Contestatory Democracy and the Interpretation of Popular Initiatives

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I. INTRODUCTION

The ballot initiative process is theoretically interesting and increasingly important for a variety of reasons. This Essay focuses on the question of how successful ballot measures should be interpreted when disputes arise regarding their meaning or scope. For example, does an initiative, which provides that "the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose,"[1] prohibit public employers from providing domestic partnership benefits to their gay and lesbian employees?[2] I rely on recent insights from civic republican theory to argue that the interpretation of popular initiatives should be understood as a form of contestatory democracy. This vision of statutory interpretation demonstrates the need to adopt certain substantive canons or structural reforms, which would promote freedom as non-domination and thereby improve the democratic legitimacy of the ballot initiative process.

II. DIFFICULTIES WITH THE INTERPRETATION OF POPULAR INITIATIVES

In the leading law review article on this topic, Professor Jane Schacter demonstrated that when courts interpret successful

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[1] *See* MICH. CONST. art. I, § 25.

[2] *See* Nat'l Pride at Work, Inc. v. Governor of Michigan, 748 N.W.2d 524 (Mich. 2008) (resolving this issue).

initiatives, they typically apply the same "intentionalist" methodology that is traditionally used to interpret ordinary legislation.[3] Instead of ascertaining the intent of a legislature, however, courts purport to ascertain the intent of the voters in the ballot initiative context. Schacter also demonstrated that when courts ascertain the intent of the voters, they rely almost exclusively on formal legal sources of meaning, including the language of a ballot measure, the language of related statutes, canons of statutory construction, legal precedent, and information from ballot pamphlets, which is sometimes used as a substitute for legislative history.[4] Meanwhile, courts routinely ignore media accounts and advertising as potential sources of voter intent, despite social science literature suggesting that those sources are most likely to influence the positions of voters in ballot campaigns.[5] Schacter pointed out that this approach to the interpretation of popular initiatives results in a paradox, because "the hierarchy of interpretive sources that courts consult in the asserted service of locating popular intent is roughly *inverse* to the hierarchy of informational sources that voters consult most regularly in ballot campaigns."[6]

Professor Schacter also explained that a judicial inquiry into the popular intent of the electorate will frequently be an exercise in futility for a variety of reasons. First, the widely recognized problems of intentionalism in ordinary statutory interpretation are magnified in the context of popular initiatives.[7] For example, even if individual voters formulated an ascertainable intent on the detailed questions of interpretation that are typically presented to courts, the judiciary simply could not cumulate what might be millions of voter intentions on an issue.[8] Similarly, while it might be reasonable to assume that elected legislators have some detailed knowledge of the intended meaning of newly enacted statutes, many of the specific legal consequences of popular initiatives are systematically unforeseeable

[3] *See* Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 117–19 (1995); *see also* Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 406–11 (2003) (summarizing Schacter's groundbreaking research, and citing the work of other scholars who subsequently made similar findings).

[4] *See* Schacter, *supra* note 3, at 119–23.

[5] *See id.*; *see also id.* at 131–38 (canvassing social science research regarding influences on voter behavior in ballot elections).

[6] *Id.* at 130.

[7] *See id.* at 124–26.

[8] *See id.* at 124–25.

to the electorate.[9] Voters generally lack any "detailed knowledge of the legal context surrounding a proposed initiative."[10] Moreover, voters are often unfamiliar with the technical language that is used in the text of proposed ballot measures.[11] Indeed, a wide range of empirical evidence suggests that many voters do not even read, much less understand, the text of proposed ballot measures.[12]

Unlike the voters, the *initiative proponents*, who draft proposed ballot measures and campaign for their enactment, are routinely capable of researching, understanding, and even partially controlling the formal legal sources used by courts to interpret successful ballot initiatives.[13] The overwhelming influence of these unelected and largely unaccountable initiative sponsors would only be exacerbated if courts discarded intentionalism in favor of the other leading interpretive methodologies in this context.[14] Thus, strict textualism and its reliance on the "plain meaning" of an enactment would seem particularly unjustifiable when it is well established that most voters do not read or fully comprehend the language of initiative measures—which are often ambiguously drafted in the first place (and sometimes strategically so).[15] To the extent that textualism is

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[9] *See id.* at 127–28.

[10] *See* Schacter, *supra* note 3, at 128.

[11] *See id.* at 127–28.

[12] *See id.* at 139–40 and nn.136–44; *see also* Staszewski, *supra* note 3, at 408 and n.53 (collecting sources).

[13] *See* Schacter, *supra* note 3, at 128–30; Glen Staszewski, *The Bait-and-Switch in Direct Democracy*, 2006 WIS. L. REV. 17, 47–48 (2006); Staszewski, *supra* note 3, at 432–35; *see also* Philip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1996 ANN. SURV. AM. L. 477, 519 ("Unlike the electorate as a whole, many of the active participants . . . are frequent 'players' in the repeat game of direct democracy [who can be expected to pay attention to judicial decisions]."); Elizabeth Garrett, *Who Directs Direct Democracy?*, 4 U. CHI. ROUNDTABLE 17, 30 (1997) ("[B]allot proposals are drafted by repeat players who can learn the rules of statutory interpretation and behave accordingly.").

[14] Staszewski, *supra* note 13, at 48.

[15] *See* Frickey, *supra* note 13, at 481 ("For a variety of reasons, direct democracy is probably more likely than legislative lawmaking to produce ambiguous statutory text."); Elisabeth R. Gerber, et al., *When Does Government Limit the Impact of Voter Initiatives? The Politics of Implementation and Enforcement*, 66 J. OF POL. 43, 58 (2004) (arguing that the "realities of the initiative process often render some degree of vagueness inevitable," partly because "some initiative proponents do not have enough information to write detailed implementation instructions," and partly because "appealing to broad principles rather than specific policy changes may be seen as a better way to cultivate an electoral majority"); Schacter, *supra* note 3, at 149–50 (explaining that the "animating, yet often untenable, idea that there is a single ordinary or plain meaning" is especially problematic in the ballot initiative context).

justified by a desire to respect the compromises or deals that are facilitated by the federal constitutional structure and its requirements of bicameralism and presentment,[16] there would be no reason to extend its application to a lawmaking process where those safeguards are deliberately omitted.[17] The same consideration would undermine heavy reliance on purposivism in this context because this approach to statutory interpretation is based largely on optimistic assumptions of coherent action by elected representatives in an ongoing deliberative process, which cannot plausibly be extended to the one-shot process of direct decision making on a single subject by the electorate.[18] In addition, routinely construing ambiguity in a generous fashion to promote an initiative's broad underlying purpose would further privilege the intentions of the initiative proponents, and potentially lead to collateral consequences that were never intended by the voters and perhaps other more egregious forms of manipulation.[19] At the end of the day, the leading foundational theories of statutory interpretation simply do not translate well to the initiative context.

III. THE DEMOCRATIC LEGITIMACY OF STATUTORY INTERPRETATION

We therefore need to develop a different way of thinking about statutory interpretation in the ballot initiative context.[20] In so doing, it is useful to keep in mind precisely why the foundational theories fall short, and to adopt an alternative approach that will ameliorate those difficulties. The traditional understanding of statutory interpretation is that the judiciary should serve as a faithful agent of the legislature.[21] As "honest agents of the political branches," courts

[16] *See generally* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001).

[17] Staszewski, *supra* note 13, at 48.

[18] *Id.*; *see also* Frickey, *supra* note 13, at 486–87; Garrett, *supra* note 13, at 32–33.

[19] Staszewski, *supra* note 13, at 48; *see also* Schacter, *supra* note 3, at 158–59 (recognizing that "a broad-purpose approach" could encourage "abuse of the initiative process" and that an appropriate rule of narrow construction "would reduce the incentives for initiative proponents to draft long, intricate, and ambiguous laws, the complexity of which can effectively be shrouded by slogans and soundbites").

[20] This Part draws heavily from my previous work on statutory interpretation theory, which was recently published in the *William and Mary Law Review*. *See* Glen Staszewski, *Statutory Interpretation As Contestatory Democracy*, 55 WM. & MARY L. REV. 221 (2013).

[21] *See* Manning, *supra* note 16, at 5; Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 594–95, 599–603 (1995).

"carry out decisions they do not make."[22] Because statutory interpretation allegedly implements previous decisions by an elected legislature, and does not involve creative policymaking by courts, the enterprise is consistent with, and, indeed, affirmatively facilitates majoritarian democracy.[23] From this perspective, the democratic pedigree of statutory interpretation is impeccable, because elected officials who are politically accountable to the voters are making all of the important policy decisions. While the dominant understanding of the best interpretive strategy for a faithful agent of the legislature has gradually shifted over the years in response to prevailing understandings of law and the legislative process, the leading approaches to statutory interpretation all achieve their democratic legitimacy based on the notion that courts are merely implementing the legislature's policy decisions.[24]

The traditional view of the democratic legitimacy of statutory interpretation has been difficult to sustain for a variety of reasons.[25] First, the legal realist movement and contemporary theories of interpretation have highlighted the inherent ambiguity of language and the severe limitations on legislative foresight.[26] It is therefore widely accepted that the legislature does not resolve every issue that arises in statutory interpretation, and that courts have considerable interpretive leeway. Second, the rise of the modern regulatory state has resulted in widespread delegations of broad discretionary authority from the legislature to other institutions, and a candid recognition that resolving ambiguities in federal regulatory statutes necessarily involves policymaking.[27] Third, recent developments in political science have undermined the optimistic pluralistic conception of the legislative process that underlay the traditional model, and called into question the capacity of voters to hold elected officials accountable for their policy decisions.[28] These developments raise serious questions about the cogency of faithful agent theory, and suggest that the democratic legitimacy of statutory interpretation

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[22] Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 60 (1984).

[23] *See* Staszewski, *supra* note 20, at 231 (describing faithful agent theory).

[24] *See id.* at 231–39.

[25] *Id.* at 223–24; *see also id.* at 231–39 (describing the "countermajoritarian difficulty in statutory interpretation").

[26] *See* Schacter, *supra* note 21, at 599–603.

[27] *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

[28] *See* Schacter, *supra* note 21, at 603–06.

can no longer be taken for granted.

Similarly, courts may appear at first glance to be acting in a democratically legitimate fashion when they interpret successful ballot measures by ascertaining the intent of the voters. It turns out, however, that "voter intent" frequently does not exist, and courts therefore cannot be acting as faithful agents of the electorate.[29] Rather, the judiciary is either privileging the intentions of initiative proponents, or perhaps implementing its own policy preferences. Either way, the judiciary's authority to interpret popular initiatives in hard cases raises serious questions of democratic legitimacy, which are at least as severe as the difficulties that arise when courts exercise policymaking discretion in the course of interpreting ordinary statutes. In other words, the judiciary's interpretation of successful ballot measures routinely presents the same "countermajoritarian difficulty" that arises whenever lawmakers have not explicitly resolved the precise question at issue, and courts are therefore compelled to make policy choices during the course of statutory interpretation.

I have previously argued that the countermajoritarian difficulty in statutory interpretation can be resolved by applying recent insights from civic republican theory to the adjudication of statutory disputes in the modern regulatory state.[30] From a republican perspective, freedom consists of the absence of the potential for arbitrary domination, and democracy should therefore include both electoral and contestatory dimensions.[31] In my view, statutory interpretation in the modern regulatory state is best understood as a mechanism of contestatory democracy.[32] The remainder of this Essay claims that my proposed understanding of statutory interpretation is even more compelling in the ballot initiative context, and that this theory suggests the adoption of certain substantive canons of statutory interpretation or structural reforms that would promote freedom as non-domination and thereby improve the democratic legitimacy of the ballot initiative process.

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[29] *See supra* notes 7–12 and accompanying text.

[30] *See* Staszewski, *supra* note 20.

[31] *See* Philip Pettit, *Republican Freedom and Contestatory Democratization*, *in* DEMOCRACY'S VALUE 164 (Ian Shapiro & Casiano Hacker-Cardón eds., 1999).

[32] *See* Staszewski, *supra* note 20.

My proposed understanding of statutory interpretation draws on recent literature in democratic theory, which provides an alternative to the liberal conception of *liberty as non-interference*, and identifies the two essential dimensions of democracy.[33] Specifically, Philip Pettit has articulated a republican conception of *liberty as non-domination*, whereby freedom consists of the absence of the possibility of arbitrary domination by others.[34] While government promotes liberty under this view by protecting citizens from the possibility of arbitrary domination by private parties, the government can also be a potential source of arbitrary domination. It is therefore essential for any government that values liberty to provide safeguards to limit the possibility of arbitrary domination by the state. Pettit claims that a republican democracy with two essential dimensions is the form of government that is most conducive to this understanding of freedom.[35]

Pettit explains that limiting arbitrary governmental action requires mechanisms to prevent public officials from ignoring the interests and perspectives of ordinary people, and that this argues in favor of *the electoral dimension of democracy*.[36] Periodic elections bring government under the control of the people in the sense that voters are empowered to select candidates for office based on their likelihood of promoting the collective interests of the people. The republican argument for elections is simply that they provide a sensible way to force government to advance the common, perceived interests of citizens, and thereby provide a check against arbitrary domination by the state.

Pettit recognizes, however, that elections can only provide a limited protection against the possibility of arbitrary domination, because electoral democracy is not necessarily responsive to the interests and perspectives of minorities.[37] Indeed, "it is quite consistent with electoral democracy that government should only track the perceived interests of a majority, absolute or relative, on any issue and that it should have a dominating aspect from the point of view of others."[38] For this reason, republican theorists have always

[33] *Id.* at 225–27, 240–45 (describing the relevant aspects of Pettit's theory).

[34] *See generally* PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT (1997).

[35] *See* Pettit, *supra* note 31.

[36] *See id.* at 173; *see also* Staszewski, *supra* note 20, at 242 (describing this aspect of Pettit's theory).

[37] *See* Pettit, *supra* note 31, at 173–78.

[38] *Id.* at 174.

been concerned about providing structural safeguards to prevent the tyranny of the majority.[39] "The elimination of domination would require, not just that the people considered collectively cannot be ignored by government, but also that people considered severally or distributively cannot be ignored either."[40]

Pettit therefore considers "whether there is any way of subjecting government to a mode of distributive or minority control in order to balance the electorally established mode of collective or majority control."[41] The most obvious solution is a procedure that would enable minorities to question public decisions on the basis of their perceived interests, and to trigger a review in an impartial forum where all "relevant interests are taken equally into account and only impartially supported decisions are upheld."[42] A contestatory regime of this nature provides citizens with the power to challenge public decisions on the grounds that their interests and perspectives were not adequately taken into account during the decision-making process, and the resulting decisions were therefore arbitrary.[43] The underlying assumption is that the final decision would have been different if such interests were given equal consideration.[44]

Pettit claims that the electoral mode of democracy promotes legitimacy because it ensures that governmental decisions originate, "however indirectly, in the collective will of the people."[45] Significantly, however, the contestatory mode of democracy further improves the legitimacy of those decisions to the extent that they can withstand challenges brought by individuals "in forums and under procedures that are acceptable to all concerned."[46] Whereas the electoral mode of democracy "gives the collective people an indirect power of *authorship* over the laws," the contestatory mode of democracy "would give the people, considered individually, a limited and, of course, indirect power of *editorship* over those laws."[47]

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[39] *See, e.g.*, Glen Staszewski, *Avoiding Absurdity*, 81 IND. L.J. 1001, 1014–28 (2006) (setting forth civic republican conceptions of the legislative process, the American constitutional structure, and the "absurdity doctrine" in statutory interpretation).

[40] Pettit, *supra* note 31, at 178.

[41] *Id.*

[42] *Id.* at 179.

[43] *See id.* at 180.

[44] *See id.*

[45] *Id.*

[46] Pettit, *supra* note 31, at 180.

[47] *Id.* (emphasis added).

IV. THE TWO ESSENTIAL DIMENSIONS OF DIRECT DEMOCRACY

This theory of republican democracy helps us to understand both the value and the shortcomings of direct democracy, and it can provide us with a different way of thinking about the interpretation of successful ballot measures. If the election of representatives helps to prevent the government from ignoring the interests and perspectives of ordinary people, and thereby "gives the collective people an *indirect* power of authorship over the laws,"[48] the ballot initiative process gives ordinary people another, more powerful mechanism for expressing their views, and theoretically allows "the collective people" to author the laws directly. In other words, the ballot initiative process exemplifies *the electoral dimension of democracy*.

It is important to remember, however, that "it is quite consistent with electoral democracy that government should only track the perceived interests of a majority . . . on any issue, and that it should have a dominating aspect from the point of view of others."[49] Pettit has therefore emphasized that "[t]he elimination of domination would require, not just that the people considered collectively cannot be ignored by government, but also that people considered severally or distributively cannot be ignored either."[50] For this reason, the ballot initiative process is in desperate need of *mechanisms for contestatory democracy*, which would enable citizens to challenge public decisions on the grounds that their interests and perspectives were not adequately taken into account during the decision-making process, and the resulting decisions were therefore arbitrary.

Judicial review of the constitutionality of successful initiatives could certainly play this role, and Professor Julian Eule famously argued that courts should give certain ballot measures a "harder judicial look" based on the absence of other structural safeguards to prevent majority tyranny in this context.[51] Nonetheless, I want to suggest that the interpretation of successful ballot measures should also be understood as a mechanism of contestatory democracy. After all, when a court decides a case or controversy about the meaning of a successful initiative, it is essentially resolving a "contest" over the

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[48] *See id.*; *supra* text accompanying note 47 (quoting Pettit).

[49] *See* Pettit, *supra* note 31, at 174; *supra* text accompanying note 38 (quoting Pettit).

[50] *See* Pettit, *supra* note 31, at 178; *supra* text accompanying note 40 (quoting Pettit).

[51] *See generally* Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503 (1990).

permissible scope of governmental authority.[52] Thus, for example, when a court decides whether an initiative that prohibits same-sex marriage should also be understood to prohibit public employers from providing domestic partnership benefits,[53] it is essentially resolving a "contest" over whether the state can revoke the health care benefits of the members of certain families based on this enactment. By resolving those contested issues, litigation over the meaning of successful ballot measures potentially gives the people, "considered individually, a limited and, of course, indirect power of editorship over those laws."[54]

My sense is that in the absence of a constitutional violation,[55] the electoral dimension of the ballot initiative process, and the collective authorship of the laws that are enacted in this fashion, should be respected by the judiciary and other public officials who should generally implement *the explicit policy choices* of the electorate that are *unambiguously established* by "the clear text or evident, core purposes" of a popular initiative.[56] Thus, for example, an initiative which provides that "the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose,"[57] should be understood to prohibit same-sex marriage and probably civil unions. On the other hand, courts should adopt substantive canons of statutory interpretation that narrowly construe ambiguous ballot measures when the potential collateral consequences of a proposal were not readily apparent to voters, and the substantive merits of a particular course of action were therefore not subject to reasoned deliberation, particularly when the interests or perspectives of the individuals or groups who would be adversely affected by a proposed understanding of the law were not considered during the lawmaking process.

Consistent with this approach, Professor Schacter has advocated the narrow interpretation of ambiguous language when it seems especially likely that a ballot measure was tainted by the manipulation

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[52] *Cf.* Staszewski, *supra* note 20, at 245–49 (claiming that the interpretation of ordinary statutes should be understood in this fashion in the modern regulatory state).

[53] *See supra* notes 1–2 and accompanying text.

[54] *See* Pettit, *supra* note 31, at 180; *supra* text accompanying note 47 (quoting Pettit).

[55] This Essay does not take a position on the merits of Eule's proposal.

[56] Frickey, *supra* note 13, at 522.

[57] *See* MICH. CONST. art. I, § 25.

of "highly organized, concentrated, and well-funded interests . . . ."[58] Similarly, Professor Philip Frickey has recommended the establishment of a strong preference for continuity in the ballot initiative context based on republican principles of government, whereby "pre-existing law is displaced by the ballot proposition only when the clear text or evident, core purposes of the electorate so require."[59] I have previously advocated the adoption of a substantive canon that would narrowly construe ambiguity in accordance with the campaign statements of initiative proponents.[60] The use of these canons, in tandem, would alleviate the problem of faction, promote reasoned deliberation about the details of legislation, and discourage initiative proponents from seeking to mislead the electorate about the intended consequences of their proposals.[61] As a result, these substantive canons would promote freedom as non-domination, and thereby improve the democratic legitimacy of the ballot initiative process. Incidentally, they would all compel the conclusion that the initiative prohibiting same-sex marriage *should not* be interpreted to prohibit public employers from providing domestic partnership benefits.[62]

V. OTHER POTENTIAL MECHANISMS OF CONTESTATORY DEMOCRACY

We should also not lose sight of the fact that judicial review and statutory interpretation by courts are not the only potential mechanisms of contestatory democracy that are available for the ballot initiative process.[63] For example, I have previously suggested that the same basic structural safeguards that apply to lawmaking by federal administrative agencies should be adopted in the ballot

[58] *See* Schacter, *supra* note 3, at 156–61. Professor Schacter also suggested that courts should encourage deliberation regarding the implementation of direct democratic measures by making the process of litigating the meaning of ambiguous ballot measures open to a broader range of perspectives. *See id.* at 155–56. I pick up on this intriguing suggestion in the following part of this Essay.

[59] Frickey, *supra* note 13, at 522.

[60] *See* Staszewski, *supra* note 13, at 45–55.

[61] *Id.* at 50.

[62] *Compare id.* at 50–52 (advocating the application of the foregoing substantive canons to decide that the proposal does not prohibit public employers from providing domestic partnership benefits), *with* Nat'l Pride at Work, Inc. v. Governor of Mich., 748 N.W.2d 524 (Mich. 2008) (holding that domestic partnership benefits are prohibited by the "plain meaning" of the proposal).

[63] *See* PETTIT, *supra* note 34, at 295–96 (explaining that "procedural and consultative measures" during a decision-making process are "two of the three sides to a contestatory democracy," and that the third side is the opportunity for *ex post* review by an impartial appellate body).

initiative context.[64] Thus, after qualifying a measure for the ballot, the initiative proponents should be required to provide the general public with notice of their proposal and an opportunity to submit written comments and proposed amendments. The initiative proponents should be allowed to amend their proposal in response to any legitimate concerns that arise, but they should also be required to provide a general statement of the basis and purpose of their final proposal that explains any major changes, in addition to their reasoning for rejecting various objections and proposed amendments. Finally, courts should be authorized to engage in hard-look judicial review of the validity of successful ballot measures under an arbitrary and capricious standard, which would allow the judiciary to ascertain whether the initiative proponents engaged in reasoned decision making during the lawmaking process.[65] By requiring initiative proponents to consider and respond to the interests and perspectives of the people who would be adversely affected by their proposals during the lawmaking process, this structural reform would limit arbitrary domination by the state and thereby promote freedom as non-domination.

A related topic that requires more careful consideration in the scholarly literature on direct democracy is the extent to which the interpretations of successful ballot measures by administrative agencies are entitled to deference from the judiciary. My previous work on statutory interpretation as contestatory democracy recognized that "agencies are, by necessity, the primary official interpreters of federal statutes" in the modern regulatory state,[66] and that statutory disputes often involve challenges to the legality of agency action.[67] I have also argued that agencies have a variety of institutional advantages over courts in statutory interpretation, and

[64] *See* Staszewski, *supra* note 3, at 447–59; *see also* Staszewski, *supra* note 13, at 56 (summarizing this proposal).

[65] *Cf.* 5 U.S.C. § 706(2)(a) (2006) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ."); Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) ("[An agency rule is arbitrary and capricious] if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.").

[66] *See* Staszewski, *supra* note 20, at 254 (quoting Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 502–03 (2005)).

[67] *See id.* at 245–47.

that courts should therefore frequently defer to agency decision making.[68] The application of these insights to the ballot initiative context is seriously complicated, however, by the politics of implementing and enforcing popular initiatives.[69] In this regard, political scientists have pointed out that "the people who create and support winning initiatives are not authorized to implement and to enforce them," and that the initiative proponents "must delegate these tasks to legislatures and bureaucrats."[70] Moreover, these scholars have found that successful initiatives are less likely to be implemented and enforced than ordinary legislation because laws passed by voters over the objection of legislative majorities or governors "face powerful post-passage opposition" that is not encountered by legislation enacted by those officials.[71] The organizations that sponsor ballot initiatives are further disadvantaged by the fact that they frequently disband after an election and therefore cannot easily sanction public officials who decline to implement or enforce their proposals.[72]

While these political dynamics could be viewed as beneficial to the extent that they prevent ambiguous ballot measures from having policy consequences that were never intended by the voters, there is little reason to think that such "non-enforcement decisions" are likely to be transparent or deliberative,[73] and it is troubling for the public officials who are responsible for implementing popular initiatives to ignore the clear text or evident core purposes of those measures.[74] The politics of implementing and enforcing popular initiatives could therefore potentially make it problematic for state courts to give strong deference to the decisions of state agencies in this context. Moreover, some state courts do not give state agencies *Chevron*-style deference even when state agencies are interpreting or implementing ordinary statutes that provide them with delegated lawmaking authority.[75] Finally, to the extent that *Chevron* deference is premised

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[68] *See id.* at 258–61.

[69] *See* Gerber et al., *supra* note 15; *see also* GERBER, ET AL., STEALING THE INITIATIVE: HOW STATE GOVERNMENT RESPONDS TO DIRECT DEMOCRACY (2001).

[70] Gerber, et al., *supra* note 15, at 44.

[71] *Id.* at 46 (emphasis omitted).

[72] *See id.*

[73] Similar problems exist when federal administrative agencies decline to implement their statutory mandates. *See, e.g.*, Glen Staszewski, *The Federal Inaction Commission*, 59 EMORY L.J. 369 (2009).

[74] *See supra* notes 55–56 and accompanying text.

[75] *See, e.g.*, William R. Andersen, Chevron *in the States*: *An Assessment and a Proposal*, 58 ADMIN. L. REV. 1017 (2006).

on the legislature's intent to delegate formal lawmaking authority to an administrative agency,[76] it is difficult to believe that *the voters* could consciously express such an intent in the ballot initiative context, regardless of the clarity of the relevant statutory language. I have found that law students have a hard enough time understanding the judiciary's prevailing deference doctrine; to attribute such an understanding to ordinary voters would take the notion of a *legal fiction* to a whole new level.[77] Indeed, my sense is that sophisticated initiative proponents would only delegate formal lawmaking authority to a state agency if they expected the state agency to be sympathetic to their policy agenda (in this regard, an initiative could even set up a new state agency to implement a successful ballot measure).[78] If this intuition is accurate, then the politics of implementing and enforcing popular initiatives could be overcome, but the application of *Chevron* deference to a state agency's interpretation of a successful ballot measure would further privilege the intentions of the initiative proponents in the name of voter intent.

The best solution to this dilemma may be simply to encourage the state agencies that implement and enforce successful ballot measures to engage in reasoned deliberation about the best means of doing so. My preliminary thoughts are that it is typically appropriate (and sometimes necessary) for initiative proponents to delegate lawmaking authority to state agencies, which are subsequently responsible for implementing successful ballot measures. Those agencies should, in turn, resolve ambiguities about the meaning or scope of popular initiatives through deliberative procedures, such as notice-and-comment rulemaking, and their decisions should be subject to hard-look judicial review. Moreover, it may be worthwhile for state and local governments to establish independent commissions, such as the Citizens Initiative Implementation Oversight Commission ("CIIOC") proposed by Elizabeth Garrett and Mathew McCubbins,[79] which would have the authority to weigh in on interpretive controversies before state agencies as well as in court. The state agencies would thereby provide a forum for contestatory democracy that would utilize their substantive expertise, while the

[76] *See* United States v. Mead Corp., 533 U.S. 218 (2001).

[77] *Cf.* Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 267 (2002) (recognizing that resting *Chevron* deference on Congress's intent is a fiction).

[78] *See, e.g.*, Elizabeth Garrett & Mathew D. McCubbins, *The Dual Path Initiative Framework*, 80 S. CAL. L. REV. 299, 334–35 (2007) (providing examples).

[79] *See id.* at 302–03, 332–45 (describing this proposal).

CIIOC would provide additional input and oversight that could facilitate the consideration of different interests and perspectives and thereby help to limit the pernicious effects of the politics of initiative implementation and enforcement. When the decisions of state agencies are challenged, the judiciary should consider all of the relevant information and exercise its own independent judgment regarding the best interpretation of a successful ballot measure, but courts should give the views of state agencies and the CIIOC respect based on the persuasiveness of their positions.[80]

Finally, the state or local governments that authorize initiative lawmaking could adopt other structural reforms that would make the interpretive process more deliberative.[81] Deliberative democratic theorists, such as James Fishkin and Ethan Leib, have advocated greater involvement by citizens in lawmaking through the use of techniques such as "deliberative polling" or policymaking juries.[82] The basic idea is to bring cross-sections of citizens together for a sufficient period of time to study the relevant issues based on information provided by experts and political activists with a variety of different perspectives. After engaging in reasoned deliberation on the best course of action under the circumstances, the citizen juries would make recommendations to elected representatives or perhaps even promulgate statutes or constitutional amendments. My sense is that we could potentially use deliberative juries of this nature to *supplement* the existing ballot initiative process by constituting them to discuss and resolve the ambiguities that will inevitably arise when the meaning or scope of successful popular initiatives is subsequently contested.

While there are many details that would need to be resolved, the basic idea is to establish a mechanism that would allow (or perhaps require) courts to refer interpretive problems involving the meaning or scope of ambiguous ballot measures to a non-partisan commission that would conduct a "deliberative poll" on the issue. Once an

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[80] *Cf.* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (explaining that the weight of an agency's "judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control").

[81] *See* Schacter, *supra* note 3, at 155–56 (suggesting this possibility).

[82] *See, e.g.*, JAMES S. FISHKIN, WHEN THE PEOPLE SPEAK: DELIBERATIVE DEMOCRACY AND PUBLIC CONSULTATION (2009); ETHAN J. LEIB, DELIBERATIVE DEMOCRACY IN AMERICA: A PROPOSAL FOR A POPULAR BRANCH OF GOVERNMENT (2004) [hereinafter LEIB, *Deliberative Democracy*]; Ethan J. Leib, *Can Direct Democracy Be Made Deliberative?*, 54 BUFF. L. REV. 903 (2006).

interpretive problem was referred from the judiciary to the commission,[83] the commission would be required to secure the participation of approximately five hundred randomly selected citizens to serve on a deliberative jury.[84] The commission would also be required to provide the "jurors" with briefing materials before the "interpretive convention," which would include a statement of the issues from the court, briefs from the parties to the litigation and various friends of the court,[85] and policy analysis from non-partisan experts where appropriate. The interpretive convention would begin with opening statements from the commission about the nature of the proceedings, followed by opening arguments or reports from the parties and other drafters of the briefing materials. The jurors would then be divided into small groups of approximately fifteen citizens who would engage in reasoned deliberation about the best course of action on the merits, and prepare questions for the parties or policy experts that arise from those discussions. The deliberative jury would reconvene for a second plenary session wherein each small group would be expected to pose their questions to the parties or nonpartisan experts. The small groups would then reconvene to discuss their impressions of the question and answer period and any remaining issues. The entire group of jurors would then reconvene for a third plenary session where the parties would present final arguments and the policy experts could make closing remarks. Finally, the jurors would be required to cast a vote on their preferred interpretation of the statute under the circumstances, and to provide

[83] For other more fully developed proposals to refer interpretive problems from courts to lawmaking bodies, see Amanda Frost, *Certifying Questions to Congress*, 101 NW. U. L. REV. 1 (2007); Lumen N. Mulligan & Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: Lessons From Administrative Law*, 59 UCLA L. REV. 1188 (2012).

[84] *Cf.* FISHKIN, *supra* note 82, at 24–31 (describing his method of deliberative polling and explaining that it "was developed explicitly to combine random sampling with deliberation"); LEIB, *Deliberative Democracy*, *supra* note 82, at 12–13, 23–25 (advocating the use of stratified random samples of eligible voters based on Fishkin's approach).

[85] I anticipate that leave to file amicus briefs would be liberally granted and that it would be worthwhile for state and local governments to provide public financing to secure the participation of otherwise unrepresented interests with a significant stake in the outcome. *Cf.* Schacter, *supra* note 3, at 156 (suggesting that "interpretive litigation" could most effectively ameliorate the shortcomings of the ballot initiative process "if courts maximized procedural opportunities for participation by a range of interests" by "liberally granting applications for intervention and amicus curiae participation" and considering "appointing pro bono representation for unrepresented, or even unorganized, interests").

a written explanation for their final decision.[86] The commission would tabulate the results, and provide a proposed decision to the court in favor of the position that secured a majority of the votes. While the jury's recommendation would presumptively bind the court, the judiciary would have the authority to deviate from the jury's proposed decision if the court found that the jury's verdict was contrary to the great weight of the evidence,[87] and the court provided a reasoned explanation for its decision. If a lower court declined to follow the jury's recommendation on this ground, however, the court's decision would be subject to appellate review under an abuse of discretion standard. My sense is that (frequently elected) state judges would be under significant pressure to follow the recommendations of a deliberative jury in this process, but that courts should nonetheless have the ability to deviate from a deliberative jury's decision when necessary to protect against the tyranny of the majority.

One might wonder why we would rely on deliberative juries to resolve contests over the meaning or scope of ambiguous ballot measures, when we would ordinarily rely upon administrative agencies or courts to resolve statutory ambiguities. Aside from the shortcomings of statutory interpretation by agencies and courts in the initiative context that are described above, deliberative juries would provide the same kinds of advantages that have traditionally been offered to justify *Chevron* deference to agencies in the context of regulatory legislation. In this regard, Professor Fishkin's deliberative polls are conducted by using a stratified random sample of citizens in the relevant jurisdiction.[88] He therefore touts the results of the polls as an accurate reflection of what the people would think about a problem if they had an opportunity to engage in reasoned deliberation about an issue.[89] From this perspective, the decisions of a deliberative jury could provide precisely the type of political

[86] On the importance of the latter requirement, *see, e.g.*, Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253 (2009).

[87] *Cf.* Cassandra Burke Robertson, *Judging Jury Verdicts*, 83 TUL. L. REV. 157, 157 (2008) (clarifying "the doctrinal underpinnings of weight-of-the-evidence review," and recommending that "courts safeguard the jury-trial right both by increasing the trial judge's discretion to grant a new trial on the weight of the evidence and by requiring a balanced appellate review of decisions granting and denying new trials"). The court could, of course, also decline to follow a jury's proposed verdict on the grounds that it would be unconstitutional. *See supra* notes 51, 55, and accompanying text.

[88] *See* FISHKIN, *supra* note 82, at 24–31.

[89] *See id.* at 28.

accountability that is thought to be provided by agency decision making under *Chevron*. Indeed, this form of political accountability would be considerably more direct, and thus arguably much stronger, than it is in the agency context.[90] In addition, if the initiative proponents knew that any ambiguities in their proposals would ultimately be resolved by a deliberative jury, it would probably be fair to say that they have implicitly delegated any subsidiary policy issues for resolution by such a body. Finally, while the jurors themselves would not have any particular expertise, they would hear from experts on the relevant issues during the course of the decision-making process. Accordingly, one could argue that all of the rationales for *Chevron* deference would be satisfied in this context. What is perhaps most important from the standpoint of contestatory democracy—in both agency decision making as well as in the initiative context—is that there are structural safeguards in place that encourage or require the decision makers to engage in reasoned deliberation during the lawmaking process.

While relying upon deliberative juries to resolve contests over the meaning or scope of ambiguous ballot measures would not be perfect, it strikes me as substantially better than the current practice of relying on the pre-political preferences of initiative proponents (or perhaps judges) to ascertain the alleged "will of the people." By resolving interpretive disputes through the use of an impartial forum where "all interests are taken equally into account and only impartially supported decisions are upheld,"[91] we would be limiting the possibility of arbitrary domination by the state, and thereby promoting the only understanding of democracy that is properly connected to the requirements of individual freedom.[92] We would also be making direct democracy significantly more democratic.

VI. CONCLUSION

Legal scholars have recognized that the dominant theories of statutory interpretation do not translate well to the ballot initiative context. Meanwhile, political scientists have pointed out that popular initiatives are especially likely to contain ambiguities, and there is often unusually strong political opposition to their implementation

[90] For an argument that political accountability is actually quite weak in the agency context, see, for example, Staszewski, *supra* note 86, at 1271.

[91] *See* Pettit, *supra* note 31, at 179; *supra* text accompanying note 42 (quoting Pettit).

[92] *See* Pettit, *supra* note 31, at 184–85.

and enforcement. Both sets of insights suggest a need for different ways of thinking about the interpretation and implementation of successful ballot measures. I have suggested that this project can be advanced based on recent insights from civic republican theory, which understand freedom as the absence of the potential for arbitrary domination, and recognize that democracy should include both electoral and contestatory dimensions. From this perspective, the ballot initiative process seems to exemplify the electoral dimension of democracy. Nonetheless, this form of lawmaking is in desperate need of mechanisms for contestatory democracy, which help to ensure that all interests are taken equally into account and only impartially supported decisions are upheld. I have suggested that this need can be satisfied by the judiciary's use of certain substantive canons of statutory interpretation, or by the adoption of various structural reforms that would facilitate reasoned deliberation in the promulgation, implementation, and interpretation of successful ballot measures. All of these reforms would limit the potential for arbitrary domination by the state, and they would thereby improve the democratic legitimacy of the ballot initiative process.