INTERPRETING INITIATIVES SOCIOLOGICALLY

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When state courts interpret successful ballot initiatives, they characteristically rely upon formal sources of legal meaning to attribute an intent to the voters that is usually a fiction. One potential response to this interpretive dilemma is for state courts to rely upon originalist or textualist methods and associated populist rhetoric to assign an original public meaning to the law that was presumably understood and endorsed by the voters. This approach substitutes the fiction of popular intent with the pretense that "the People" can speak with a single voice through the initiative process, and that state courts can neutrally and objectively hear and articulate their will. Because courts can use originalist or textualist methods to interpret successful ballot initiatives in a manner that is consistent with their own preferences, while attributing their choices to the People, this approach is profoundly undemocratic.

State courts could instead forthrightly acknowledge that voters lack an ascertainable intent on most interpretive problems, and that a ballot initiative's original public meaning on the precise question at issue is often ambiguous. Interpretive litigation is therefore frequently, and necessarily, a continuation of the lawmaking process. Like other policy choices in a pluralistic democracy, the resulting decision should reflect the most justifiable option on the merits under the circumstances based on reasoned consideration of the relevant legal, ethical, and sociological criteria. Drawing loosely upon progressive-era jurisprudential theory, I label this approach "sociological jurisprudence."

While prior efforts to instantiate sociological jurisprudence have foundered on legitimate concerns regarding the judiciary's limited institutional competence and questionable democratic pedigree, this Essay contends that those concerns could be counteracted in the initiative context by assigning decision-making authority over interpretive disputes to a deliberative jury. The deliberative jury would be presented with data, views, and arguments regarding the relevant legal, ethical, and sociological considerations, and charged with selecting the most justifiable understanding of the initiative based on this information. State courts would perform the limited roles of referring cases to this interpretive process and reviewing the constitutionality of the deliberative jury's decision. This approach would promote federalism's experimental spirit and direct democracy's preference for lawmaking by the people, while counteracting characteristic problems with the initiative process and improving the quality of constitutional dialogue within the states.

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INTRODUCTION

State courts, unlike their federal counterparts, have a regular opportunity to interpret laws enacted directly by the voters pursuant to the ballot initiative process. Jane Schacter's pathbreaking work detailed the "interpretive dilemmas" that arise when state courts are charged with this task.[1] Most judges claim they are ascertaining the intent of the voters when they interpret initiated laws. But they rely on formal legal sources that are inaccessible to voters and ignore the media reports and advertising that voters use to cast their ballots when making these determinations. Voters do not have a meaningful, ascertainable intent on most of the interpretive questions presented in litigation. The concept of "popular intent" is largely a fiction.

It is not exactly clear, however, what should take its place. There is a rich academic literature on how courts should interpret statutes in the absence of an ascertainable legislative intent.[2] But the leading theories are generally based on competing assessments of how unelected federal judges should treat statutes enacted by elected members of Congress pursuant to the constitutionally required procedures of bicameralism and presentment—*none* of which applies to the interpretation of ballot

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

2. *See, e.g.,* John F. Manning, *Without the Pretense of Legislative Intent*, 130 HARV. L. REV. 2397 (2017).

initiatives by (most) state judges. We are seemingly bereft of useful guidance.[3]

Theories of legal interpretation do, however, suggest a couple of diametrically opposed options that could be pursued as alternatives to popular intent in the initiative context. First, courts could move in a more formal or orthodox direction and interpret initiatives based on the original public meaning of their enacted text. Given the increased popularity of originalism and textualism in recent years, a betting person could predict that this is by far the most likely option. The judicial populist rhetoric that often accompanies those interpretive methods is also tailor-made for the initiative context.[4] Courts can use originalist or textualist methods to interpret successful ballot measures in a manner that is consistent with their own preferences, while attributing their choices to "the People." This approach would substitute the fiction of popular intent with the pretense that the People can speak with a single voice through the initiative process, and that courts can neutrally and objectively hear and articulate their will. And, indeed, we have seen disturbing examples suggesting that state courts may already be moving in this direction.[5]

State courts could instead forthrightly acknowledge that voters do not have an ascertainable intent on most interpretive problems, and that a ballot initiative's original public meaning on the precise question at issue is often ambiguous. Interpretive litigation is therefore frequently, and necessarily, a continuation of the lawmaking process. Like other policy choices in a pluralistic democracy, the resulting decision should reflect the most justifiable option on the merits under the circumstances based on reasoned consideration of the relevant legal, ethical, and sociological criteria. Drawing loosely upon progressive-era jurisprudential theory,[6] and with a nod to the University of Wisconsin's rich law and society heritage, I label this approach "sociological jurisprudence."

Of course, prior efforts to instantiate sociological jurisprudence have foundered on legitimate concerns regarding the judiciary's limited institutional competence and questionable democratic pedigree. This Essay contends that those concerns could be counteracted in the initiative

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3. For leading examples of scholarly efforts to provide such guidance, see *infra* note 244.

4. For recent discussions of the populist rhetoric that pervades textualism and originalism, see Anya Bernstein & Glen Staszewski, *Judicial Populism*, 106 MINN. L. REV. 283, 308–24 (2021); William N. Eskridge, Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718 (2021).

5. *See, e.g.*, *Nat'l Pride at Work, Inc. v. Governor of Mich.*, 748 N.W.2d 524 (Mich. 2008).

6. *See generally* Brian Z. Tamanaha, *Sociological Jurisprudence Past and Present*, 45 L. & SOC. INQUIRY 493 (2020).

context by assigning decision-making authority over interpretive disputes to a deliberative jury. The deliberative jury would be presented with data, views, and arguments regarding the relevant legal, ethical, and sociological considerations, and charged with selecting the most justifiable understanding of the initiative based on this information. State court judges would perform the limited roles of referring cases to this interpretive process and reviewing the constitutionality of the deliberative jury's decision. This reform would promote federalism's experimental spirit and direct democracy's preference for lawmaking by the people. What is more, such reform could counteract characteristic problems with the initiative process and improve the quality of constitutional dialogue within the states—perhaps beyond what is realistically possible within the federal legal system.[7]

Part I discusses the fiction of voter intent in ballot initiative interpretation. Part II identifies increased resort to judicial populism or sociological jurisprudence as the two most viable alternatives. Part III lays out a novel proposal for institutionalizing sociological jurisprudence as the preferred approach to ballot initiative interpretation in the states. Part IV discusses the reduced but vital role for state courts in using this system and ensuring compliance with broader constitutional norms.

I. THE FICTION OF POPULAR INTENT

State courts typically purport to be ascertaining the will of the voters when they interpret successful ballot initiatives. This was one of the key findings of Jane Schacter's illuminating study,[8] and it appears generally to remain true today.[9] State courts rely almost exclusively on formal sources of interpretive guidance, such as the plain meaning of the ballot initiative's text, the language and history of related statutes, other legal texts, canons of construction, and statements from official ballot pamphlets (in lieu of legislative history), to ascertain the electorate's intent.[10] State courts, in contrast, typically ignore media reports and advertising as potential sources of voter intent.[11] Schacter referred to this

7. *See* David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729, 729, 768–69 (2021) (identifying and exploring the "resonance gap" that exists in federal constitutional law "between the inputs into supreme law and the concerns that most people care about").

8. *See* Schacter, *supra* note 1, at 117–19.

9. For purposes of this Essay, my research assistant replicated Schacter's methodology in Michigan from 1995 to 2021 and found seven statutory cases that reinforced her earlier findings. He also found nine cases in Michigan and Wisconsin that interpreted initiated constitutional amendments using a similar interpretive methodology during this period.

10. *See* Schacter, *supra* note 1, at 119–23.

11. *See id.* at 121–23.

set of interpretive practices as "the paradox of the inverted informational hierarchy" because it reverses the priority of sources that voters use to decide how to cast their ballots, and she persuasively claimed that voters cannot possibly be expected to know or understand the formal legal sources of meaning that courts use to ascertain the electorate's intent on most interpretive problems.[12] Because aligning the sources of interpretive guidance used by courts with the sources of information that influence voters would raise formidable problems of its own, Schacter concluded that "the gap between judicial and voter practices seems enduring—perhaps inevitable."[13]

Academic commentators almost universally agree that the popular intent state courts attribute to initiatives is typically a fiction.[14] The well-known problems with *legislative intent* identified by legal realists[15]—including the limited foresight of lawmakers, the difficulties of attributing a single authoritative will to a multi-member body, and deficiencies in knowledge of the preexisting legal context—are all magnified when the relevant lawmakers include potentially millions of ordinary citizens.[16] The electorate simply does not have a meaningful intent that could be ascertained by courts on most of the interpretive problems that arise when ballot initiatives are implemented.[17]

II. WITHOUT THE PRETENSE OF VOTER INTENT

Legal scholars have developed rich theories of the best approach to legal interpretation in the absence of an ascertainable legislative intent.[18] Those theories generally seek to establish an appropriate institutional relationship between the authoritative lawmaking body and its interpretive agent or partner, and thus frequently draw inspiration from separation of powers principles.[19] The two leading alternatives to

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12. *Id.* at 130–47.

13. *Id.* at 147.

14. *See* Michael D. Gilbert, *Interpreting Initiatives*, 97 MINN. L. REV. 1621, 1627–29 (2013).

15. *See* Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930).

16. *See, e.g.*, Gilbert, *supra* note 14, at 1627–28; Schacter, *supra* note 1, at 123–28.

17. The initiative process also lacks the institutional structures and mechanisms for imposing cohesive party discipline that could facilitate the attribution of a meaningful legislative intent to the modern Congress. *See* Brian D. Feinstein, Congress Is An It (2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4031134.

18. *See generally* Manning, *supra* note 2.

19. *See id.* at 2413; *see also* Jerry Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685, 1686 (1988) ("Any theory of statutory interpretation is at base a theory about constitutional law. It must at the very least assume a set of legitimate institutional roles and legitimate institutional procedures that inform interpretation.");

intentionalism in statutory interpretation—legal process purposivism and the new textualism—both fall into this category. Purposivism views statutes as a mechanism for Congress to solve social problems, and implores courts to "[i]nterpret the words of the statute immediately in question so as to carry out the purpose as best [they] can."[20] Textualism, in contrast, views statutes as fragile political compromises that should be interpreted pursuant to the ordinary meaning of their terms, lest the judiciary undermine deals enacted into law by Congress.[21] While the new textualism is supported by bicameralism and presentment's tendency to facilitate compromise as a prerequisite to the enactment of valid legislation, legal process purposivism is underwritten by the capacity of those same procedures to generate a broad, deliberative consensus on which courses of action will promote the public good.[22] Neither of these interpretive theories is transferable to the initiative process, where lawmakers are unelected and there are no structural safeguards analogous to bicameralism and presentment to facilitate compromise or deliberative consensus, much less to protect against the possibility of majoritarian tyranny.[23]

Scholars have proposed several substantive canons of interpretation to counteract structural problems with the initiative process,[24] but those reforms tend to be skeptical of direct democracy and designed primarily to limit its damage.[25] They are perhaps best understood as substitutes for, rather than mechanisms of, ascertaining the electorate's will. And those interpretive canons are thus arguably in tension with the basic idea of initiatives as lawmaking by the people. The remainder of this Part argues

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Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 593–94 (1995) ("To carry out its [interpretive] task, the court must adopt—at least implicitly—a theory about its own role by defining the goal and methodology of the interpretive enterprise and by taking an institutional stance in relation to the legislature.").

20. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1200 (Tentative ed. 1958); *see also* Manning, *supra* note 2, at 2418–21 (describing legal process purposivism).

21. *See* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 74 (2006).

22. *See* Glen Staszewski, *Avoiding Absurdity*, 81 IND. L.J. 1001, 1026–27 (2006) (discussing competing conceptions of the legislative process and constitutional structure that underlie new textualism and purposivism).

23. *See* Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1549 (1990) (recognizing the absence of structural safeguards in the initiative process and exploring the potential implications for judicial review).

24. *See, e.g.*, Philip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1996 ANN. SURV. AM. L. 477, 522–23; Schacter, *supra* note 1, at 155–61; Glen Staszewski, *The Bait-and-Switch in Direct Democracy*, 2006 WIS. L. REV. 17, 45–55.

25. *See* Gilbert, *supra* note 14, at 1630–32.

that the two most viable alternatives for interpreting initiatives in the absence of an ascertainable voter intent, while still purporting to capture a form of the electorate's will, are increased resort to judicial populism or a shift towards sociological jurisprudence. Because judicial populism allows courts to implement their own interpretive preferences in the name of the people without justifying their decisions on the merits, while sociological jurisprudence can be implemented in a way that involves genuinely deliberative lawmaking by citizens, this Part endorses the latter approach. Parts III and IV explain how it can be institutionalized.

A. Judicial Populism

The authoritarian populism that has gained influence in contemporary politics has three key traits: anti-pluralism, anti-institutionalism, and a Manichean, good-versus-evil worldview.[26] Populists are anti-pluralist in claiming that they alone represent or embody the will of a unified "People," which other democratic institutions miss, ignore, or distort.[27] Of course, a diverse populace does not have one true will on most issues. Democracies rely on institutions to mediate disagreement and find provisionally acceptable compromises among different interests or views.[28] Populism's anti-institutional stance allows populist leaders to attribute their own preferences to the People. And it paints critics or opponents as enemies of the People. Invoking a fundamental, Manichean conflict between the unified people and intellectual elites or other outsiders who do not properly count as part of the polity, populists deny the need for negotiation, compromise, or reasoned deliberation. Instead, they claim legitimacy by fiat. Populism is an exclusionary form of identity politics that is fundamentally undemocratic.[29]

While most discussions of populism have focused on the political sphere, Anya Bernstein and I have recently demonstrated that populist reasoning has also made deep inroads in the law.[30] *Judicial populism*

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26. *See* Bernstein & Staszewski, *supra* note 4, at 287–90. *See generally* JAN-WERNER MÜLLER, WHAT IS POPULISM? (2016) (considering traits common amongst "populists"); Andrew Arato & Jean L. Cohen, *Civil Society, Populism, and Religion*, 24 CONSTELLATIONS 283 (2017); Aziz Z. Huq, *The People Against the Constitution*, 116 MICH. L. REV. 1123 (2018); Nadia Urbinati, *Political Theory of Populism*, 22 ANN. REV. POL. SCI. 111 (2019).

27. *See* MÜLLER, *supra* note 26, at 2–3.

28. *See* Anya Bernstein & Glen Staszewski, *Populist Constitutionalism*, 101 N.C. L. Rev. (forthcoming 2023).

29. *See* MÜLLER, *supra* note 266, at 3; Bernstein & Staszewski, *supra* note 4, at 284.

30. *See generally* Bernstein & Staszewski, *supra* note 4; Eskridge & Nourse, *supra* note 4, at 1722–23, 1810–13.

incorporates the same key traits and invokes the same rhetorical strategies to deny the disagreement and complexity that is inherent in legal interpretation and suggest that legal problems have a single correct answer that good judges can find by using the right methods. It disparages the work of legislatures and agencies that mediate competing interests and views and treats critics or opponents as morally inferior "judicial activists," who seek to impose their own elite policy preferences onto the people in contravention of the only legitimate understanding of American constitutional democracy and the rule of law.

Judicial populist rhetoric can be used by any judge for any substantive purpose, but it is deeply engrained in orthodox textualism and originalism[31]—interpretive approaches that treat the "original public meaning" of a statute or constitutional provision as legally dispositive.[32] These interpretive approaches are anti-pluralist in the sense that they presume that legal text has a single, objectively correct meaning that can usually be found by a judge who uses the right methods, and that legal ambiguity is thus relatively rare.[33] They are anti-institutional in the sense that they are disinterested in evidence of legal meaning that can be gleaned from legislative deliberations,[34] and they are increasingly unwilling to defer to the interpretations developed by agencies charged with implementing statutory mandates,[35] preferring instead to focus on how "the People" would allegedly understand the text in its broader legal

31. For present purposes, I am distinguishing between "the new textualism," which focuses on the alleged need to adhere to the plain meaning of enacted text based on the requirements of bicameralism and presentment and alleged nature of the legislative process, and "orthodox textualism" (or originalism), which seeks to ascertain the original public meaning of the law (regardless of the methods by which it was enacted). *Cf.* Eskridge & Nourse, *supra* note 4, at 1721 n.6 (distinguishing between plain meaning and orthodox textualism). While the new textualism is inapplicable to ballot initiative interpretation, orthodox textualism and originalism are theoretically viable interpretive strategies in this context.

32. For a discussion of potentially significant differences between textualism and originalism, see Katie Eyer, *Disentangling Textualism and Originalism*, 13 CONLAWNOW 115 (2022).

33. *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 6 (2012) ("As we hope to demonstrate, most interpretive questions have a right answer."); Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315, 320 (2017) ("In my own opinions as a judge, I have never yet had occasion to find a statute ambiguous.").

34. *See, e.g.*, SCALIA & GARNER, *supra* note 33, at 349, 369–98 (rejecting the use of legislative history and the concept of legislative intent).

35. *See, e.g.*, *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring).

context.[36] Adherents of these approaches frequently "recast complex, multifaceted issues as a simple pitting of obvious truth against bad faith obfuscation,"[37] and thus disparage the competing views of agencies or other judges as implausible or illegitimate, as opposed to merely unpersuasive or mistaken.[38] Perhaps most important, they deny the need for judges to justify the consequences of their decisions, because they are only purporting to find the preexisting final answers to legal problems that would already be clear to ordinary people, rather than exercising interpretive discretion.[39]

Judicial populist rhetoric and orthodox textualist or originalist methods are perhaps disturbingly tailor made for interpreting initiatives enacted directly by "the People."[40] State courts can simply use textualist or originalist methods to assign an original public meaning to the initiative's text,[41] and then attribute their chosen results to the electorate's decision to approve the measure. State courts can then avoid any obligation to justify the consequences of their interpretive decisions because they are merely purporting to implement the clear will of the voters. And, better yet, anyone who disagrees can easily be portrayed as an antidemocratic elitist—an enemy of the People—whose views do not count. Finally, state courts can add that dissatisfaction with the results of initiative lawmaking should be remedied by the People through the political process, not by activist judicial interpretation.

There is some evidence of state courts already using these techniques, and one might confidently predict that this approach will only become more prominent as orthodox textualism and originalism continue to gain influence and populist rhetoric becomes increasingly normalized. The most well-known example of this approach is *National Pride at Work, Inc., v. Governor of Michigan*,[42] a case involving the scope of an initiated state constitutional amendment to define marriage as a union

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36. *See* Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2195 (2017) ("[T]extualists . . . view themselves as agents of the people rather than of Congress and as faithful to the law rather than to the lawgiver.").

37. Bernstein & Staszewski, *supra* note 4, at 308.

38. *See, e.g.*, *King v. Burwell*, 135 S. Ct. 2480, 2500 (2015) (Scalia, J., dissenting) (referring to the majority's "interpretive jiggery-pokery").

39. *See* Bernstein & Staszewski, *supra* note 4, at 305–08, 327–44.

40. I have previously suggested that it is more accurate to view initiatives as lawmaking by the *initiative proponents*, which can either be rejected or ratified by the voters. *See* Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 420–32 (2003) (discussing the dominant role of initiative proponents and limited engagement by voters).

41. This is a creative process, not a process of discovery. *See* Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 372 (1994).

42. 748 N.W.2d 524 (Mich. 2008).

between a husband and wife.[43] The proposal's text stated, "[t]o secure and preserve the benefits of marriage for our society and for future generations of children, 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."[44] While the amendment was widely understood to prohibit legal recognition of same-sex marriage or the civil unions that were available in some states, such as Hawaii and Vermont, at the time, the question was whether it also prohibited public employers from providing healthcare benefits to the domestic partners of their employees.[45] This possibility was raised by the initiative's opponents during the ballot campaign, but the initiative's sponsors were quoted in the press as dismissing their concerns as a "scare tactic" or "diversion from the real issue."[46] The initiative's proponents repeatedly claimed instead that the proposed amendment was merely intended to strengthen the state's existing statutory limitation of marriage to one man and one woman and that it *would not* affect domestic partnership benefits.[47] A non-partisan analysis provided before the election mentioned the existence of this debate, and simply concluded that the long-term implications of the proposed amendment were "open to interpretation."[48]

The Michigan Supreme Court nonetheless held that the plain meaning of the initiative unambiguously prohibited public employers from providing health-insurance benefits to their employees' qualified, same-sex, domestic partners.[49] The court declared that its "primary objective" in interpreting initiated constitutional amendments "is to determine the original meaning of the provision to the ratifiers, 'we the people,' at the time of ratification."[50] This approach is allegedly

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43. *Id.* at 529.

44. Proposal 04-2, 2004 Mich. Pub. Acts 2443.

45. *Nat'l Pride at Work, Inc.*, 748 N.W.2d at 529.

46. *See* Staszewski, *supra* note 24, at 23–24 & n.28 (collecting press accounts).

47. For example, an official campaign brochure distributed by Citizens for the Protection of Marriage provided:

> Proposal 2 is *Only* about Marriage. Marriage is a union between husband and wife. Proposal 2 will keep it that way. This is not about rights or benefits or how people choose to live their lives. . . . It merely settles the question once and for all what marriage is–for families today and future generations.

First Amended Complaint for Declaratory Relief at 13, *Nat'l Pride at Work, Inc. v. Governor of Mich.*, No. 05:368-CZ, 2005 WL 3038040 (Cir. Ct. Mich. 2005) (quoting CFPM brochure). The organization's thirty-second commercial for the campaign similarly declared: "Proposal 2 isn't about benefits, it just puts the definition of marriage in our constitution. Judges and politicians couldn't change it; only voters could." Staszewski, *supra* note 24, at 23–24 & nn.26–28 (documenting examples).

48. CITIZENS RSCH. COUNCIL OF MICH., STATE BALLOT ISSUES ON THE NOVEMBER GENERAL ELECTION BALLOT 1 (Sept. 2004).

49. *Nat'l Pride at Work*, 748 N.W.2d at 543.

50. *Id.* at 533.

necessary "to faithfully give meaning to the intent of those who enacted the law."[51] The Michigan Supreme Court "typically discerns the common understanding of constitutional text by applying each term's plain meaning at the time of ratification."[52] The court therefore broke the initiative's text down into individual words or clusters and attributed an "ordinary meaning" to the terms "similar union," "recognized," "only agreement," and "for any purpose," and in a process that Bill Eskridge and Victoria Nourse have critically characterized as "cracking and packing,"[53] spun those definitions and associated interpretive canons together to conclude that the text unambiguously prohibited public employers from providing domestic partnership benefits.[54]

Even if the court constructed the best understanding of the initiative's text in its semantic context,[55] a conclusion that Eskridge and Nourse vigorously dispute,[56] the proposal did not state that "public employers shall no longer be allowed to provide domestic partnership benefits to their employees," or include other clear language to that effect. The court nonetheless refused to consider numerous statements by the initiative's proponents during the ballot campaign that the amendment would not affect those benefits because the proposal's text was allegedly unambiguous.[57] Indeed, the court suggested that the mere existence of a public debate about the proposed amendment's scope should have put the voters on notice that domestic partnership benefits could potentially be eliminated if the amendment were enacted.[58] Yet the court's decision was

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51. *Id.*

52. *Id.* (citing *Wayne Co. v. Hathcock*, 684 N.W.2d 765 (Mich. 2004)).

53. *See* Eskridge & Nourse, *supra* note 4, at 1747, 1751–53 ("Disaggregating the sentence into individual words cracked the statute open, allowing Justice Markman to choose the broadest possible meaning of each term. When packed back together, the text appeared to have only one plain meaning—but Justice Markman's interpretation left out relevant text and (con)text."). *Cf. Bostock v. Clayton County*, 140 S. Ct. 1731, 1827 (2020) (Kavanaugh, J., dissenting) ("Legislation cannot sensibly be interpreted by stringing together dictionary synonyms of each word and proclaiming that, if the right example of the meaning of each is selected, the 'plain meaning' of the statute leads to a particular result.") (quoting *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 144 n.7 (2d Cir. 2018) (Lynch, J., dissenting)).

54. *Nat'l Pride at Work*, 748 N.W.2d at 533–39, 543.

55. *Cf.* Manning, *supra* note 21, at 70 (distinguishing textualism from purposivism on the grounds that textualists emphasize semantic context over policy context and vice versa); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2463 (2003) (claiming that the antecedent for a textualist to consider policy context "is the existence of some ambiguity that confers discretion on the interpreter").

56. *See* Eskridge & Nourse, *supra* note 4, at 1754 ("Cracking the amendment into itty bits of text, Justice Markman created an implausibly broad construction, rendered the preamble irrelevant, and failed to consider relevant (con)text—namely, state civil union and domestic partnership laws.").

57. *Nat'l Pride at Work*, 748 N.W.2d at 540.

58. *Id.* at 540–42.

contrary to the public record, which clearly showed "that everyone, including critics, agreed that the core problem was marriage and civil unions, not contracts."[59] As a result, no one ever provided a reasoned justification for eliminating healthcare benefits provided to public employees and their domestic partners pursuant to employment contracts.[60] The court simply took their healthcare benefits away by fiat in the name of the People.

While *National Pride at Work* may be an unusually stark example of a court imposing its own views onto the law in the name of the people,[61] this form of judicial populism may be present whenever state courts treat the "plain meaning" of an initiative's text as legally dispositive, on the theory that it reflects the best evidence of voter intent. And this appears to be the predominant approach used by today's state courts to interpret successful initiatives. For example, in *People v. Bylsma*,[62] the Michigan Supreme Court stated that "the intent of the electors governs the interpretation of voter-initiated statutes, just as the intent of the Legislature governs the interpretation of legislatively enacted statutes."[63] The court also indicated that a "statute's plain language provides the most reliable evidence of intent."[64] The court therefore instructed that "[i]f the statutory language is unambiguous, no further judicial construction is required or permitted because [the court] must conclude that the electors intended the meaning clearly expressed."[65]

The issue in *Bylsma* was whether the Michigan Medical Marihuana Act (MMMA), an initiated statute, provided "a registered primary caregiver with immunity when growing marijuana collectively with other registered primary caregivers and registered qualifying patients."[66] The statute provided that registered primary caregivers shall be immune from

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59. Eskridge & Nourse, *supra* note 4, at 1807.

60. *See* Staszewski, *supra* note 24, at 51 (pointing out that the amendment's textual ambiguity "focused the debate almost exclusively on whether the proposal" would eliminate domestic partnership benefits, and that "[b]ecause of the way this debate played out, none of the initiative proponents (or anyone else, for that matter) ever provided a reasoned explanation for why domestic partnership benefits should be eliminated").

61. *See* Eskridge & Nourse, *supra* note 4, at 1807 (claiming that Justice Markman "was imposing his own meaning on that ratified by the voters," and that "[h]is opinion reflected the worst features of 'judicial' populism—claiming to find the 'ordinary meaning' of a statute no ordinary reader would adopt, imagining a public in the image of the judiciary").

62. 825 N.W.2d 543 (Mich. 2012).

63. *Id.* at 547 (internal quotations omitted) (quoting *People v. Kolanek*, 817 N.W.2d 528, 541 (Mich. 2012)).

64. *Id.* (internal quotations omitted) (quoting *Sun Valley Foods Co. v. Ward*, 596 N.W.2d 119, 123 (Mich. 1999)).

65. *Id.* at 547–48 (internal quotations omitted) (quoting *People v. Cole*, 817 N.W.2d 497, 499 (Mich. 2012)).

66. *Id.* at 545.

prosecution, provided that they do not "possess[]" more than "12 marihuana plants kept in an enclosed, locked facility" for each of their registered qualifying patients.[67] Bylsma was a registered primary caregiver for two registered qualifying patients, which meant that he was immune from prosecution for the possession of up to twenty-four marijuana plants.[68] He was charged, however, with manufacturing marijuana in violation of state law because he shared a single warehouse facility with other registered primary caregivers that contained as many as eighty-eight marijuana plants.[69] Bylsma essentially argued that only twenty-four of the marijuana plants were his, that the other plants belonged to his co-tenants, and he should therefore be deemed immune from prosecution under the statute.[70]

The Michigan Supreme Court rejected defendant's argument and concluded that the initiated statute does not immunize participants in collective arrangements of this nature from prosecution.[71] First, the court reiterated the statutory limitations on the amount of marijuana that registered primary caregivers or patients are allowed to possess (in this case twenty-four), and then reasoned that its decision would turn on the question of "what constitutes 'possession' within the meaning of the MMMA."[72] Second, the court acknowledged that "the MMMA does not itself define 'possession,'" and proceeded to adopt the longstanding definition of that term established by other sources of state law: "a person possesses marijuana when he exercises dominion and control over it."[73] Third, the court concluded that the defendant was not immune from prosecution under the MMMA because he exercised dominion or control over all the marijuana plants in the warehouse, since he had unrestricted access to the building (which was an "enclosed, locked facility"), and because each tenant's allotment of marijuana plants was accessible to the other tenants (*i.e.*, they were not kept under lock and key in separate rooms or compartments within the building).[74] While the court emphasized that Bylsma "was actively engaged in growing all the marijuana in the facility and used his horticultural knowledge and expertise to oversee, care for, and cultivate all the marijuana growing there,"[75] *each of the tenants* could be charged with possessing *all eighty-eight marijuana plants* under this analysis—even if they were legitimately

67. MICH. COMP. LAWS § 333.26424(b) (2022).
68. *Bylsma*, 825 N.W.2d at 546, 549–50.
69. *Id.* at 546.
70. *Id.*
71. *Id.* at 545.
72. *Id.* at 549–50.
73. *Id.* at 550.
74. *Id.* at 551–52.
75. *Id.* at 551.

sharing the warehouse space, adhering to their own individual statutory allotments, and growing their own marijuana plants.[76]

While *Bylsma* was not necessarily wrongly decided, it is exceedingly unlikely that the voters who enacted the MMMA had any ascertainable intent on this issue. Moreover, the initiative's text does not unambiguously resolve this question in a way that would be readily apparent to the people of Michigan. The Michigan Supreme Court therefore effectively imposed its own preferred interpretation onto the statute in the name of the people and made no serious effort to justify that decision on the merits. *Bylsma* is thus a routine example of judicial populist reasoning by state courts in the interpretation of initiatives—a practice that is likely to become increasingly ubiquitous in the absence of a viable alternative.

If the electorate does not have an ascertainable intent on an interpretive problem and the initiative's text does not unambiguously resolve the precise question at issue in a manner that would be clear to ordinary voters, state courts will inevitably be "making law" when they interpret successful initiatives. Judicial populism employs orthodox textualist or originalist methods and rhetoric to artificially minimize or eliminate ambiguity and construct an original public meaning that the court can then attribute to the people. This approach supplements or replaces the fiction of popular intent with the pretense that "the People" can speak with a single voice through the initiative process, and that courts can neutrally and objectively hear and articulate their will. Yet, this approach allows state courts to adopt their own preferred interpretations of initiatives in the name of the people without justifying their decisions on the merits. Judicial populism is anti-pluralist, anti-institutional, and Manichean, and it potentially facilitates domination of the people who are adversely affected by the products of direct democracy. It is therefore profoundly undemocratic.

B. Sociological Jurisprudence

An alternative approach to initiative interpretation would acknowledge that voters frequently lack an ascertainable intent on interpretive problems and that an initiative's text often fails to unambiguously resolve the precise questions at issue. In such cases, interpretive litigation should be viewed as a continuation of the lawmaking process. The resulting legal or policy decisions should therefore ideally reflect the most justifiable courses of action on the merits based on reasoned consideration of the relevant legal, ethical, and

76. *See id.* at 550–51 (citing *People v. Wolfe*, 489 N.W.2d 748, 753 (Mich. 1992)) (relying on earlier precedent for the proposition that more than one person can possess the same drugs, and one need not be the drugs' owner to possess them).

sociological criteria. The remainder of this Essay draws loosely from progressive-era jurisprudential theory and the law and society tradition to call this approach "sociological jurisprudence,"[77] and to argue that it could be incorporated into the process for interpreting initiatives in a manner that would improve the democratic legitimacy of initiative lawmaking, promote federalism principles, and help to achieve direct democracy's aspiration to serve as a meaningful form of lawmaking by the people.

While sociological jurisprudence (and its relationship to other schools of thought) has a complicated and contested history, I believe it provides a useful framework for my proposed approach to ballot-initiative interpretation partly because it provides a natural foil to judicial populism. Sociological jurisprudence is widely understood to have developed as a reaction against legal formalism,[78] and it would therefore make sense to use this jurisprudential perspective as inspiration for developing an alternative interpretive approach to judicial populism, which relies heavily on formalistic rhetoric and methods. Moreover, a body of historical work suggests that originalism was initially developed as a reaction against *Brown v. Board of Education*,[79] a legal decision that is often viewed as the embodiment of sociological jurisprudence.[80] Judicial populism and sociological jurisprudence are thus in a sense natural rivals or antagonists.

Beyond those connections, several core principles or lessons from sociological jurisprudence have a direct bearing on my proposed approach to ballot initiative interpretation. Sociological jurisprudence grew out of philosophical pragmatism and reflected a broad commitment to "a progressive, policy-oriented" conception of law.[81] It recognized and

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77. I am not, for example, applying the specific ideas of any prior theorist, and I do not endorse the strong moral absolutism that is sometimes attributed to sociological jurisprudence. *See, e.g.*, G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999 (1972). Sociological jurisprudence is, however, most closely associated with the work of Roscoe Pound. *See, e.g.*, Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 607 (1907); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence* (pt. 1), 24 HARV. L. REV. 591 (1911); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence* (pt. 2), 25 HARV. L. REV. 140 (1911); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence* (pt. 3), 25 HARV. L. REV. 489 (1912).

78. *See* White, *supra* note 77, at 1001–04.

79. Calvin TerBeek, *"Clocks Must Always Be Turned Back":* Brown v. Board of Education *and the Racial Origins of Constitutional Originalism*, 115 AM. POL. SCI. REV. 821, 821–22 (2021).

80. *See, e.g.*, Jonathan Simon, Katz *at Forty: A Sociological Jurisprudence Whose Time Has Come*, 41 U.C. DAVIS L. REV. 935, 937–42 (2008).

81. Manning, *supra* note 2, at 2416; *see also* Frederick Schauer, *Law's Boundaries*, 130 HARV. L. REV. 2434, 2444 (2017).

accepted that legal principles and rules are often (though *not always*) underdetermined, and that legal interpretation is necessarily a continuation of the lawmaking process in hard cases.[82] Judges should thus make law unapologetically when they resolve interpretive controversies.[83] Sociological jurisprudence also recognized and embraced the provisional nature of law and society and understood that law is used instrumentally to achieve social goals.[84] Legal interpretation is thus properly understood as purposive, dynamic, and consequentialist in nature.[85] Judicial decisions should be informed by prevailing social norms of justice and reasonableness and based on reliable empirical information from other disciplines, including the social sciences.[86] This sort of dynamic, empirically- and socially- informed method of judicial lawmaking is vital both to improve the functioning of law and to ensure that it continues to meet its social needs and maintains its democratic legitimacy.[87]

Sociological jurisprudence is widely associated with "cooperative partner" or "relational agent" approaches to statutory interpretation.[88] Instead of seeing courts as "faithful agents" of the enacting legislature, which are obligated to follow the legislature's original intent, these approaches view courts as having authority to trim back or extend the

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82. ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 103 (1922) ("[T]he greater part of what goes by the name of interpretation [] is really a lawmaking process, a supplying of new law where no rule or no sufficient rule is at hand.").

83. *See, e.g.*, Manning, *supra* note 2, at 2417 ("For Pound, then, the function of 'supplementing, developing, and shaping' the law was 'a necessary part of [the] judicial power.'") (quoting POUND, *supra* note 82, at 105–06); Schauer, *supra* note 81, at 2445 ("Pound believed that by using the social sciences in reaching decisions, judges could better enable law to serve the social good.").

84. *See* Brian Z. Tamanaha, *The Third Pillar of Jurisprudence: Social Legal Theory*, 56 WM. & MARY L. REV. 2235, 2262–66 (2015).

85. *See* Manning, *supra* note 2, at 2415–18; Schauer, *supra* note 81, at 2444 ("Pound [] urged judges to make decisions in light of law's larger goals and to use all available empirical and policy resources in making such decisions.").

86. Schauer, *supra* note 81, at 2445 (explaining that Pound wanted "judicial practice to incorporate the full toolbox of social science and policy analysis"); Tamanaha, *supra* note 6, at 513 ("Only sociological jurisprudence has a normative commitment in support of jurists that incorporates social science as integral to the identification and advancement of law as an ethical idea and pursuit.").

87. *See* Tamanaha, *supra* note 6, at 505 ("[S]ociological jurisprudence has practical ends and a normative commitment to improve the functioning of law."); *see also* ROGER COTTERRELL, SOCIOLOGICAL JURISPRUDENCE: JURISTIC THOUGHT AND SOCIAL INQUIRY 59–62, 71–72 (2018).

88. *See* Eskridge & Nourse, *supra* note 4, at 1760–61 (claiming that such approaches have a strong historical pedigree and are most consistent with American constitutional democracy). Bill Eskridge and John Ferejohn have proposed a "horticultural" model of constitutional interpretation that is broadly analogous. *See generally* William N. Eskridge, Jr. & John Ferejohn, *Constitutional Horticulture: Deliberation-Respecting Judicial Review*, 87 TEX. L. REV. 1273 (2009).

reach of statutes in common law fashion based on unanticipated problems or changed circumstances.[89] Judicial interpretation should use "all available empirical and policy resources" to make just decisions "in light of law's larger goals."[90] Advocates of this approach deplore "mechanical jurisprudence" of the kind suggested by judicial populism,[91] in favor of an "equitable" approach to legal interpretation that is guided by formal legal authorities but also provides sufficient policymaking discretion for judges "within wide limits . . . to deal with the individual case, so as to meet the demands of justice between the parties and accord with the general reason of ordinary [people]."[92] This approach effectively allows courts to make what they regard as the most justifiable decision on the merits in each case based on the relevant legal, ethical, and sociological considerations, while taking responsibility for their policy choices, rather than falsely attributing their decisions to the enacting legislature, the original public meaning of a legal text, or some other mythical, abstract, and non-existent public will.

The primary concern, of course, is that sociological jurisprudence could exceed the judiciary's institutional competence and democratic mandate.[93] For instance, courts may lack the aptitude to accurately understand or use the latest empirical information from other disciplines, and adversarial litigation may lack sufficient structural mechanisms to ensure quality control over the information that is presented and considered.[94] Moreover, even if courts could reliably incorporate cutting-edge, multidisciplinary research into their interpretive decisions, and thus have a better understanding of the likely consequences of different courses of action, their decisions would still turn on contestable normative values in many cases.[95] While courts would be expected to openly acknowledge and justify their normative choices when making policy under this approach, there is little reason to think they would perform this function better than other public officials (like administrative

89. Manning, *supra* note 2, at 2415.

90. Schauer, *supra* note 81, at 2444; *see also* Manning, *supra* note 2, at 2416 (quoting Schauer, *supra* note 81, at 2444) (summarizing Pound's views).

91. *See generally* Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 605 (1908).

92. Manning, *supra* note 2, at 2416 (quoting Pound (pt. 3), *supra* note 77, at 515).

93. *See, e.g.*, Tamanaha, *supra* note 6, at 515 (discussing the "formidable" challenges facing sociological jurisprudence).

94. *Id.*

95. *See id.* ("[C]ontemporary societies are sharply divided over value questions, [] and skepticism already exists about the capacity of social sciences to produce objective findings on facts, all the worse for fraught questions relating to values.").

agencies)[96] or that they could identify objectively correct answers to interpretive problems.[97] These concerns have traditionally bedeviled arguments in favor of a sociological jurisprudential approach to legal interpretation, and it could be viewed as especially problematic to charge state courts with playing the role of a "cooperative partner" of lawmakers when they interpret ballot initiatives because judicial policymaking seems contrary to the fundamental premise that direct democracy constitutes lawmaking by the people.

The next Part argues that these concerns can be overcome and that sociological jurisprudence can be successfully incorporated into the process of interpreting initiatives by assigning decision-making responsibility to a deliberative jury. The deliberative jury would be presented with data, views, and arguments regarding the relevant legal, ethical, and sociological considerations and charged with making the most justifiable policy decision based on this information. State courts would merely initiate the interpretive proceedings and ensure that the deliberative jury's decision is constitutionally permissible. This novel proposal for resolving interpretive disputes in the initiative context would have other notable advantages, including advancing direct democracy's animating preference for lawmaking by the people.

III. INSTITUTIONALIZING SOCIOLOGICAL JURISPRUDENCE

This Part provides a roadmap for interpreting initiatives sociologically and contends that this approach would have substantial advantages over state courts' use of judicial populist methods and rhetoric to impose their own interpretive preferences on the people. The proposal recognizes that interpreting initiatives in hard cases is necessarily a continuation of the lawmaking process and that the resulting policy decisions should therefore be the product of a dialogue that involves competing interests and views. Broadly representative deliberative juries would thus be empaneled to make these interpretive decisions pursuant to the relevant legal, ethical, and sociological criteria. Those deliberative

96. *Cf.* Bernstein & Staszewski, *supra* note 28 (manuscript at 19–20) (claiming that administrative agencies are the primary locus for pluralistic contestation—and thus democratically legitimate policymaking—in today's federal government).

97. *See, e.g.*, Pierre Lepaulle, *The Function of Comparative Law with a Critique of Sociological Jurisprudence*, 35 HARV. L. REV. 838, 838–55 (1922) (questioning sociological jurisprudence's capacity for objective application); Harlan F. Stone, Book Review, 22 COLUM. L. REV. 382, 384 (1922) (reviewing BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921)) (claiming that "the method of sociology is the method which the wise and competent judge uses in rendering the dynamic decision which makes the law a living force," but warning that "[t]he weak and incompetent judge cannot use it and indeed in his hands it is a dangerous instrument, for the only guide for its use is judicial wisdom").

juries would be charged with reaching the most justifiable decision on the merits under the circumstances and an official opinion would be prepared setting forth a reasoned explanation for their interpretive choices. A state's adoption of this proposal would promote federalism's experimental spirit and generate a meaningful new form of lawmaking by the people, and it could also reduce the "resonance gap" between the law on the books and the law in action. Meanwhile, state courts could provide a safeguard against the possibility of domination in this context by reviewing a deliberative jury's interpretive decisions for constitutionality.

A. Interpretive Litigation as an Ongoing Lawmaking Dialogue

Contrary to populist rhetoric, a unified popular will does not exist on most legal or policy issues in a pluralistic society with divergent interests and views. The will of the people is constructed by democratic institutions that mediate competing perspectives through deliberation and negotiation in an effort to reach legitimate collective decisions that are reasonably justified on the merits and subject to ongoing contestation and potential revision.[98] There is no meaningful popular will on most issues that arise when initiatives are interpreted—voters lack an ascertainable intent on such detailed questions, and the legal text frequently fails to clearly resolve the matter.[99] We should establish a mediating institution to perform the deliberative and contestatory role that is needed to make collective lawmaking decisions on behalf of the people in a pluralistic democracy, and thereby improve the democratic legitimacy of the initiative interpretation process.

The initial key to improving the democratic legitimacy of initiative interpretation is simply to acknowledge that hard cases involve policymaking discretion, and that interpretive litigation is thus a continuation of the lawmaking process. The process for interpreting initiatives should therefore include mechanisms for decision-makers to consider and respond in a reasoned fashion to competing interests and views. Decision makers should also be encouraged to make the most justifiable decisions on the merits under the circumstances and expected to give reasoned explanations for their interpretive choices.[100]

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98. *See* Bernstein & Staszewski, *supra* note 28 (manuscript at 5–11) (articulating an "agonistic republican" conception of democracy).

99. Under this proposal, "easy cases" that are unambiguously resolved by the clear language of the initiative and the evident understanding of the electorate could still be resolved by state courts, without referral to a deliberative jury. There should, however, be a strong presumption in favor of referring or certifying borderline cases to deliberative juries for resolution.

100. Those policy decisions should nonetheless be understood as provisional, and the prevailing understanding of ballot initiatives should be subject to ongoing

State courts could conceivably play this role by using sociological jurisprudential methods to interpret successful initiatives. However, they may not have the institutional competence, democratic pedigree, or access to the data, views, and arguments necessary to perform this function effectively—especially if they continue to operate within the traditional parameters of adversarial litigation between two parties with diametrically opposed stakes in the outcome.[101] We should therefore assign this lawmaking responsibility to a deliberative jury and design the interpretive process to facilitate its capacity to make the most justifiable decisions on the merits based on all the relevant information, including the competing interests and views of all the affected stakeholders.

B. Deliberative Juries and Interpretation by the People

The widely recognized challenges associated with operationalizing a sociological jurisprudential approach to legal interpretation could be overcome by giving this authority to a deliberative jury in the ballot initiative context. While there are many details that would need to be worked out, this process could be initiated by the referral or certification of an interpretive problem from a state court to a deliberative jury for resolution.[102] The state would likely need to establish an Initiative Interpretation Commission or other administrative body to implement this process. The Commission should be structured to ensure its political independence and headed by individuals with expertise in dispute resolution or related public engagement efforts. The Commission should also be staffed by employees with the requisite training and experience and should be authorized to use hired consultants to help organize and run interpretive proceedings as necessary.[103]

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contestation and potential revision—rather than set in stone, for example, pursuant to a super-strong rule of stare decisis. *See generally* Glen Staszewski, *A Deliberative Democratic Theory of Precedent*, 94 U. COLO. L. REV. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4222002.

101. *See supra* notes 93-97 and accompanying text.

102. For examples of analogous referral or certification procedures, see Lumen N. Mulligan & Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188, 1234–40 (2012). The court could certify the legal issue or issues for resolution by a deliberative jury sua sponte or pursuant to a motion by the parties.

103. This Part briefly discusses potential models for selecting and composing deliberative juries, keys to organizing and operating an effective dialogue among deliberative jurors, and the decision-making criteria that deliberative juries should use to interpret initiatives sociologically. There are many other important design details that would need to be worked out. I anticipate that states would experiment with different models, and that they would take advantage of the expertise of consultants with experience in conducting deliberative exercises of this nature in making the requisite design choices. As Hélène Landemore has recently explained, "[t]he most appropriate

The selection methods and composition of deliberative juries also warrants careful consideration.[104] While many options exist for designing and conducting deliberative exercises of this nature,[105] there are at least three basic models that could make sense. The simplest option would be to empanel a regular jury pursuant to the state's usual methods for jury selection. While this approach would take advantage of existing information and familiar procedures, there are well-known problems with the (lack of) representativeness of many juries and other aspects of the existing jury selection process.[106] Therefore, this is not the ideal choice for establishing deliberative juries to interpret successful ballot initiatives.

A better approach would be to use something along the lines of the Jefferson Center's model for Citizen Juries,[107] Reeve Bull's proposal for citizen advisory committees,[108] or the Citizens' Initiative Reviews that Oregon has used to provide voters with guidance on proposed ballot initiatives.[109] These bodies are slightly larger—usually consisting of

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institutional arrangement for any given political context is likely to reveal itself via trial and error and local experimentation rather than either induction on the basis of one or a few cases or sheer deduction." HÉLÈNE LANDEMORE, OPEN DEMOCRACY: REINVENTING POPULAR RULE FOR THE TWENTY-FIRST CENTURY 12–13 (2020).

104. *See id.* at 93 ("The selection method may seem like a technical issue. But it is actually essential to the democraticity (and also legitimacy) of the process.").

105. For a more detailed discussion of those options, see CAROLYN J. LUKENSMEYER & LARS HASSELBLAD TORRES, IBM CTR. FOR BUS. GOV'T., PUBLIC DELIBERATION: A MANAGER'S GUIDE TO CITIZEN ENGAGEMENT 24–32 (2006); MICHAEL SANT'AMBROGIO & GLEN STASZEWSKI, ADMIN. CONF. U.S., PUBLIC ENGAGEMENT WITH AGENCY RULEMAKING 128–138 (2018).

106. *See, e.g.*, Barbara O'Brien & Catherine M. Grosso, *Jury Selection in the Post-*Batson *Era*, *in* CRIMINAL JURIES IN THE 21ST CENTURY: CONTEMPORARY ISSUES, PSYCHOLOGICAL SCIENCE, AND THE LAW 19–35 (Cynthia J. Najdowski & Margaret C. Stevenson, eds., 2019) (discussing the "stubborn persistence of racial bias in jury selection").

107. *See generally* JEFFERSON CENTER, CITIZENS JURY HANDBOOK (rev. ed. 2004).

108. *See* Reeve T. Bull, *Making the Administrative State "Safe for Democracy": A Theoretical and Practical Analysis of Citizen Participation in Agency Decisionmaking*, 65 ADMIN. L. REV. 611, 640–47 (2013).

109. For discussions of Oregon's experience with Citizens' Initiative Reviews and other ways to use mini-publics to improve the initiative process, see John Gastil & Robert Richards, *Making Direct Democracy Deliberative Through Random Assemblies*, 41 POL. & SOC'Y 253, 265– 270 (2013); John Gastil, Robert Richards & Katherine Nobloch, *Vicarious Deliberation: How the Oregon Citizens' Initiative Review Influenced Deliberation in Mass Elections*, 8 INT'L J. COMM. 62 (2014). The strategies Gastil and his co-authors identify to improve democratic deliberation throughout the initiative process could usefully inform relevant design questions and potentially provide useful supplements to my proposal for using deliberative juries to interpret initiatives sociologically.

eighteen to twenty-four jurors[110]—and thus likely to be more diverse and to reflect a broader range of interests and views. The jury pools are selected at random to ensure that jury panels are representative of the population in specified demographic criteria, including age, education, race, gender, geographic location, and other traits deemed relevant to the underlying policy issue.[111] While designed to be a microcosm of the relevant population, such juries are usually not completely balanced and may not reflect all the competing interests and views.[112]

The best approach for forming a deliberative jury may therefore be to borrow from the model pioneered by James Fishkin for conducting deliberative polls or Ethan Leib's proposal for a popular branch of government.[113] These models involve participation by approximately 500 randomly-selected citizens who agree to participate in a detailed discussion of a designated problem over the course of a couple of days. Participants complete a confidential survey of relevant questions before and after participating in intensive group deliberations, and Fishkin reports that "it is routine to find large and statistically significant changes of opinion over the weekend."[114] Deliberative polls are thus carefully designed "to combine random sampling with deliberation" in an effort to ascertain what the general public would think about a legal or policy issue if the electorate was fully informed about the relevant problem and had a chance to engage in collective deliberation about what should be done.[115]

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110. JEFFERSON CENTER, *supra* note 107, at 3. Bull suggests that while the ideal size of citizen advisory committees will vary "depending upon the complexity of the issue and the number of perspectives to be represented, the total size of the group likely would not exceed a few dozen participants, as a larger number would likely stifle group interaction." Bull, *supra* note 108, at 641–42.

111. JEFFERSON CENTER, *supra* note 107, at 24–28.

112. *Id.* at 32.

113. *See generally* 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). *See also* David J. Arkush, *Direct Republicanism in the Administrative Process*, 81 GEO. WASH. L. REV. 1458, 1494–503 (2013) (proposing a similar model of "administrative juries"); Glen Staszewski, *Contestatory Democracy and the Interpretation of Popular Initiatives*, 43 SETON HALL L. REV. 1165, 1179–82 (2013) (providing a brief suggestion of the possible use of this model for interpreting initiatives); *cf.* LANDEMORE, *supra* note 103, at 13, 128–51 (setting forth principles of open democracy and proposing the ideal of an "'open mini-public': a large, all-purpose, randomly selected assembly of between 150 and a thousand people or so, gathered for an extended period of time (from at least a few days to a few years) for the purpose of agenda-setting and law-making of some kind, and connected via crowdsourcing platforms and deliberative forums (including other mini-publics) to the larger population").

114. FISHKIN, *supra* note 113, at 26.

115. *Id.* at 25–26; *see also* James S. Fishkin, *Consulting the Public Through Deliberative Polling*, 22 J. POL. ANALYSIS MGMT. 128 ("A Deliberative Poll . . . attempts

The keys to organizing and operating an effective dialogue with a deliberative jury of any size or composition for purposes of interpreting initiatives would include providing participants with quality briefing materials that explain the relevant legal or policy issues in a balanced, accurate, and understandable manner prior to commencement of the proceedings.[116] The Commission or its consultants would therefore need to verify the veracity of the data, views, or arguments presented by the parties,[117] and supplement this information with additional perspectives from other interested stakeholders and analyses from unaffiliated experts to ensure that the jurors have access to the best available empirical information and all the relevant interests and views.[118] During the hearing itself, the deliberative jurors would sit in plenary sessions where they would hear opening presentations from the parties, additional invited stakeholders, and unaffiliated experts, before breaking into randomly assigned small groups for preliminary discussions moderated by commission staff or a consultant.[119] The entire body would then reconvene for another plenary session where the small groups could ask questions of the parties, other interested stakeholders, or unaffiliated experts. The hearing would then alternate between small group and plenary discussions. At the end of the session, jurors would retake the initial survey and make their final interpretive decision.[120]

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to represent what the public would think about the issue if it were motivated to become more informed and to consider competing arguments."); Ethan J. Leib, *Can Direct Democracy Be Made Deliberative?*, 54 BUFF. L. REV. 903, 914 (2006) (suggesting that "current mechanisms of direct democracy" could be replaced by a popular branch "designed to entrust lay citizens to make policy decisions, only after they have an opportunity to really think an issue through"). Leib's proposal would use a popular branch to decide whether to enact a proposed initiative or referendum, whereas my proposal would ask a deliberative jury (or "popular branch") to resolve disputes regarding how an enacted initiative should be interpreted. I am not expressing any view here on whether deliberative juries should replace the general electorate in making the initial lawmaking decision.

116. The convenors would also need to spend time training the parties, other interested stakeholders, and unaffiliated experts, as well as the jurors themselves, on the ground rules for how the proceedings will be conducted. *See* Gastil & Richards, *supra* note 109, at 273 (discussing the need to provide sufficient training for advocates and citizen deliberators).

117. At a minimum, the Commission should require the parties to adhere to applicable rules of professional responsibility, including the equivalent of FED. R. CIV. P. 11. Yet a more demanding standard of candor would also be worth considering in this context.

118. *Cf.* FISHKIN, *supra* note 113, at 130, 132 (discussing the carefully balanced briefing materials that are provided to participants in a deliberative poll).

119. This aspect of the proposal differs from Fishkin's deliberative polls where "the experts and politicians do not give speeches" in the plenary sessions, but only "respond to questions from the sample." Fishkin, *supra* note 115, at 130.

120. While Fishkin's deliberative polls are merely advisory and therefore do not require participants to make an authoritative legal decision, Leib's popular branch would

Depending on the deliberative jury's size, this process could aim to achieve a consensus. But it is far more likely that reasonable disagreement would remain, and that the interpretive problem would need to be resolved by a jury vote at the deliberations' conclusion. Deliberative jurors would also be required to provide reasoned explanations for their votes that would be included in the lawmaking record (along with all the survey responses). The Commission or consultants would then be charged with writing a preliminary opinion setting forth the jury's decision and articulating a reasoned justification for the chosen interpretation based on a synthesis of the reasons provided by the deliberative jurors. After providing jurors with notice and an opportunity to comment on the draft opinion, the Commission or consultants would issue a final decision that would be legally binding on the parties and could serve as precedent in future cases or controversies in state court.

While this form of jury service could be legally required, it would also be advisable for deliberative jurors to receive generous compensation for their services and for the proceedings to be held in an appealing location to provide an additional incentive or reward for participation. Deliberative jury proceedings of this nature would admittedly be somewhat resource intensive, but the costs should not be overstated. A limited number of cases have raised interpretive problems involving ballot initiatives over the past several decades,[121] and it is likely that such proceedings would be relatively rare. The value of improving the democratic legitimacy of the initiative process and experimenting with a promising new form of public engagement with lawmaking almost certainly justifies the increased costs or burdens associated with legal interpretation by the people pursuant to sociological jurisprudential methods.

C. Decisional Criteria

Regardless of the precise composition and structure of the deliberative jury and its proceedings, it is vital to formally recognize that a deliberative jury's interpretive decision is a continuation of the lawmaking process (as opposed to an archaeological effort to discover the initiative's original public meaning or intent), and that the deliberative jury is therefore authorized to make a policy decision. This lawmaking

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have binding lawmaking authority analogous to my proposed deliberative juries. *See* Leib, *supra* note 115, at 915.

121. Schacter identified fifty-three statutory cases in all state high courts from 1984 to 1994. *See* Schacter, *supra* note 1, at 114–17. According to my assistant's research, only sixteen statutory or constitutional cases have come before the Supreme Courts of Michigan and Wisconsin since Schacter's study.

process should therefore include mechanisms to ensure that the deliberative jury considers and responds in a reasoned fashion to competing interests and views. The deliberative jury should also be instructed to make the most justifiable decision on the merits based on all the relevant considerations. From a sociological jurisprudential perspective, this means that the deliberative jury should engage in practical reasoning to identify the best interpretation under the circumstances based on legal, ethical, and sociological criteria. Those interpretations would have a far stronger claim to democratic legitimacy than judicial populist decisions that attribute the judiciary's preferred interpretations to the People without any substantive justification.[122]

1. LEGAL LEGITIMACY

While ballot-initiative interpretation by deliberative juries should be understood as a continuation of the lawmaking process, that does not mean that the initiative's text or surrounding legal context are irrelevant. On the contrary, conventional sources of legal meaning are entitled to significant weight under cooperative partner approaches to legal interpretation, and the same should hold true here. A cooperative partner is, after all, seeking to advance the core purposes of the shared project in a constructive way, and her decisions should therefore generally fit the surrounding legal terrain.[123] Yet, because initiative interpretation in hard cases is a creative process, lacking any single pre-determined, objectively correct answer, the deliberative jury should be presented with a broad range of legal arguments based on all the widely accepted modalities of legal interpretation.[124]

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122. *See generally* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005) (exploring the legal, moral, and sociological dimensions of constitutional legitimacy).

123. *See, e.g.*, LON L. FULLER, LAW IN QUEST OF ITSELF 8–12 (1940) (comparing legal interpretation to a repeatedly retold anecdote); Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527, 541–43 (1982) (comparing legal interpretation to creation of a chain novel).

124. *See generally* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982) (exploring five "archetypes" of constitutional argument); William N. Eskridge, Jr. & Philip Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 325 (1990) (criticizing "Foundationalist" theories of statutory interpretation as "suffer[ing] from flawed assumptions, indeterminacy, and nonexclusivity"). Commentators have recognized that juries in criminal cases are sometimes required to engage in statutory interpretation, and they seem to have a tendency in hard cases to engage in practical reasoning of this nature. *See generally* Lawrence M. Solan, *Jurors as Statutory Interpreters*, 78 CHI.-KENT. L. REV. 1281 (2003); Darryl K. Brown, *Plain Meaning, Practical Reason, and Culpability: Toward a Theory of Jury Interpretation of Criminal Statutes*, 96 MICH. L. REV. 1999 (1998).

This means, for example, that deliberative juries should be presented with competing arguments regarding the best understanding of an initiative based on the formal sources of legal meaning that are already used by state courts.[125] This would, of course, include arguments based on the ordinary meaning of the initiative's text,[126] canons of construction, the whole act or the whole code, existing legal precedent, and statements from official ballot pamphlets. It should also extend, however, to other information about the circumstances surrounding the enactment, including the mischief the ballot initiative was initially designed to address, the statements of initiative proponents and other information that was presented to voters during the ballot campaign, the way the initiative has been implemented over time, and related policy considerations. This would be a more far-reaching and expansive set of information and interpretive evidence than most state courts are willing to consider—and it could include the kinds of informal sources of meaning that social science research suggests actually influences voters.[127] But the relatively unruly nature of this information should not be unduly problematic in this context, because the information is merely being treated as relevant and not dispositive. The deliberative jury is being charged with ascertaining the most justifiable interpretation of the initiative based on all the relevant information—it is not purporting to ascertain the original intent of the voters or the original public meaning of the initiative's text. And this sort of contextual evidence *is relevant* to the best understanding of the initiative as a legal matter from a sociological jurisprudential perspective.

Thus, for example, if a deliberative jury were charged with interpreting the constitutional amendment at issue in *National Pride at Work*, it should be expected to consider competing arguments regarding the best understanding of the initiative's text. The deliberative jury should, however, also be presented with information regarding the circumstances surrounding the initiative's enactment—including the fact that the proposal was purportedly designed to strengthen the state's existing statutory limitation of marriage to one man and one woman in the face of successful efforts to promote marriage equality or establish civil unions in other jurisdictions, and the fact that the initiative proponents repeatedly claimed that the proposal would not affect domestic partnership benefits during the ballot campaign.[128] Similarly, a

125. *See* Schacter, *supra* note 1, at 119–21.

126. While the use of corpus linguistics to attribute an original public meaning to legal language is severely problematic for a host of reasons, carefully constructed studies of this nature could potentially provide relevant information in this context, so long as they are not treated as legally dispositive. *See generally* Anya Bernstein, *Legal Corpus Linguistics and the Half-Empirical Attitude*, 106 CORNELL L. REV. 1397 (2021).

127. *See* Schacter, *supra* note 1, at 131–39.

128. *See supra* notes 57-60 and accompanying text.

deliberative jury charged with resolving the interpretive issue presented in *Bylsma* should be presented with any available information about the extent to which collective arrangements by registered patients or their registered primary caregivers were considered or discussed during the ballot campaign.

The competing legal positions could be presented to a deliberative jury pursuant to adversarial arguments by the parties. Because the parties will often have incentives to spin this information to their advantage in ways that may be hard for a jury accurately to assess, it may also be necessary for the court to provide the jury with a legal advisor (or law clerks) who could conduct research and answer the jury's questions. The legal advisor could also pose questions to the parties on behalf of the jury as part of the deliberative process.

The deliberative jury would be asked to engage in practical reasoning to assess the competing legal arguments and construct the most persuasive resolution of the interpretive problem as a matter of law based on formal legal sources and other information that is particularly relevant in the ballot initiative context. And while the legitimacy of the deliberative jury's interpretation as a formal legal matter is surely an important consideration that should receive great weight in its final decision, there are other relevant factors that should also be considered when ballot initiatives are implemented from a sociological jurisprudential perspective, including ethical and sociological criteria. Legal legitimacy is therefore highly relevant but not dispositive when deliberative juries interpret initiatives in hard cases.

2. ETHICAL LEGITIMACY

Even if deliberative juries adopted a multi-modal approach to legal interpretation and considered a broad range of interpretive evidence, the traditional modalities of judicial decision-making—and particularly those involving constitutional meaning—would still limit the use of data, views, or arguments that most people would consider relevant to the development of the best understanding of the law.[129] A sociological jurisprudential approach to interpreting initiatives would expand the legitimate, decision-making criteria to include additional information that is relevant for reaching the most justifiable decision on the merits under the circumstances because the interpretive process would itself be

129. *See* Pozen & Samaha, *supra* note 7, at 731–32 (defining "anti-modalities" as "the categories of reasoning that are employed in nonconstitutional debates over public policy and political morality but are considered out of bounds in debates over constitutional meaning" and explaining that, "[they] shut out of constitutional law virtually all the arguments that drive most citizens' views on most matters of public concern").

understood as a deliberative forum for lawmaking. The deliberative jury would in turn serve as a mediating institution for considering competing interests and views and making provisionally justifiable policy decisions. And if a deliberative jury is formally empowered to make a policy decision, it should be encouraged to consider all the data, views, and arguments that are relevant for this purpose. This should include, most notably, empirical information about the likely consequences of the respective interpretive choices, ethical arguments about the justifiability of those results as a normative matter, and even the possibility of reaching a deliberative compromise among the competing positions advocated by the parties.[130]

One cliché of legal interpretation is that judges are not supposed to "legislate from the bench."[131] This is increasingly understood to mean both that judges should refrain from imposing their own policy preferences onto the law, and also that their interpretive choices "must not be 'results-oriented,' with outcomes dictated by an instrumentalist inquiry into the welfare effects or distributional implications of a disputed government action or legal rule."[132] But the consequences of judicial decisions matter and traditional sources of legal meaning are often underdetermined, and so policy considerations are frequently incorporated into legal interpretation in an indirect, diluted, or even unacknowledged form.[133] The result, as David Pozen and Adam Samaha put it, is that "constitutional law often trades on pseudoscience" instead "of social science."[134]

A deliberative jury charged with resolving an interpretive dispute regarding an initiative could, in contrast, rely upon the best available empirical data and rigorous social scientific analyses of the likely consequences of different legal interpretations in reaching its decision. As explained above, the jury would be presented with briefing materials at the outset of the process that explained the relevant legal and policy

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130. *See id.* at 731 (observing that the anti-modalities include "policy arguments that are formulated as openly instrumentalist inquiries into welfare effects; fundamentalist arguments that depend on deep philosophical premises or comprehensive normative commitments; . . . and logrolling arguments that propose . . . a splitting of differences between competing parties or positions in the interest of compromise").

131. *See* David E. Pozen, *Constitutional Bad Faith,* 129 HARV. L. REV. 885, 922 n.180 (2016).

132. Pozen & Samaha, *supra* note 7, at 746–50; *see also* Aaron Tang, *Consequences and the Supreme Court*, 117 NW. U. L. REV. (forthcoming 2023) (recognizing that the "conventional wisdom" is that the Supreme Court may not consider the consequences of its decisions).

133. Pozen & Samaha, *supra* note 7, at 734; *see also* Jane S. Schacter, *Text or Consequences?*, 76 BROOK L. REV. 1007 (2011) (showing that Justice Scalia's purportedly textualist opinions are laden with consequentialist reasoning); Tang, *supra* note 132 (identifying a "consequentialist turn" in recent Court decisions).

134. Pozen & Samaha, *supra* note 7, at 734.

issues and provided background information regarding the competing interpretive positions and their likely practical consequences. The jury would then listen to presentations from the parties, other interested stakeholders, and unaffiliated experts during the plenary sessions,[135] participate in small group discussions regarding their preliminary thoughts and concerns, and have multiple opportunities to pose questions to the panelists before reaching a final decision. The jury would also be expected to justify its interpretive decision based in part on the likely consequences of its policy choice. In other words, the interpretive jury *would be legislating from the bench*, and it would be provided with the information necessary to do so in a knowledgeable and competent manner.

Of course, a deliberative jury's interpretive decision would turn in many cases on contested value judgments. That is precisely why the parties should be expected to provide ethical arguments to justify their preferred interpretations as a normative matter. Because the deliberative jury would be charged with making a legitimate collective decision on behalf of the entire polity, the parties and other panelists should be expected to present public-regarding reasons for their positions that could be accepted by free and equal persons with competing interests or views.[136] The deliberative jury should in turn provide mutually acceptable reasons of this nature to justify its final interpretive decision. In contrast to traditional forms of adversarial litigation, a deliberative jury could also be empowered to reach interpretive decisions that reflect a deliberative compromise between or among the competing positions offered by the parties.[137] Thus, deliberative juries could conceivably adopt creative interpretations of initiatives that strike a sensible middle ground, instead of declaring a single winner and loser. Rather than being subject to a super-strong rule of stare decisis, interpretive decisions by deliberative juries could be reconsidered in future cases if unanticipated problems arise or circumstances materially change.[138]

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135. The unaffiliated experts would generally include academics and officials from relevant administrative agencies.

136. *See* AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 52–94 (1996) (discussing the principle of reciprocity at the core of deliberative democracy).

137. *See generally* AMY GUTMANN & DENNIS THOMPSON, THE SPIRIT OF COMPROMISE: WHY GOVERNING DEMANDS IT AND CAMPAIGNING UNDERMINES IT (2012).

138. *See supra* note 100. I anticipate that state courts would initially determine whether a prior deliberative jury's interpretive decision should be given stare decisis effect when deciding whether to refer a subsequent case that raises the same issue to another deliberative jury. The court could either deny referral and treat the prior interpretive decision as binding precedent or refer the case to a new deliberative jury that would be charged with assessing whether to follow, overrule, or perhaps distinguish the precedent. Of course, when state courts treat interpretive decisions by deliberative juries as binding precedent, critics or opponents could still "overrule" those decisions by

National Pride at Work interpreted an initiated constitutional amendment to prohibit public employers from providing domestic partnership benefits based on the Michigan Supreme Court's stated understanding of the original public meaning of the initiative's text.[139] The court never justified this decision on the merits and therefore did not provide mutually acceptable reasons to explain, for example, why LGBTQ+ employees and their families should be denied negotiated contractual benefits that are routinely provided to other employees. The court similarly failed to address, much less justify, the negative consequences of this legal policy on the recruitment efforts of public employers, such as Michigan State University. The Michigan Supreme Court also rejected the legality of cooperative marijuana growing arrangements by registered patients or qualified registered caregivers under the MMMA based on the definition of drug possession the court had previously adopted in a different statutory context.[140] The court gave no consideration, for example, to the practical mechanics of making medical marijuana available to qualified registered patients or to the experiences of other states that authorized various cooperative growing arrangements. Nor did the court justify its decision to prohibit cooperative growing arrangements on the merits. While such arrangements undoubtedly involve complex tradeoffs, and *Bylsma* therefore raised potentially difficult empirical and normative questions, these are precisely the kinds of issues that policymakers should consider and resolve in a reasoned fashion as a prerequisite to making legitimate collective decisions on behalf of the entire polity.

Deliberative juries would be unusually well-situated to interpret initiatives pursuant to sociological jurisprudential methods. They could be presented with a broad range of legal arguments and instructed to use all the conventionally accepted interpretive modalities to seek to identify the best way to advance an initiative's core project in a manner that is legally legitimate. They could also be presented with reliable empirical information and rigorous social scientific analyses of the likely consequences of competing interpretations and charged with seeking to promote the public good by making effective and normatively desirable social policy. While deliberative juries composed of a representative group of ordinary citizens would have a superior democratic pedigree for interpreting the products of direct democracy than state courts, the sociological legitimacy of their decisions could be further enhanced if deliberative juries were also allowed to consider reliable public opinion polls on the relevant legal or policy questions.

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enacting another initiative or, in some states, by amending the initiative's language pursuant to a supermajority vote of the state legislature.

139. *See supra* notes 49–54 and accompanying text.

140. *See supra* notes 711–766 and accompanying text.

3. SOCIOLOGICAL LEGITIMACY

I have argued thus far that deliberative juries established to interpret initiatives should be charged with making the most justifiable decision in each case based on legal and ethical criteria—their decisions should generally seek to fit the surrounding legal context and reach the most justifiable results on the merits.[141] Yet, one might still be concerned that a deliberative jury's interpretation could lack sociological legitimacy if it is inconsistent with the ascertainable preferences of the community. One response to this potential concern is that the deliberative jury's decision would be designed to reflect the electorate's preferred resolution of the issue *if* voters had an opportunity to engage in reasoned deliberation about the interpretive problem. While this response would likely be decisive from the perspective of deliberative democratic theory, sociological jurisprudence is also concerned with prevailing social norms of justice and reasonableness, and the community's ascertainable preferences would therefore seem relevant to the interpretation of initiatives from this perspective. Moreover, the initiative process is often billed as an overtly majoritarian institution, and it could therefore pose tension with the basic premises of direct democracy for deliberative juries to ignore reliable evidence of the electorate's preferences when they interpret ballot initiatives. Reliable evidence of the median voter's preferences on the interpretive question would thus be another factor that a deliberative jury should consider when it makes its final interpretive decision.

Michael Gilbert has argued that state courts should interpret initiatives by seeking to ascertain the plausible understanding that would be preferred by the median voter.[142] Gilbert contends that in contrast to traditional legislation, which is the product of multimember bargaining within and across institutions, a search for the interpretive preferences of the median voter is both tangible and consistent with the majoritarian premises of direct democracy.[143] While Gilbert provides limited guidance regarding precisely how state courts should identify the median voter's interpretive preferences, he emphasizes that the inquiry should include the views of *all voters*—supporters and opponents of the proposal alike—and that reliable public opinion polls could be used for making this determination.[144]

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141. *Cf.* RONALD DWORKIN, LAW'S EMPIRE 239–40 (1986) (arguing that constitutional interpretation should "both fit[] and justif[y]" the relevant legal context). In contrast to Dworkin, however, I do not believe that most legal problems have single, uniquely correct answers.

142. *See* Gilbert, *supra* note 14, at 1623.

143. *See id.* at 1632–51.

144. *Id.* at 1624, 1647–50.

Gilbert's proposal would be relatively simple to incorporate into a deliberative jury's decision-making process. The Commission staff or consultants who organize and moderate the proceedings could include reliable public opinion polls on the interpretive problem in the briefing materials provided to the jury, and the methodology and results of those polls could be discussed during the plenary sessions. The organizers of the proceedings could also commission professional public opinion polls on the relevant issues if reliable information on those questions did not already exist or was outdated. The deliberative jury could therefore be presented with information regarding the median voter's preferences on the precise question at issue during the interpretive process.

For example, public opinion polls conducted in Michigan shortly before the state constitution was amended to prevent marriage equality showed that fifty percent of respondents favored a ban on same-sex marriage, while more than sixty percent of respondents opposed the revocation of healthcare benefits for domestic partners of public employees.[145] This suggests that the median voter on this initiative would have preferred an interpretation that only banned same-sex marriage and civil unions and left domestic partnership benefits intact.[146] Contrary to Gilbert's argument, however, public opinion polls and other evidence of the median voter's interpretive preferences should be considered relevant but not dispositive when deliberative juries make their final decisions from a sociological jurisprudential perspective. A deliberative jury would, after all, be charged with making the most justifiable decision on the merits based on all the relevant considerations. While the electorate's naked preferences are potentially relevant to this determination, the deliberative jury should also consider legal and ethical criteria in its effort to make a legitimate collective decision that responds in a reasoned fashion to everyone's interests and views—not just those of the majority.

D. The Experimental Spirit of Federalism and Reduced Resonance Gap

The enactment of a state law that established procedures for deliberative juries to interpret initiatives pursuant to sociological jurisprudential methods would be an admittedly bold move. But attempting creative solutions to otherwise intractable problems is consistent with the experimental spirit of federalism. Asking a representative group of ordinary citizens to engage in reasoned deliberation and select the most justifiable interpretation of an initiative on legal or policy issues that were not anticipated or resolved by voters is also consistent with direct democracy's aspiration to facilitate

145. *See Nat'l Pride at Work v. Governor of Michigan,* 748 N.W.2d 524, 547–48 (Mich. 2008) (Kelly, J., dissenting).

146. Gilbert, *supra* note 14, at 1649.

lawmaking by the people. Deliberative juries would play a mediating role by considering competing interests and perspectives, and they would be in a good position to serve as cooperative partners of the electorate by identifying the best interpretations under the circumstances based on the relevant legal, ethical, and sociological criteria. Their interpretive decisions would have far greater democratic legitimacy in this context than those of the state judiciary, particularly if state courts would otherwise be inclined to invoke judicial populist methods and rhetoric.

The most intriguing aspect of this proposal may, however, be the rare opportunity it offers to reduce the "resonance gap" between the data, views, and arguments used by litigants and judges in conventional constitutional interpretation, and the forms of reasoning and justification that would be embraced by interpreting initiatives sociologically. Pozen and Samaha explain:

> [T]he concept of a resonance gap is meant to capture the distance between (1) the sorts of arguments that might motivate or influence citizens in their extralegal evaluation of an issue of public import and (2) the sorts of arguments that participants in a debate about the Constitution's meaning believe they are allowed to make, if they wish to be taken seriously and to persuade relevant audiences.[147]

They contend that the resonance gap in American constitutional interpretation is quite large and that judicial decisions may therefore "appear far away from—may fail to resonate with—the values and concerns of ordinary people and policymakers."[148] While efforts could conceivably be made to reduce this resonance gap in constitutional adjudication, Pozen and Samaha contend that the more promising strategy to align fundamental law with the concerns of ordinary Americans may be to shrink constitutional law's domain.[149]

While Pozen's and Samaha's position may be persuasive in the context of federal constitutional adjudication, I want to suggest that authorizing deliberative juries to interpret ballot initiatives pursuant to sociological jurisprudential methods could be an exceedingly effective way to reduce the resonance gap in public law litigation in state courts by expanding the range of information and arguments that decision-makers would be obligated to consider. Under this proposal, deliberative juries would be explicitly authorized to consider precisely the types of data, views, and arguments that are excluded from consideration by the anti-modalities of constitutional law and that ordinary people typically

147. Pozen & Samaha, *supra* note 7, at 769.

148. *Id.*

149. *See generally id.* at 787–96.

care about—policy arguments, consequential considerations, mutually acceptable ethical reasons, the possibility for compromise, public opinion, and maybe even emotional appeals. This information could also be presented to deliberative juries in a systematic, reliable, workable, and understandable manner. Accordingly, state-level initiative interpretation by deliberative juries pursuant to sociological jurisprudential methods could result in legal and policy decisions on questions of public law that are in a real sense, closer to the people.

IV. A (SMALLER) PLACE FOR JUDICIAL REVIEW

By shifting responsibility for interpreting initiatives from state courts to deliberative juries, we could preserve a more comfortable and institutionally appropriate role for the state judiciary. First, state courts would be responsible for referring open questions of initiative interpretation to the deliberative jury process. While this process should ideally be operated by a state agency with the requisite expertise and trained consultants, state judges could conceivably play a role in how the proceedings are conducted. State courts would also have responsibility under this proposal for reviewing the constitutional validity of a deliberative jury's decision.

I will not attempt to provide a comprehensive theory of judicial review in this context. There is a longstanding debate regarding whether ballot initiatives should receive more searching judicial scrutiny based on the absence of other structural safeguards against majoritarian tyranny or arbitrariness,[150] or whether courts should review the constitutional validity of initiatives deferentially on the theory that they are as pure as democracy can get.[151] My sense is that this debate should continue to play out when it comes to assessing the constitutionality of initiatives on their face or as applied to their most unambiguous applications. The innovation resulting from my proposal is that state courts would also be asked to assess the constitutionality of the interpretations adopted by deliberative juries. This would be a more comfortable and judicially manageable task than requiring state courts both to interpret initiatives and to review the constitutionality of their chosen interpretations in the same case for several reasons.

Under the existing model, an initiative's opponents may have strong incentives to claim that the measure should be broadly interpreted for

150. *See, e.g.*, Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 23 (1978); Eule, *supra* note 23, at 1548–73.

151. *See* Frickey, *supra* note 24, at 483 (reporting that "some state courts have held that legislation adopted by direct democracy may deserve special judicial deference," and observing that "[a]t first blush, judicial invalidation" of initiatives on constitutional grounds seem to heighten the countermajoritarian difficulty).

purposes of their constitutional challenge, while simultaneously seeking a narrow construction of the initiative as an operational matter if their constitutional claim proves unsuccessful.[152] This potentially creates an unseemly or at least awkward dynamic in litigation. While this tension could conceivably be managed by judicious use of the avoidance canon, such decisions could come at the expense of what would otherwise be the most justifiable understanding of the initiative measure as a matter of legal interpretation.[153] Under my proposal, the deliberative jury would first decide on the most justifiable understanding of the initiative based on the relevant legal, ethical, and sociological considerations,[154] and state courts would then review the constitutionality of the deliberative jury's interpretive decision. Because initiative interpretation would literally be separated from judicial review, this awkward tension would disappear.

My proposal would also facilitate judicial review by state courts as a practical matter by providing both a detailed record of the interpretive proceedings and a reasoned justification for the deliberative jury's decision. The proposal would also facilitate judicial review *as a political matter* by charging state courts with responsibility for reviewing the constitutional validity of a deliberative jury's decision, rather than requiring state courts to assess the constitutionality of a decision by the voters. Accordingly, state courts could more easily perform their reviewing function without worrying about potential retribution by voters during a judge's bid for reelection.[155] Both dynamics could even work in tandem to create space for some healthy experimentation with creative or novel approaches to judicial review in the initiative context. Such experimentation should, in my view, draw on Justice Brennan's famous observation that state courts can always provide more robust protection for constitutional norms when they interpret state constitutions than federal courts may be willing or able to provide when they interpret the

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152. *See* Schacter, *supra* note 1, at 157 n.216 (suggesting this possibility).

153. *See* Frickey, *supra* note 24, at 512–17 (exploring the proper use of the avoidance canon in initiative interpretation).

154. The deliberative jury would, however, be authorized to use the avoidance canon in selecting the most justifiable interpretation of the initiative in appropriate circumstances. This would likely require efforts to educate deliberative juries on the relevant constitutional issues. This information could be conveyed in the briefing materials provided to deliberative juries at the outset of the process, by the parties or other unaffiliated experts such as law professors during plenary sessions, and by the law clerks assigned to answer legal questions raised by jurors during small group discussions. *Cf.* Gastil & Richards, *supra* note 109, at 271–72 (discussing the most effective means of furnishing legal information to participants in Citizens' Initiative Reviews).

155. *See* Julian N. Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. COLO. L. REV. 733 (1994) ("[E]ven if we assume that some judges will be able to ignore the prospect of electoral reprisal, the voters have the final word. Judges who fail to heed voter messages may soon find themselves replaced by those with better hearing.").

federal Constitution.[156] That may be the most important lesson of all when it comes to the subject of "Interpretation in the States."

CONCLUSION

The electorate does not usually have an ascertainable intent on the detailed legal or policy questions presented in interpretive litigation involving ballot initiatives. State courts appear increasingly inclined to impose their own preferences onto initiated laws in the name of the people pursuant to judicial populist methods and rhetoric. This Essay proposes an alternative approach that would charge deliberative juries with selecting the most justifiable interpretation of initiatives pursuant to sociological jurisprudential methods and explains how this approach could be institutionalized. State courts would merely refer interpretive problems to deliberative juries and assess the constitutionality of their decisions. This proposal is consistent with the experimental spirit of federalism and the fundamental premise of direct democracy as lawmaking by the people, and it would substantially improve the democratic legitimacy of initiative interpretation in the states.

156. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977).