliberation-promoting model leads to three deficiencies seriously undermining Staszewski’s reform proposals.

First, the federal-rulemaking fixation ignores the need to adapt deliberative reforms to variations in a state’s administrative procedure act

178. *Id.*

179. *Id.* at 438 n.185.

180. *Id.*

181. *See* 5 U.S.C. 553, 706(2)A & (2)D (2000).

and the idiosyncrasies of its political and legal culture.¹⁸² Reforming initiative procedures to enhance the development and recordation of meaningful sponsor intent, while convincing courts to pay greater attention to sponsors, requires the acquiescence (and probably the active support) of state judges and officials. State-specific tailoring of proposed reforms would likely increase the comfort level of these leaders.

A second problem is that Staszewski’s exclusive focus on the federal notice-and-comment rulemaking model leads him to endorse a relatively cumbersome and arguably over-elaborate deliberative approach. Staszewski describes federal notice-and-comment rulemaking in exclusively positive terms,¹⁸³ other students of the federal administrative process have noted the substantial costs, both in time and money, extracted by full APA compliance.¹⁸⁴ It would be one thing to show the merits of the federal notice-and-comment process, in cost/benefit terms, in comparison to other possible alternatives (including the alternative rulemaking procedures of particular states).¹⁸⁵ But it is quite another thing—and one substantially less likely to persuade the state officials who would need to adopt Staszewski’s proposals—to give the APA rulemaking procedures presumed legitimacy.

The third and most important deficiency flowing from Staszewski’s commitment to the federal APA model is that he unwisely imports into the state direct-democracy context the full judicial-review schema for federal rulemaking. In essence, Staszewski proposes that, even after an initiative survives constitutional challenge, it could still be invalidated, sending its proponents back to the drawing board.¹⁸⁶ During potential multiple rounds of judicial review,¹⁸⁷ judges would probe three different

182. One example of the difficulty this causes: Staszewski’s presumption that the federal-rulemaking model is per se appropriate leads him to advocate aggressive “hard look” judicial review of whether proponents comply with relevant deliberative procedures. *See* Staszewski, *supra* note 1, at 443–44. This in turn requires Staszewski to confront the problem that “a number of states have not adopted hard-look judicial review.” *Id.* at 443 n.201. Staszewski’s only response to this problem is to say that the states *should* change their approach. *See id.* A reform proponent not so wedded to full congruence with the federal model could propose state-sensitive alternatives that would be substantially more likely to be adopted.

183. *See* Staszewski, *supra* note 1, at 441–47.

184. *See, e.g.,* CORNELIUS M. KERWIN, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 102–13 (3d ed. 2003) (discussing several issues detracting from rulemaking timeliness).

185. This is the kind of analysis that would be necessary to ensure that Staszewski’s proposal constituted an *appropriately* enhanced focus on sponsor intent, and that it avoided disproportionate remedies, the first evaluation criterion discussed in Part III.B. *See supra* text accompanying notes 60–61. Part V discusses some preliminary relevant considerations for the inquiry.

186. *See* Staszewski, *supra* note 1, at 453–54.

187. As with review of APA rules, a court could invalidate an initiative during the first round of judicial challenges on procedural grounds (for example, because proponents failed to

aspects of possible initiative shortcomings: procedural violations, deliberative failures, and substantive illogic.¹⁸⁸

Allowing aggressive and repetitive judicial intervention in the initiative process raises transparent questions of judicial legitimacy. These outstrip even the more dubious proposals of Staszewski's predecessors:¹⁸⁹ at least Schacter's proposal for more pro-deliberative judicial structuring envisions only *one* round of judicial involvement with successful initiatives. Further, the implied disparagement of direct democracy exceeds the skepticism inherent in the most disparaging reform proposals suggested by other scholars. For example, Schacter would only allow frustration of the voter's decision at the margin, through arguably unguided judicial reconstructions; even she does not envision courts stopping initiatives dead in their tracks.

Because he assumes the federal rulemaking model to be the natural and constitutionally-relevant procedure for direct democracy, Staszewski fails to inquire whether judicial overkill would even be necessary to police new requirements that sponsors explain their intent and respond to other views.¹⁹⁰ Unlike the administrative rulemaking process, in direct democracy (as in the legislative process) several nonjudicial participants are present to assist with "enforcement" of deliberative requirements. The opponents of initiative proposals would have strong incentives to call public attention to proponents who fail to respond to apt criticisms or who respond in illogical ways. The media could also be expected to give substantially more attention to public deliberations and disputes about initiatives than to relatively more staid and complex administrative-

adequately respond to an opponent's policy argument). One or more additional notice-and-comment proceedings on the same or an amended initiative proposal could lead to new procedural problems, generating new rounds of judicial review with the potential to send an adopted initiative back for yet further procedures. Even if proponents eventually got the procedures right, a court could still invalidate an initiative at a later time for substantive deficiencies during "arbitrary and capricious" review. If the administrative rulemaking process is an example, many years could pass between initial proposal of the initiative and its ultimate success or failure.

188. See Staszewski, *supra* note 1, at 453-54.

189. Staszewski anticipates judicial-legitimacy questions by responding that "[t]he *initiative proponents* who control the lawmaking process are hardly a coequal branch of government—or even elected officials who are held accountable for their decisions by significant institutional constraints." *Id.* at 472. He implies that judges should feel less compunction about frustrating the goals of these marginally legitimate actors. Yet, this fails to confront the reality that initiatives do not become law until "the people" give them very real, albeit uninformed, democratic *assent*. As a result, Staszewski's assertion that "impos[ing] . . . additional procedural requirements on initiative proponents is not inconsistent with a 'reservation' of direct lawmaking authority for 'the people,'" *id.*, remains unpersuasive. Voter approval is a new part of the equation that those who would impose onerous procedural barriers need to consider.

190. In the language of the first evaluation criterion, Staszewski's judicial-review proposal would be a highly disproportionate remedy.

rulemaking discussions. Under the enhanced-sponsor-intent paradigm, initiative proponents should fear not responding adequately to the way participants in deliberations characterize the intended operation of proposed initiative terms, the rationales behind their proposals, and other relevant dimensions. A nonexistent or inadequate response would risk creating “negative legislative history” that could come back to haunt proponents during later initiatory construction.

V. HARVESTING THE FULL POTENTIAL OF AN ENHANCED SPONSOR-INTENT FOCUS

Seeing the value of an enhanced sponsor-intent focus, but avoiding lock-step adoption of federal rulemaking procedures replete with judicial enforcement and “hard look” review, clears the way for important practical improvements in the procedures of direct democracy. With enhanced sponsor intent as their lodestar, direct-democracy reformers could analyze proposed reforms, including exemplary practices actually in place in some states, and design optimal procedures for causing sponsors to refine and register their intent.

A full elaboration of these possibilities is beyond the scope of this article.¹⁹¹ Yet, this Part notes three relevant issues and several possible approaches—in part, so that other initiatory-construction scholars might be encouraged to assist with the field work.

A. *Refining and Registering Sponsor Intent*

If initiatory-construction courts should be paying more overt attention to the intent of initiative sponsors, sponsors must have appropriate incentives and mechanisms for forming and formalizing their intentions. Professor Staszewski’s proposed use of federal informal-rulemaking procedures provides one promising avenue. When a federal agency proposes a rule, it is required to think and write about the existing legal context in which its proposed rule change would operate, provide a detailed explanation of the need for the proposed change, and expound in detail about what the proposed rule would and would not do.¹⁹² Many state rulemaking schemes follow the federal APA’s “statement of basis and

191. This Article’s author is at work on a detailed analysis, to be published separately, of how current California procedures for rulemaking, legislation, and direct-democracy could be adapted to ensure that sponsors register authoritative intent and participate in meaningful policy-formulation discussions with state officials and the public.

192. See Staszewski, *supra* note 1, at 449.

purpose” model¹⁹³; in these states, the existing legal requirements could probably be imported into the direct-democracy context with little alteration. Or, a state may have refined its rulemaking process in ways that would be appropriate for direct democracy.¹⁹⁴

The administrative-rule-proposing model is not the only promising one, however. Another analogy is the process for executive or legislative review of rules—with initiative sponsors playing the role of rulemakers and voters playing the role of executive or legislative reviewers.¹⁹⁵ To the extent that different information-submission procedures are used for these processes at the federal or state level, additional potentially appropriate models arise. Or, promising elements might be borrowed from the various impact statements—environmental and otherwise—required of administrative rulemakers and, at times, legislators.¹⁹⁶ Perhaps drafters should have to file an “initiative impact statement,” detailing how their proposal would, and would not, impact the existing and future legal, social, and political environments of the state.

Regardless of the specific model employed, on both substantive and practical grounds the process should be targeted to achieve maximum useful information (perhaps by asking sponsors to address a series of detailed questions) with minimal unnecessary burden or verbosity. Achieving the proper balance is important to all who would use the intent register directly, i.e., initiatory-construction courts, especially motivated members of the voting public, and those in officialdom, the media, and interest groups who would communicate with voters about sponsor intent. The sponsor-intent register should be a discrete document, representing only the views of the prime sponsor and meaningfully distinguishable from the prime sponsor’s other electioneering communications.

193. See 5 U.S.C. 553(b) (2000).

194. As noted in Part III, see *supra* text accompanying notes 66–70, working within a state’s legal tradition, rather than imposing a potentially foreign federal model, has substantial practical advantages.

195. See *supra* text accompanying note 167.

196. See, e.g., 2000 ESKRIDGE, FRICKEY & GARRETT, *supra* note 57, at 180, 188 (noting requirements that proponents of legislation analyze impact of “unfunded mandates” on state and local governments during consideration of budget acts and delineate “tax simplicity” implications during committee consideration of significant tax measures); *id.* at 188 (“Congress is considering various proposals to impose procedural frameworks on the consideration of most regulatory bills.”); KERWIN, *supra* note 184, at 59–61 (summarizing “information statutes” requiring administrative agencies to disclose positions about environmental, small-business, and paperwork issues).

B. Encouraging—Even Requiring—Sponsor Consultation with Public Officials and Other Expert and Interested Parties

A well-conceived consultation process could respond to the frequent criticism that initiative sponsors too rarely interact with public officials, private experts, and interest groups. Two main advantages would flow from an expanded dialogue. First, sponsors would benefit from the useful substantive information, understanding about existing law, and drafting expertise that public and private experts could provide. This could produce more specific and refined sponsor intent, reduce drafting errors, and lessen unforeseen consequences. Second, as noted earlier,¹⁹⁷ consultation with interested parties would serve as an important deliberative check on sponsors—it would force them to deal with the perspectives of important constituencies and to respond to criticisms upon pain of making adverse “legislative history.”

In selecting the optimal consultative procedures from the wide variety of models available, initiatory-construction reformers need to confront a number of questions about the degree of formality and timing. For example, if informal, non-public consultation is all that is desired or possible, reformers could follow the lead of states requiring sponsors to consult with relevant state officials, such as lawyers in the secretary of state’s office, before submitting an initiative proposal for the ballot.¹⁹⁸ Or, reformers could adapt the largely non-public consultative processes accompanying executive-level review of administrative regulations at the federal and state levels.

If, instead, reformers wish to trigger a more public consultation process—among other reasons, so that sponsors will be forced to heed expert advice or explain publicly why they did not, thereby creating useful evidence of intent—several models are available. Certainly the “comment” part of the federal notice-and-comment rulemaking process is one useful alternative. By requiring proponents of legal change to seek written or oral input within a structured process, and then to respond to received comments when publishing a final “statement of basis and purpose” explaining the new law, rulemaking procedures mimicking or adapting the federal APA could substitute for the deliberation many find lacking in direct democracy.¹⁹⁹ Another alternative is the legislative-

197. See *supra*, Part IV.B.1.

198. See, e.g., Silak, *supra* note 8, at 7–8 (describing Idaho process in which Attorney General reviews proposed initiatives, in consultation with proponent, “for substance” and, on “merely advisory” basis, “may recommend . . . revisions or alterations . . . deemed necessary and appropriate”); Tornquist, *supra* note 7, at 683–84 (noting Oregon Attorney General’s provision of “advice regarding the eligibility of initiatives”).

199. See Staszewski, *supra* note 1, at 449–50 (citing Administrative Procedure Act, 5

type hearing. For example, reformers could look to states in which initiatives are considered at legislative hearings—and sometimes discussed in committee reports and other legislative deliberations—as part of the “indirect initiative” process.²⁰⁰ Or, public hearings about initiative proposals could be an additional requirement for a process leading to direct voter approval.²⁰¹ A well handled legislature-led consultation process could provide meaningful participation by major experts and interests while avoiding the delays and over-formalization for which the federal rulemaking process has been criticized.²⁰²

An additional option for conducting, or at least initiating, a more public-deliberation process is review by executive-branch officials or outside experts. For example, Massachusetts uses a public “certification” process in which the state attorney general must review a proposed initiative before it is circulated for voter signatures and approval.²⁰³ This executive-review process is limited to compliance with constitutional provisions, including single-subject rules, but nothing prevents any state from expanding the list of review criteria or involving private interest groups or experts formally or informally in executive-official review. Thus, Oregon’s Secretary of State arranged for a committee of law-school deans to “review[] initiatives and make[] suggestions concerning their constitutionality”; the committee’s recommendations are available to the public via the ballot pamphlet.²⁰⁴

The question of when to require consultation also raises interesting issues and possibilities. As is implicit in some of the suggestions just reviewed, reformers might wish to “front load” the consultation process.²⁰⁵ This would respond to the common criticism that direct-democracy procedures prevent initiative proponents from responding when pre-election

U.S.C. § 553(c) (2000)).

200. See, e.g., *id.* at 447 n.213.

201. See, e.g., CAL. COMM’N ON CAMPAIGN FIN., *DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA’S FOURTH BRANCH OF GOVERNMENT* 22 (1992) (noting that “other states such as Colorado conduct public hearings before circulation [of initiatives for voter approval] begins”); Staszewski, *supra* note 1, at 448 n.213 (noting requirement that Nebraska Secretary of State subject initiative proposals to “public hearings . . . in each congressional district . . . no more than 8 weeks prior to the general election” (quoting NEB. SEC’Y OF STATE, *HOW TO USE THE INITIATIVE AND REFERENDUM PROCESS IN NEBRASKA* Part II.B.3(b))).

202. See KERWIN, *supra* note 184, at 102–13 (discussing rulemaking delays).

203. See Alexander G. Gray, Jr. & Thomas R. Kiley, *The Initiative and Referendum in Massachusetts*, 26 *NEW ENG. L. REV.* 27, 29 (1991). Utah has a similar pre-petition-circulation review process involving the Lieutenant Governor and the Attorney General. See Oldroyd, *supra* note 70, at 369–70.

204. Tornquist, *supra* note 7, at 685.

205. See *id.* at 678–79 (proposing pre-circulation review of initiatives by “the legislative counsel or some other knowledgeable expert or group of experts,” and urging that expert evaluation be publicly available).

debates suggest that change is needed. Here, the federal ANPR ("advanced notice of proposed rulemaking") process, in which agencies trigger public input during proposal formulation by circulating a more preliminary concept or asking for comment on specific threshold inquiries,²⁰⁶ could be a useful starting point for further adaptation. Alternatively, reformers might decide that it is more important to trigger deliberations after an initiative has been proposed or qualified. Their thinking might be that the political culture surrounding their state's direct-democracy process makes it unlikely that pre-proposal consultations would be fruitful or that initiative proponents would be willing to modify their proposals to accommodate potential criticism. If the initiative process seems consigned to highly contentious arguments, it might seem more important to use the consultation process to force supporters to respond to their critics, elaborating sponsor thinking along the way.²⁰⁷

C. *The Direct Involvement of Voters*

A last question faced by designers of improved procedures for discerning sponsor intent is the extent to which the public should be involved directly. The question might seem heretical, given the importance usually attached to public participation in the legislative and rulemaking processes. Indeed, from Professor Staszewski's position that the federal rulemaking model should be fully imported into the direct-democracy process, the right of individual members of the public to participate would be assumed.

Through the lens of enhancing appropriate focus on sponsor intent, however, the question would be whether direct participation by members of the public, as opposed to indirect representation through surrogates such as public officials and interest-group leaders, would increase the clarity of sponsor intentions enough to make it worth the potential delays inherent in direct voter participation. Certainly, the experience with federal rulemaking is instructive. Highly controversial rules can generate thousands of individualized comments, which consume significant resources, even if they are not carefully analyzed and responded to by the rulemakers.²⁰⁸ This risk is greatest when initiatives are likely to offend

206. See KERWIN, *supra* note 184, at 170.

207. In theory, both pre-proposal and post-proposal consultation rounds could be required; this might, however, be politically unrealistic overkill in practice. Another alternative would be to require post-proposal consultation, but encourage pre-proposal consultation by waiving (or reducing) post-proposal consultation requirements if sponsors engage in deliberations before finalizing initiative language.

208. See KERWIN, *supra* note 184, at 172 (regulatory-strategy hearings with 3100 public-meeting attendees and 110,000 individual letters; proposed food-labeling rule generating

powerful interest groups, which then generate letter-writing campaigns. Extensive voter participation could risk turning a public consultation process intended to elicit the substantive thinking of initiative proponents and opponents into another venue for unsophisticated political wrangling.

VI. TWO CONCLUDING OBSERVATIONS

The initiatory-construction scholarship reflects a strong consensus about fundamental deficiencies in the dominant approach judges use to give meaning to popularly enacted legislation. Unfortunately, the scholarship reveals no similar consensus about how to fix the broken initiatory-construction process; all the proposals are deficient when evaluated under four major criteria. In 2003, Professor Staszewski pointed the way to a promising new direction for improving initiatory construction—a direction implicit in previous scholarship and the statutory-construction analogy. Refocusing on the intent of initiative sponsors would indeed legitimate the prevailing intent-based judicial approach and achieve numerous other advantages. But lock-step insistence that initiative sponsors develop and test their intentions through an “agency model” would be unjustified, unwise, and impolitic. This Article instead suggests a fresh vantage point from which it is possible to compare rulemaking’s merits to other promising options for improving the way that sponsors register their detailed intentions, in consultation—or at least through adversary wrangling—with public officials, private experts, and important interest-group representatives. Those who wish to improve judicial construction of initiatives can then conduct a detailed, state-specific assessment leading to optimal procedures also improving direct democracy in the bargain.

In concluding, two additional points about future field work deserve a brief treatment. First, it is important to recognize the ongoing sagacity of Professor Garrett’s observation that empirical studies of direct democracy are needed “to provide the . . . foundation for thoughtful and effective reform.”²⁰⁹ An impressionistic appreciation of a particular state’s political and legal cultures is one important ingredient of designing optimal processes for registering and perfecting sponsor intent. Yet, it would be highly desirable for the creative work to benefit specifically from detailed, and, where possible, empirical, studies of the relative strengths and weaknesses of the procedures different states use for direct democracy.

10,000 public comments).

209. Garrett, *supra* note 3, at 27.

Second, for those interested in further work at the arsenal of statutory-construction canons, the sponsor-intent insight opens the way to fulfilling a possibility previous initiatory-construction scholars have noted—the application of statutory-construction canons and presumptions in a manner sensibly reflecting the differences between direct democracy and representative lawmaking. From the perspective of an enhanced focus on sponsor intent, it is possible to develop differential canonical approaches that, unlike some of the proposals analyzed in this Article, are founded on an appreciation, rather than a disparagement, of direct democracy’s different dynamics. Ultimately, it should be possible to develop an interpretive taxonomy distinguishing “sponsor’s canons” (i.e., canons, presumptions, and other interpretive tools accurately reflecting the realities of how sponsors operate in drafting and championing initiatives) from “voter’s canons” (i.e., canons that attribute false sagacity to voters, and should remain unfired lest they lead interpreters to repeat past mistakes).²¹⁰

These and other potential advances await initiatory-construction scholars and other participants in the direct-democracy process, if only they will adopt an appropriately enhanced focus on sponsor intent.

210. Here, too, the fruits of empirical research from the worlds of political science, policy, and law could be very helpful in separating fact from fiction.

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