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THE BAIT-AND-SWITCH IN DIRECT DEMOCRACY

GLEN STASZEWKI*

INTRODUCTION

On November 2, 2004, the voters of Michigan joined ten other states in approving constitutional amendments to prohibit same-sex marriage.1 This development has already received widespread attention in scholarly journals and the popular press because of a perception that the electorate’s opportunity to vote on socially conservative ballot measures was critical to the reelection of President George W. Bush.2 Moreover, the overwhelming success of such measures, despite state laws that already prohibited same-sex marriage in most of the relevant jurisdictions, provides apparent support for the claim that our society is in the midst of a “culture war,” and highlights the tension between the populist impulse underlying direct democracy and the fear that it has

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2. See id. at 969-72 (identifying proposals to prohibit same-sex marriage in Ohio and Kentucky as examples of “crypto-initiatives,” a recent trend in which ballot measures “are designed by agenda setters, often from outside the state or locality in which the initiative is being run,” who hope to accomplish goals other than policymaking); Susan Page, Shaping Politics from the Pulpits, USA Today, Aug. 3, 2005, at 1A (“Evangelical Christian leaders nationwide have been emboldened by their role in re-electing President Bush and galvanized by their success in campaigning for constitutional amendments to ban same-sex marriage, passed in 18 states so far.”); see also Daniel A. Smith, Was Rove Right? The Partisan Wedge and Turnout Effects of Issue 1, Ohio’s 2004 Ballot Initiative to Ban Gay Marriage (Jan. 15, 2005) (unpublished manuscript, on file with the University of Southern California-Caltech Center for the Study of Law and Politics), available at http://lawweb.usc.edu/cslp/conferences/direct_democracy_05/documents/smith.pdf.
become a powerful tool for imposing the "tyranny of the majority."  

Finally, there is a basis for believing that these laws could be invalidated by the judiciary on federal constitutional grounds in light of the Supreme Court's decisions in *Romer v. Evans* and *Lawrence v. Texas*. It is nearly certain that each of these issues will continue to receive well-deserved attention in the months and years ahead.

Regardless of the subject matter, however, the events surrounding Proposal 2 in Michigan, and similar constitutional amendments in other states, provide a disturbing example of pervasive structural flaws in the ballot initiative process. These problems stem, in part, from the vague drafting of measures, which provided in the case of Proposal 2 that "the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose." Although no one in Michigan seemed to know the precise reach of this language prior to the election, opponents of the measure claimed that it could be used to prohibit public employers from providing benefits for the domestic partners of gay and lesbian employees. In response, leading proponents of the measure chastised the opposition for seeking to distract the electorate from the "real issue" and claimed that "the proposal [would] not affect benefits offered to people living together or

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4. See *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating a Texas statute that made it a crime for two persons of the same sex to engage in certain intimate sexual contact under the Due Process Clause); *Romer v. Evans*, 517 U.S. 620 (1996) (invalidating an initiated amendment to Colorado's Constitution that prohibited governmental officials from providing any protected status to gays and lesbians under the Equal Protection Clause); see also *Citizens for Equal Prot., Inc. v. Bruning*, 368 F. Supp. 2d 980 (D. Neb. 2005) (holding that a state constitutional amendment that prohibited the official recognition of same-sex marriage or other similar relationships violated several provisions of the U.S. Constitution).


in same-sex relationships.”7 Almost immediately after the election, however, some of the same proponents took the position that the ratification of a collective bargaining agreement between the state and public employees, which included domestic partnership benefits for certain gay and lesbian workers, would have violated “the letter and the spirit of the amendment.”8 One of the reported coauthors of Proposal 2 and perhaps its most outspoken advocate declared that “[b]enefits only to homosexuals are a formal recognition of a homosexual relationship as equal or similar to marriage . . . . And the voters have said they don’t want that.”9 Indeed, the attorney general of Michigan subsequently issued a formal advisory opinion declaring that a municipality’s policy of providing benefits to the domestic partners of gay and lesbian employees conflicts with the “plain meaning” of Proposal 2.10 Although a state trial court disagreed with this opinion based on a different understanding of the “plain meaning” of the constitutional amendment,11 the attorney general’s motion to stay the trial court’s decision was granted and the issue is currently pending in the Michigan Court of Appeals.12

This sequence of events in Michigan—which could quite conceivably occur elsewhere13—dramatically illustrates the bait-and-

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7. See Jay Kaplan & Kary L. Moss, Prop 2 Supporters Should Keep Word on Allowing Partner Benefits, DETROIT NEWS, Nov. 18, 2004, at 17A; infra notes 26-28 and accompanying text (quoting reported statements of several initiative proponents prior to the election).


9. See Stacey Range, Proposal 2 Supporters Taking Aim at Benefits, LANSING ST. J., Nov. 4, 2004, at 6 (quoting Gary Glenn); see also Berman, supra note 8 (reporting that Gary Glenn claimed to understand the meaning of Proposal 2 because “he co-authored its language”).


13. The broad scope of similar constitutional amendments in other states has already led to extensive litigation and collateral consequences that were unanticipated by voters. See, e.g., Forum for Equal. PAC v. McKeithen, 893 So. 2d 715, 716 (La. 2005) (reversing a trial court’s decision that Louisiana’s constitutional amendment violated the state’s single-subject rule and holding that each of its provisions was “germane to the single object of defense of marriage and constitute[d] an element of the plan advanced to achieve this object”); State v. Burk, No. CR 462510, 2005 WL 786212 (Ohio Ct. Com. Pl. Mar. 23, 2005) (dismissing a criminal indictment and holding that the application of Ohio’s domestic violence statute to an unmarried
switch in direct democracy. In order to utilize this technique, initiative proponents must (1) qualify a particularly popular idea for the ballot; (2) draft the measure in sufficiently broad or ambiguous terms to create "collateral consequences"; (3) either evade questions about those collateral consequences during the election campaign or flatly deny that they were intended (perhaps criticizing the opposition for even posing such questions); and (4) establish the collateral consequences through litigation or by lobbying executive officials who are responsible for implementing the measure. This Article claims that the foregoing technique constitutes lawmaking at its worst, and that jurisdictions that authorize the ballot initiative should take action to prevent the bait-and-switch in direct democracy.

The story of Proposal 2 is outrageous because the collateral consequences at issue were apparently intended by some of the initiative proponents, and their actions seem premeditated. Moreover, the initiative proponents expressly addressed the relevant interpretive issue prior to the election and therefore appear to have affirmatively misled the voters. Finally, some of the same individuals who claimed that the amendment would not affect the legality of domestic partnership benefits are involved in the effort to eliminate them. These aggravating factors are unnecessary, however, for the ballot initiative process to lead to collateral consequences that the voters never intended, and which they may have opposed if the relevant questions had been squarely brought to their attention. Accordingly, the bait-and-
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switch in direct democracy is, in reality, a particularly egregious version of a far more widespread problem with the ballot initiative process.

The Article begins by describing the story of Proposal 2 and how some of its proponents are seeking to complete the bait-and-switch in direct democracy. Part II claims that the existing initiative process facilitates this technique by foreclosing opportunities to improve the drafting of ballot measures, and refusing to hold initiative proponents sufficiently accountable for their actions. This Part also explains that the same structural shortcomings increase the risk that successful ballot measures will have other collateral consequences not intended by the voters. Part III evaluates the ability to alleviate these problems through existing procedural safeguards or the adoption of interpretive techniques that narrowly construe ambiguous ballot measures to minimize collateral damage. While endorsing the latter solution, this Part also explains that these problems could be attacked more directly by the adoption of basic structural reforms of the ballot initiative process that have proven effective in other contexts. Part IV considers whether the shortcomings of candidate elections and the traditional legislative process undermine the rationale for proposals of this nature to reform the ballot initiative process. The Article concludes that while more candid deliberation is desirable in each of these contexts, the ballot initiative process has a distinct capacity to combine passionate voting (by the electorate) and instrumental lawmaking (by the initiative proponents and others) in a way that is especially prone toward divergence (based on the absence of representation and other structural safeguards). The bait-and-switch in direct democracy is particularly troubling from a variety of different normative perspectives because it self-consciously seeks to capitalize on this state of affairs.

I. THE STORY OF PROPOSAL 2

The successful effort to amend the Michigan Constitution to prohibit the recognition of same-sex marriage and “similar unions for any purpose” likely began with a confluence of two distinct events. First, the gay rights movement made significant gains through recent judicial decisions, which suggested that Michigan’s existing statutory prohibition of same-sex marriage could be vulnerable to legal challenge.14 Second, the presidential election and several major

14. See supra note 4; Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (holding that the state’s limitation of the protections, benefits, and obligations of civil marriage to couples of the opposite sex violated equal protection principles of the state constitution). A statute that was previously enacted by the
congressional races promised to be hotly contested in 2004, especially in a few key battleground states. Conservative Republicans viewed the opportunity to place the issue of same-sex marriage on the ballot as a dual opportunity to disable state courts from recognizing further advances in gay rights and to improve the electoral prospects of their favored candidates.\textsuperscript{15}

The first attempt to implement this strategy in Michigan involved the introduction of resolutions to amend the state constitution to prohibit the recognition of same-sex marriage or similar unions in both chambers of the legislature.\textsuperscript{16} If a joint resolution were adopted by a two-thirds majority of both legislative chambers, the question would be presented to the voters for their approval or rejection in a referendum election.\textsuperscript{17} Although the proposed constitutional amendment was favorably reported out of the House Family and Children's Services Committee,\textsuperscript{18} it met significant partisan opposition on the floor of the chamber.\textsuperscript{19} The resolution's sponsors reportedly agreed to amend the proposal to protect domestic partnership benefits and to schedule a special referendum election for August to attract moderate lawmakers and dampen charges that the resolution was designed primarily to mobilize voter turnout for President Bush in November. Despite these apparent concessions, the resolution failed to secure the requisite two-thirds majority in the house and was therefore never considered by the senate.\textsuperscript{20}

This defeat in the legislature prompted the formation of "Citizens for the Protection of Marriage," a ballot initiative committee seeking to present the issue of same-sex marriage directly to the voters.\textsuperscript{21} The organization mounted a petition drive and quickly obtained more than 500,000 signatures to place its initiative proposal on the November

Michigan legislature already prohibited same-sex marriage. \textit{See} MICH. COMP. LAWS ANN. § 551.1 (West 2005) ("A marriage contracted between individuals of the same sex is invalid in this state.").

\textsuperscript{15} \textit{Cf.} Smith, \textit{supra} note 2, at 1, 9-12 (examining "how Issue 1, the highly publicized and successful initiative to ban gay marriage in Ohio, was strategically used by the Republican party in the 2004 presidential campaign in a critical swing state").


\textsuperscript{17} \textit{See} MICH. CONST. art. XII, § 1.


\textsuperscript{20} \textit{See supra} note 19.

ballot. This statewide effort was aided by the fact that the members of numerous religious congregations were encouraged to sign the petitions before and after worship services. The state’s Catholic dioceses also donated the vast majority of the $1.2 million that was raised for the campaign, and provided parishioners with literature and videotaped messages endorsing the proposal.

Prior to the election, opponents of the measure warned that the proposal’s broad language could be interpreted to prohibit employers from providing health care and other benefits to the domestic partners of unmarried employees. In response to these concerns, representatives and allies of Citizens for the Protection of Marriage repeatedly maintained that the proposed constitutional amendment was intended to strengthen the state’s existing statutory prohibition of same-sex marriage and that it would not affect domestic partnership benefits. For example, an official campaign brochure that was distributed by the organization provided as follows:

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.

Similarly, Citizens for the Protection of Marriage produced a thirty-second television commercial for the campaign, which declared:

Proposal 2 isn’t about benefits, it just puts the definition of marriage in our constitution. Judges and politicians couldn’t

22. See id.
23. See Marisa Schultz, Churches Join Drive to Ban Gay Marriage, DETROIT NEWS, June 1, 2004, at 3.
24. See Bell, supra note 21; Charlie Cain, Proposal 2 Would Ban Gay Marriage in Michigan, DETROIT NEWS, Oct. 26, 2004, at 3. It does not appear that any of this material mentioned the potential effect of Proposal 2 on domestic partnership benefits.
25. See supra note 6. The leading opponent of the measure, the Coalition for a Fair Michigan, reportedly raised about $500,000 for the campaign. See Bell, supra note 21. The Michigan Chapter of the ACLU also vocally opposed the measure. See Kaplan & Moss, supra note 7.
change it; only voters could... One man, one woman. Vote yes, Proposal 2.27

Finally, the campaign director and communications director of the organization, as well as two of the individuals who were reportedly involved with drafting the measure, were all quoted in the press disclaiming the measure’s potential effect on domestic partnership benefits—and, in some cases, dismissing the opposition’s warnings as a “scare tactic” or “diversion from the real issue.”28

27. This commercial was posted on the official Website of Citizens for the Protection of Marriage. See http://www.protectmarriageyes.org/Latest.aspx (last visited Mar. 21, 2005) (transcribed by author).

28. For statements attributed to Marlene Elwell, the campaign director for Citizens for the Protection of Marriage, see Kyle Melinn, Marriage Supporters Want to Keep It Simple, CITY PULSE (Lansing, Mich.), Aug. 25, 2004, at 3 (“We’re saying marriage is between one man and one woman. End of story.”); id. (“As far as [Elwell] is concerned, the ballot question doesn’t dive into the other questions of domestic benefits or civil unions...”); Charisse Jones, Gay Marriage on the Ballot in 11 States, USA TODAY, Oct. 15, 2004, at 3A (“This has nothing to do with taking benefits away. This is about marriage between a man and a woman.”). Similarly, Kristina Hemphill, the communications director for the organization, reportedly stated that “[t]his amendment has nothing to do with benefits” and claimed that the discussion of this issue was “just a diversion from the real issue.” John Burdick, Marriage Issue Splits Voters, HOLLAND SENTINEL (Mich.), Oct. 30, 2004; see also Natalie Y. Moore, Gay Rights Issue Creates Little Stir, DETROIT NEWS, Oct. 27, 2004, at 1 (quoting Hemphill for the proposition that “[t]his is about defining marriage of one man and one woman” and responding to the potential elimination of domestic partnership benefits by claiming that “nothing that’s on the books is going to change. We continue to confuse this issue by bringing in speculation.”). Patrick Gillen, an attorney for the Thomas More Law Center, an organization that allegedly assisted with the drafting of Proposal 2, likewise took the reported position at one time that “benefits are not the issue.” See Catherine O’Donnell, Attack on Gays’ Benefits Feared, ANN ARBOR NEWS, Nov. 4, 2004, at 1. Finally, Gary Glenn, the president of the American Family Association of Michigan, who reportedly co-authored Proposal 2 and was one of its most outspoken advocates during the campaign, reportedly dismissed the concerns of the opponents at one point as a “scare tactic” and insisted that “public and private employers could offer domestic partnership benefits if they want to.” Sharon Emery, Proposal 2: Preserving the Traditional Family or Threatening the New?, MUSKEGON CHRONICLE (Mich.), Oct. 24, 2004; see also supra notes 7-9. Although some of Glenn’s other reported comments are consistent with his stated position after the election, he was hardly forthcoming with the voters on this issue when he had an opportunity to clearly explain his position. See Gary Glenn, Constitutional Amendment Protects Existing Marital Laws Against Judicial Activism, DETROIT NEWS, Oct. 24, 2004, at 17 (advocating the adoption of Proposal 2 without mentioning its potential effect on domestic partnership benefits); Citizens Research Council of Mich., supra note 6, at 7 (“According to the American Family Association of Michigan, the clause [or similar union for any purpose] is part of the ballot proposal solely to make the ballot language as strong as possible.”). Glenn has apparently blamed the reported discrepancies on misunderstandings by the news media. See Range, supra note 9 (“Hours after the
This particular interpretive question played a central role in the proceedings of the Board of State Canvassers ("Board"), which is responsible under state law for certifying the sufficiency of initiative petitions and approving the "statement of purpose" that actually appears on election ballots. Despite testimony at a Board hearing from an attorney for the initiative proponents who suggested that Proposal 2 would not prohibit employers from providing domestic partnership benefits, the two Democrats on the Board refused to certify the measure on the grounds that it would invalidate existing employment benefits and thereby violate certain provisions of the state constitution.

The same Board members refused to approve the statement of purpose proposed by the director of elections because the proposed ballot language did not expressly provide that it could potentially be interpreted to prohibit domestic partnership benefits. Accordingly, the four-member Board split along partisan lines and fell short of the three votes needed to approve the proposed ballot language and certify the proposed constitutional amendment for the November election.

Citizens for the Protection of Marriage promptly sought a writ of mandamus from the Michigan Court of Appeals to order the responsible officials to issue a declaration of the sufficiency of its initiative petition amendment passed, Glenn blamed confusion on the media, which he said didn't understand the proposal.


30. Eric Doster, an attorney for the initiative proponents, initially sought to evade questions about the impact of Proposal 2 on domestic partnership benefits, but eventually answered, in part, as follows:

If you're asking whether domestic partner benefits that are offered by contract by municipality or the Big Three would somehow be altered or affected by this proposal, that's really one for the courts to decide, if and when this is passed. But I can tell you that no subsequent legislation or even a constitutional amendment may affect a matter of contract between two parties. And the domestic benefits to which you are referring to are a contract between two parties. . . . That is one—that is one myth that's out there with respect to this proposal.

Transcript of Testimony of Eric Doster at Hearing Before Board of State Canvassers (Aug. 23, 2004).

31. See Citizens for Prot. of Marriage v. Bd. of State Canvassers, 688 N.W.2d 538, 540 (Mich. Ct. App. 2004) (stating that two members of the Board "declined to certify the proposal on the basis of their conclusion that it was unlawful and unconstitutional"); Dawson Bell, Election 2004: Tie Vote Keeps Gay Marriage Off Ballot, DETROIT FREE PRESS, Aug. 24, 2004, at 1A (reporting one board member's position that the nullification of existing domestic partnership benefits would violate the state constitution and therefore be invalidated by the courts).

32. See Citizens for Prot. of Marriage, 688 N.W.2d at 541.

33. See id.; see also Bell, supra note 21.
and certify the proposal for the November election. The court of appeals granted the writ based on its conclusion that the Board lacked the authority to consider the substantive validity of the proposal and therefore breached its clear legal duty to certify a petition that substantially complied with applicable statutory requirements and contained sufficient signatures to warrant certification. The court also ordered the responsible officials to approve the ballot language proposed by the director of elections because the statement of purpose was clearly written and impartial. In response to objections from Board members that the proposed ballot language did not provide adequate notice of its specific legal consequences, the court pointed out that "any attempt to determine how courts might eventually apply the proposed amendment, assuming it won voter approval, would be entirely speculative. Such speculation would not be a 'true' statement of the amendment's purpose," and would therefore be incompatible with applicable provisions of Michigan law. As a result of this decision, the proposed constitutional amendment was certified to appear on the general election ballot on November 2, 2004.

Proposal 2 was approved by approximately fifty-nine percent of the electorate and therefore easily achieved the majority vote necessary to amend the state constitution. As soon as the election results were reported, one of the coauthors of Proposal 2, and perhaps its most outspoken proponent, reportedly declared that "[b]enefits only to homosexuals are a formal recognition of a homosexual relationship as

34. See Citizens for Prot. of Marriage, 688 N.W.2d at 540. Although the petitioner requested a writ of mandamus against the Board, the court issued its order against the Secretary of State because it was convinced "to a reasonable certainty that there is no reason to believe that the two Board members who voted against the proposal and the statement of purpose will have a sudden change of heart, regardless of any order of [the] Court directing them to approve a statement of purpose." Id. at 543.

35. See id. at 541-42.

36. Id. at 542. Under Michigan law, the statement of purpose that appears on election ballots must "consist of a true and impartial statement of the purpose of the amendment or question in such language as shall create no prejudice for or against such proposal." Mich. Comp. Laws Ann. § 168.474 (West 2005). Moreover, "[t]he question shall be clearly written using words that have a common everyday meaning to the general public." Id. § 168.485. Finally, the applicable statute expressly provides that the ballot language "shall be worded so as to apprise the voters of the subject matter of the proposal or issue, but need not be legally precise." Id. (emphasis added).


38. Id. at 543.

39. See 2004 Mich. Legis. Serv. A-1 (West); see also Mich. Const. art. XII, § 2 (providing that a majority vote of the electorate is necessary to adopt an initiated constitutional amendment); Range, supra note 9 (reporting that Proposal 2 was approved by fifty-nine percent of those who cast votes on the measure).
equal or similar to marriage. . . . And the voters have said they don’t want that.”

In response to charges that he was reversing the position that he took prior to the election, this proponent reportedly “blamed confusion on the media, which he said didn’t understand the proposal.”

This proponent also reportedly claimed that any employers found to be in violation of the new amendment would be “turned over” to the attorney general of Michigan.

Although some of Proposal 2’s proponents have stayed out of the postelection fray on this issue or maintained their earlier positions, other proponents and their allies have sought to use the constitutional amendment’s broad language to prohibit public employers from granting domestic partnership benefits. For example, the Thomas More Law Center, which filed a lawsuit challenging the City of Ann Arbor’s provision of health care benefits to the domestic partners of gay and lesbian employees prior to the election, amended its pleadings after the election to claim that the enactment of Proposal 2 rendered such domestic partnership benefits unconstitutional.

An attorney for the organization, who was previously quoted disclaiming the amendment’s impact on this issue, has reportedly claimed more recently that Proposal 2 prevents public employers from providing domestic partnership benefits because such a policy recognizes a relationship similar to marriage.

40. Range, supra note 9.

41. Id. This initiative proponent reportedly explained that “he interprets the language to mean domestic partner benefits now must be extended to all public employees who share their households.” Id.

42. Id.

43. Marlene Elwell, the campaign director of Citizens for the Protection of Marriage, has reportedly said that she “hasn’t paid attention” to the debate over domestic partnership benefits since the amendment’s approval. See Thomas P. Morgan, To Unsecure These Blessings . . . Proposal 2 Sows Fear As It Becomes Law, CITY PULSE (Lansing, Mich.), Dec. 15, 2004, at 1. She added, however, “that the proposal was not intended to address the issue of domestic partnership benefits.” Id.

44. See supra notes 7-9, 40-42 and accompanying text (describing the apparent discrepancies in Gary Glenn’s reported statements on this issue).

45. See David Eggert, Lawsuit Challenges Ann Arbor Schools’ Same-Sex Benefits, ASSOCIATED PRESS, Feb. 7, 2005.

46. See O’Donnell, supra note 28 (quoting Patrick Gillen).

47. See Eggert, supra note 45. Gillen reportedly told the Associated Press, “It is akin to marriage. The Ann Arbor Schools can’t recognize same-sex marriages by calling them domestic partnerships.” Id. The Michigan Court of Appeals recently upheld a decision to grant summary judgment in favor of the defendants in this case.
Regardless of how courts ultimately interpret Proposal 2, it has already had a negative impact on the availability of domestic partnership benefits for public employees in Michigan. Shortly before the November 2004 election, the state reached a tentative agreement with five unions that would have provided domestic partnership benefits for represented employees.\footnote{See Chris Andrews, Prop 2 May Threaten State’s Plan to Offer Gay-Partner Benefits, LANSING ST. J., NOV. 11, 2004, at 1.} The ratification of this agreement was postponed, however, because the governor and other state and union officials were reportedly concerned that offering domestic partnership benefits to public employees could potentially violate Proposal 2.\footnote{See id.; see also Bad Deal: Granholm, Unions Don’t Earn Praise for Same-Sex Maneuvers, LANSING ST. J., DEC. 5, 2004, at 10; Chris Andrews, State Unions Await Ruling on Same-Sex Issue, LANSING ST. J., DEC. 3, 2004, at 1; Governor to Remove Same-Sex Benefits from State Contracts, ASSOCIATED PRESS, DEC. 2, 2004.} These officials claimed they wanted definitive guidance from the judiciary before providing domestic partnership benefits to public employees once the constitutional amendment was enacted.\footnote{See supra note 49; see also Aftershocks: Proposal 2’s Full Effects Will Be Defined by the Courts, LANSING ST. J., NOV. 17, 2004, at 8 (stating that “any legal challenge to [domestic partnership benefits] would provide one critical public service: clarify exactly what Proposal 2 does to people in Michigan”).}

In response to the request of a state legislator, the attorney general of Michigan subsequently issued a formal advisory opinion declaring that a municipality’s policy of providing benefits to the domestic partners of gay and lesbian employees conflicts with the plain meaning of Proposal 2.\footnote{Id. at 9 (quoting Black’s Law Dictionary and citing other statutory provisions and legal precedent).} The attorney general reasoned that “marriage” is commonly understood as “the legal union of one man and one woman as husband and wife.”\footnote{Id. The attorney general further stated:

It is reasonable to conclude that average citizens when casting their votes at the November 2004 election commonly understood that, to secure and preserve to our society the benefits derived from the institution of marriage, Proposal 04-2 would reserve that unique recognition to the union of one

Because the health-care
benefits at issue are routinely provided to an employee’s spouse, they are a benefit of marriage. According to a public employer’s provision of those benefits to an employee’s domestic partner would constitute the “recognition” of a similar union for any purpose. In reaching this conclusion, the attorney general expressly relied upon the “plain language of the amendment” and the canon of interpretation that seeks to give meaning to every textual provision. In other words, the attorney general suggested that his interpretation of Proposal 2 was necessary to avoid rendering the broad, catch-all phrase “similar union for any purpose” superfluous.

Although the attorney general concluded that his interpretation was compelled by the plain meaning of Proposal 2, he also claimed that the context in which the amendment was adopted further supported his decision. In particular, he pointed out that Proposal 2 was widely discussed in the media prior to the election and that its potential legal consequences for domestic partnership benefits were a central feature of the debate. Moreover, he expressly recognized that “[t]he difference in interpretation among the various views expressed on the subject was attributable to the clause ‘or similar union for any purpose’ and the effect the clause would have on domestic partner benefits if the amendment passed.” The attorney general therefore concluded that

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54. Id. at 10-11 (identifying “legal or financial benefits associated with marriage”).

55. Id. at 12-15. The attorney general expressly recognized two important limitations on his opinion. First, he concluded that Proposal 2 does not invalidate existing contractual obligations of governmental employers because it only applies prospectively to future employment contracts. See id. at 16-17. Second, he opined that Proposal 2 would not prevent a public employer “from conferring benefits on persons a city employee may wish to designate as a recipient as long as the benefits are not dependent on the existence of a union that is similar to a marriage as defined by Michigan law.” Id. at 16. At least one initiative proponent has used these qualifications as a basis for reconciling his statements before and after the election. See supra notes 7-9, 28, 40-42 and accompanying text (describing the reported role of Gary Glenn and statements that were attributed to him prior to the election).


57. See id. at 13-14.

58. Id. at 14 (citing Citizens Research Council of Mich., supra note 6).
voters were on notice that the amendment’s enactment might invalidate domestic partnership benefits:

Looking at the circumstances surrounding adoption of Proposal 2, therefore, the issue of domestic partner benefits based on a union similar to marriage was at the forefront of the public debate as voters prepared to go to the polls. Regardless of whether there was agreement regarding the effect the proposal might have on domestic partner benefits, one thing that would clearly have been evident to voters was that benefits provided based on the recognition of a “similar union” were at issue and might be eliminated if the measure passed.\textsuperscript{59}

The foregoing description of the circumstances surrounding Proposal 2 is accurate as far as it goes, but the attorney general’s opinion conspicuously failed to acknowledge that the measure’s proponents repeatedly denied that the measure would affect domestic partnership benefits, and dismissed such concerns as a “scare tactic” or “diversion from the real issue.”\textsuperscript{60} His opinion is, nonetheless, arguably binding on all public employers in the state in the absence of an authoritative judicial decision to the contrary.\textsuperscript{61}

And, indeed, a judicial decision to the contrary was briefly in place when a state trial court granted a litigant’s request for a declaratory judgment that Proposal 2 “does not prohibit public employers from entering into contractual agreements with their employees to provide domestic partner benefits or voluntarily providing domestic partner benefits as a matter of policy.”\textsuperscript{62} The decision was entered in an action that was filed against the governor by the ACLU Fund of Michigan on behalf of numerous public employees who were in danger of losing their domestic partnership benefits as a result of the attorney general’s interpretation of the constitutional amendment.\textsuperscript{63}

\begin{itemize}
\item \textsuperscript{59} Id.
\item \textsuperscript{60} See supra notes 26-28 and accompanying text.
\item \textsuperscript{61} See Mich. Beer & Wine Wholesalers Ass’n v. Att’y Gen., 370 N.W.2d 328, 331 (Mich. Ct. App. 1985) (noting that attorney general opinions do not have the force of law and are therefore not binding on courts, but they are binding on state agencies and officers). It is not clear, however, whether the attorney general’s opinion is binding on the University of Michigan, Michigan State University, or Wayne State University because these institutions have a unique status under the state constitution. See Mich. Const. art. VIII, § 5.
\item \textsuperscript{63} See Compl. for Declaratory Relief, Nat’l Pride at Work, Inc. v. Granholm, No. 265870 (Mar. 21, 2005).
\end{itemize}
central allegation of the plaintiffs was that the voters who enacted Proposal 2 "did not intend to deprive health care coverage and other employment related benefits to domestic partners of government employees and their children."  

In contrast to the attorney general's opinion, the trial court found that the "plain meaning" of Proposal 2 did not prohibit public employers from providing domestic partnership benefits. First, the court explained that domestic partnership benefits stem from the provisions of an employment contract and are therefore "not among the statutory rights or benefits of marriage." Second, the court reasoned that the criteria for awarding domestic partnership benefits do not "recognize a union" because civil unions and same-sex marriage are prohibited in the State of Michigan, which in turn suggests that there is no "union" that could be "recognized." Third, the court concluded that the criteria for awarding domestic partnership benefits do not recognize a union "similar to marriage" because marriage involves numerous rights and obligations that are not implicated by an employer's provision of domestic partnership benefits. Finally, the court explained that the "for any purpose" language of Proposal 2 was
inapplicable to the benefits at issue because the public employers did not recognize a "union similar to marriage." 69

About a month later, the Michigan Court of Appeals entered an order that established an expedited briefing schedule and agreed to provide "immediate consideration" of this matter. 70 In addition, the court granted the attorney general’s motion for a stay of the trial court’s decision. The court explained that the effect of the stay would be "to preserve the status quo" that existed on the day before the trial court’s decision, 71 thereby reinvigorating the attorney general’s opinion. Thus, at least for the time being, it appears that the proponents of Proposal 2 and their allies have achieved the bait-and-switch in direct democracy.

The attorney general’s opinion will, however, not be the last word on this issue. Instead, the Supreme Court of Michigan will likely make the final decision on whether Proposal 2 prohibits public employers from providing domestic partnership benefits, regardless of the decision of the court of appeals. Although the final chapter of this story remains to be written, one might be skeptical that the trial court’s view of the "plain meaning" of Proposal 2 will be shared by an unabashedly conservative court if and when it applies its textualist methodology of interpretation. 72

II. STRUCTURAL FLAWS OF THE INITIATIVE PROCESS

It may be tempting to dismiss the story of Proposal 2 as merely a tawdry tale of politics in Michigan. These events deserve serious consideration, however, for those concerned about democratic structure because the existing initiative process facilitates the bait-and-switch in direct democracy. In particular, the technique is made possible by a combination of several distinct characteristics of this form of lawmaking. First, although ballot measures may be approved or rejected by the electorate, the initiative proponents are the driving force behind drafting their specific text, qualifying them for the ballot, and

69. See id. at *6.
71. See id.
72. See Maura D. Corrigan & J. Michael Thomas, "Dice Loading" Rules of Statutory Interpretation, 59 N.Y.U. ANN. SURV. AM. L. 231, 233, 237-42 (2003) (claiming that "the Michigan Supreme Court has recently moved toward a textualist approach that consciously avoids use of dice-loading rules" and that recent cases "reflect that statutory interpretation in Michigan adheres to the principles consistently articulated by Justice Scalia"). Corrigan is currently the Chief Justice of the Supreme Court of Michigan.
lobbying the electorate to vote in their favor. Second, the initiative proponents are typically precluded from amending the text of a measure once their petitions have been circulated, even if potential errors, ambiguities, or “collateral consequences” are brought to their attention prior to the election. Finally, there are few procedures in place to require structured deliberation about the meaning or advisability of a proposed measure and virtually no formal mechanisms for binding the initiative proponents to what they say. Even when the initiative proponents do not overtly mislead the electorate about the intended consequences of their measure, the same structural features increase the risk that successful ballot measures will have collateral consequences that were never anticipated or approved by the voters.

Although the details of the ballot initiative process vary by jurisdiction, Michigan’s procedures for adopting an initiated constitutional amendment are typical for present purposes. First, the


74. See David B. Magleby, *Direct Legislation: Voting on Ballot Propositions in the United States* 184 (1984) (explaining that because the initiative process forecloses amendment, voters must affirm or reject ballot propositions in toto); Kenneth P. Miller, *Constraining Populism: The Real Challenge of Initiative Reform*, 41 SANTA CLARA L. REV. 1037, 1052 (2001) (recognizing that after the ballot petition is circulated for signatures, “the measure cannot be amended again, even by the proponents, even if it becomes apparent that the measure contains a flaw that should be corrected”).

75. See Philip P. Frickey, *The Communion of Strangers: Representative Government, Direct Democracy, and the Privatization of the Public Sphere*, 34 WILLAMETTE L. REV. 421, 435-37 (1998) (explaining that direct democracy offers no alternative to the opportunities for deliberation that are provided by the legislative process and pointing out that “whatever might be said at public meetings can have no effect on the measure’s language”); see also infra Part III.A (claiming that existing procedural safeguards are flawed because they do not adequately resolve textual ambiguity prior to a ballot election).

76. The Michigan Constitution provides that constitutional amendments may be proposed “by petition of the registered electors of this state.” MICH. CONST. art. XII, § 2. A constitutional amendment that is adopted pursuant to this process, such as Proposal 2, is known as a “direct initiative” because private citizens are allowed to make binding laws completely outside of the traditional legislative process. See Staszewski, supra note 3, at 396 & n.2 (describing different types of direct democracy). The Michigan Constitution also authorizes the promulgation of statutes pursuant to the “indirect initiative,” whereby private citizens are allowed to refer proposed ballot
proponents of a measure are required to circulate initiative petitions that set forth their proposal and obtain signatures from registered voters equal to at least ten percent of the votes cast in the prior gubernatorial election. The proponents must subsequently file the requisite petitions with the secretary of state at least 120 days before the targeted election. When this occurs, the director of elections and a bipartisan Board of State Canvassers are responsible for preparing a brief and impartial statement of the proposition’s purpose. The Board must also issue a declaration of the sufficiency or insufficiency of the initiative petitions at least two months before the targeted election. If the Board certifies the sufficiency of the petitions, copies of the proposition’s statement of purpose are distributed to the media and placed on the next election ballot. If the proposition is approved by a majority of the qualified electors who cast votes on the question, the proposition is officially incorporated into the state constitution.

Despite widespread rhetoric that direct democracy constitutes lawmaking by “the people,” the initiative proponents are the dominant force in successful ballot campaigns. As explained above, they conceive of a measure and draft its precise text, and they are directly responsible for obtaining the petition signatures necessary to qualify a measure for the ballot. The proponents, of course, routinely lead the campaign to persuade the electorate to vote in favor of the measure. Finally, they participate in litigation and lobbying to encourage public officials to make favorable decisions about the measure before the

measures to the legislature for consideration. If the legislature fails to enact the proposal after forty days, the measure is subsequently presented to the voters. See Mich. Const. art. II, § 9. Nineteen states allow private citizens to enact constitutional amendments, statutes, or both pursuant to the direct initiative, which is the primary focus of this Article. See M. Dane Waters, Initiative and Referendum Almanac 11-12 (2003) (describing initiative procedures that are currently available).

77. See Mich. Const. art. XII, § 2.
81. An aggrieved party may obtain judicial review of the Board’s certification decisions prior to the election pursuant to a writ of mandamus or certiorari. See id. § 168.479; see also supra notes 29-38 and accompanying text (describing the proceedings before the Board of State Canvassers and subsequent litigation regarding Proposal 2).
83. See Mich. Const. art. XII, § 2.
84. See supra note 73; see also David S. Broder, Democracy Derailed: Initiative Campaigns and the Power of Money 91-161 (2000) (describing the “initiative war in close-up”).
election, and when it is subsequently implemented. At each stage of this process, the proponents are routinely assisted by professional members of the "initiative industry." The proponents and their consultants, together, are capable of conducting sophisticated research on the existing legal landscape in order to draft a measure to achieve their intended results with an eye toward future judicial review. In addition, it is not unusual for them to use focus groups and conduct polls to determine how to effectively promote or "spin" their measure to the voters. Not surprisingly, a successful ballot campaign, particularly at the statewide level, costs the initiative proponents and their supporters huge sums of money.

Political scientists have recognized that initiative proponents often have incentives to draft ballot measures in a vague or ambiguous fashion because more specific proposals tend to be easier to criticize and perhaps subsequently defeat. While those incentives are not

85. See Elisabeth R. Gerber, The Populist Paradox: Interest Group Influence and the Promise of Direct Legislation 44-45 (1999); David McCuan et al., California's Political Warriors: Campaign Professionals and the Initiative Process, in Citizens as Legislators 55, 70 (Shaun Bowler et al. eds., 1998). Governmental officials are sometimes reluctant to faithfully implement successful ballot measures that they opposed in the traditional legislative process. See Elisabeth R. Gerber et al., Stealing the Initiative: How State Government Responds to Direct Democracy (2001). The bait-and-switch in direct democracy is therefore most likely to occur when executive or judicial officials share the policy preferences of initiative proponents on issues that would likely engender opposition in the legislature.

86. For descriptions of this industry, see Broder, supra note 84, at 43-89; Magleby, supra note 74, at 59-76; McCuan et al., supra note 85, at 55-70; see also Elizabeth Garrett, Money, Agenda Setting, and Direct Democracy, 77 Tex. L. Rev. 1845, 1851 (1999) ("Providing professional signature gatherers is one of the many services offered by the growing initiative industry, which consists of political professionals who assist groups in obtaining the required number of signatures, meeting legal and procedural challenges to ballot access, and managing the campaign itself.").

87. See Frickey, supra note 73, at 519 (recognizing that "[u]nlike the electorate as a whole, many of the active participants... are frequent 'players' in the repeat game of direct democracy" who can be expected to pay attention to judicial decisions); Elizabeth Garrett, Who Directs Direct Democracy?, 4 U. Chi. Roundtable 17, 30 (1997) (explaining that "ballot proposals are drafted by repeat players who can learn the rules of statutory interpretation and behave accordingly").

88. See Broder, supra note 84, at 71-83.

89. See id. at 163-64 (providing data on initiative spending and describing a record-setting initiative election in which competing gaming interests spent $92 million); Gerber, supra note 85, at 4-5 (providing data on "the enormous level of spending in direct legislation campaigns"); Magleby, supra note 74, at 149 tbl.8.2 (providing data on campaign spending for ballot initiatives in California from 1958 until 1982).

90. See Gerber et al., supra note 85, at 110 (explaining that "some initiative proponents may have no choice but to write an initiative in vague or ambiguous language" if they want their measure to be approved by the voters).
unique to the ballot initiative process, they undoubtedly increase the
risk that successful ballot measures will have collateral consequences
that were not anticipated or approved by the voters. Moreover, several
structural flaws of the ballot initiative process significantly exacerbate
this problem and facilitate the bait-and-switch in direct democracy.

First, it is particularly easy for the initiative proponents to “dodge”
issues during ballot campaigns because there are few opportunities for
structured deliberation and debate in this lawmaking process.91 Aside
from filing their initiative petitions, the only time proponents are even
invited to make “official” statements on behalf of their measure in
Michigan is when the director of elections and Board of State
Canvassers develop a proposal’s statement of purpose—and, even then,
the initiative proponents are not necessarily compelled to participate.92
While some jurisdictions also hold legislative hearings or produce ballot
pamphlets that routinely provide the views of initiative
proponents,93 these tools are not readily capable of forcing the initiative proponents to
adopt clear positions on potentially divisive or problematic interpretive
issues. Even if lawmakers or other interested parties posed searching
questions at public hearings, there would be little to prevent the
proponents from giving nonresponsive, evasive, or misleading answers.
Statements in ballot pamphlets, like other forms of campaign
advertising, can only produce candid information about specific
interpretive issues of this nature on a purely voluntary basis. Yet, it is
precisely this type of one-sided advertising that appears most likely to
reach voters during a ballot campaign.94

91. See supra note 75.
92. See Mich. Comp. Laws Ann. § 168.22e(2) (West 2005) (providing that “the board of state canvassers shall publicly request and allow” the sponsor of a ballot initiative “to address a meeting” to consider and approve its statement of purpose); see also Mich. Admin. Code r. 168.844-45 (1999) (setting forth governing regulations for the conduct of public meetings and hearings of the Board).
93. See Waters, supra note 76, at 24-26 (providing information about the availability and general content of ballot pamphlets); id. at 294 (reporting that hearings are conducted by the Secretary of State on proposed ballot measures in each congressional district of Nebraska and that initiative proponents and opponents are invited to participate).
94. See Shaun Bowler & Todd Donovan, Demanding Choices: Opinion, Voting, and Direct Democracy 56-59 (1998) (describing the results of surveys on voter information in ballot campaigns and reporting that a majority of voters use ballot pamphlets and that most of them find the arguments for and against a measure most helpful); Michael S. Kang, Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and “Disclosure Plus,” 50 UCLA L. Rev. 1141, 1169 (2003) (recognizing that most voters receive their information about politics “from their casual viewing of television advertising and news”); Schacter, supra note 73, at 130-44 (canvassing social science literature regarding the influences on voter
The ease with which initiative proponents can dodge potentially problematic or divisive interpretive issues limits their need to deny that particular collateral consequences were intended. The initiative proponents will, however, sometimes have political incentives to voluntarily address interpretive issues of this nature during a ballot campaign. The provision of such “interpretive guidance” will not necessarily foreclose the bait-and-switch in direct democracy, however, because there are no formal structural mechanisms for binding the initiative proponents to what they say. Indeed, the initiative proponents may have every incentive to take a “moderate” position on interpretive issues prior to an election in order to increase their likelihood of success at the polls. They may retain an equally strong incentive, however, to adopt a more “extreme” or perhaps contrary position after the election when successful ballot measures are interpreted and implemented by executive and judicial officials. If those officials interpret a measure narrowly to accord with their pre-election views, the initiative proponents have lost nothing. On the other hand, governmental officials could conceivably adopt a broader interpretation of the measure and thereby complete the bait-and-switch in direct democracy. In the absence of some tangible basis for discouraging this type of behavior, the initiative proponents (and their allies) have structural incentives to change their positions on potentially contentious interpretive issues—to “flip-flop,” so to speak—once an election has occurred.

behavior in ballot elections and reporting that media accounts and advertising are the most influential sources of information).

95. See Gerber, supra note 85, at 56 (explaining that the opponents of ballot measures “may design their campaigns to emphasize and cultivate uncertainty about a proposition,” and the initiative proponents must, in turn, “mitigate concerns about all aspects of the measure”).

96. See Frickey, supra note 75; infra Part IV (comparing direct democracy to the traditional legislative process). It is therefore not surprising that political advertising during ballot campaigns is notoriously simplistic and misleading. See, e.g., Eule, supra note 3, at 1517 (claiming that “[i]lustrations of deceptive advertising and sloganeering abound” in ballot campaigns); Daniel H. Lowensteins, Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment, 29 UCLA L. Rev. 505, 570 (1982) (stating that ballot campaigns are “marked by gross exaggeration, distortion, and outright deception”).

97. The opponents of proposed ballot measures often have the same incentives running in the opposite direction. Thus, for example, the opponents of Proposal 2 warned that it could be construed to prohibit public employers from providing domestic partnership benefits, but they are currently seeking a narrow interpretation of the measure that would avoid this outcome. See supra notes 25, 62-64 and accompanying text. By clarifying the particular legal consequences of proposed ballot measures prior to an election, the reforms that are endorsed in this Article would limit this type of
The ability of the initiative proponents to dodge issues and strategically change their positions is uniquely reinforced by other structural features of the ballot initiative process. For example, the unelected status of initiative proponents and the one-shot nature of ballot campaigns limit the need for most participants to develop and maintain trustworthy reputations.98 Perhaps more important, the text of a proposed initiative cannot be amended after its proponents have begun circulating signature petitions to qualify the measure for the ballot.99 Proponents are therefore prohibited from correcting textual errors or making other changes that would clarify or improve the drafting of proposed legislation.100 They are also precluded from accommodating any substantive concerns that arise during the ballot campaign and thereby facilitating compromise or consensus among interested parties.101 Beyond the questionable wisdom of foreclosing such opportunities, prohibitions on amendment prevent the opponents of a ballot measure from even asking the initiative proponents to "put their money where their mouth is" by agreeing to textual changes that would resolve any unnecessary ambiguity and thereby take potential collateral consequences off the table.

The foregoing structural features of the ballot initiative process combine to facilitate the bait-and-switch in direct democracy. The initiative proponents can qualify a popular idea for the ballot and intentionally draft the measure in sufficiently broad or ambiguous terms to create particular "collateral consequences." At the same time, the proponents can routinely dodge questions about the precise meaning of their proposal during the ballot campaign. When this strategy is not feasible, the proponents can always change their position after the election because there are no structural mechanisms to bind the initiative proponents to what they have previously said. Specifically,
prohibitions on amendment preclude the initiative proponents from incorporating their "campaign promises" on specific interpretive issues into the text of a measure. As a result, they—and, especially, their independent allies—can freely engage in litigation or other lobbying activities to encourage governmental officials to interpret the measure broadly in a contrary fashion. The same structural features render the ballot initiative process particularly vulnerable to collateral consequences that were not anticipated or approved by the voters, even when the bait-and-switch in direct democracy was not premeditated by the initiative proponents or even consciously invoked.

III. AVOIDING THE BAIT-AND-SWITCH IN DIRECT DEMOCRACY

The widespread appeal of direct democracy stems primarily from its potential capacity to accurately reflect the will of the people. Critics have pointed out, however, that the ballot initiative process foregoes the safeguards of representation and bicameralism and presentment, which the traditional legislative process provides to protect political minorities and ensure that lawmaking is the product of reasoned deliberation. At first blush, the bait-and-switch in direct democracy appears problematic from both normative perspectives because it allows initiative proponents to mislead voters about the particular consequences of a proposed ballot measure. The technique therefore undermines the ability of voters to accurately express their preferences and inhibits reasoned deliberation during the lawmaking process. The same shortcomings potentially exist whenever ballot initiatives have particular legal consequences that were not expressly endorsed by the voters. Fortunately, there are some readily available tools for avoiding the bait-and-switch in direct democracy and limiting the collateral consequences of successful ballot measures.

102. See Sherman J. Clark, A Populist Critique of Direct Democracy, 112 Harv. L. Rev. 434, 435-36 (1998) (explaining that the assumption that direct democracy provides the clearest expression of "the voice of the people... is at the heart of the populist case for direct democracy"); Richard B. Collins & Dale Oesterle, Structuring the Ballot Initiative Process: Procedures that Do and Don't Work, 66 U. Colo. L. Rev. 47, 58 (1995) ("An important variant of the concept that the initiative is a perfection of democracy is the claim that the initiative allows expression of pure majoritarian will, and that this is a virtue.").

A. Existing Procedural Safeguards

Before describing legal reforms that could eliminate the bait-and-switch in direct democracy and limit the collateral consequences of successful ballot measures, it is worth considering whether the existing procedural safeguards that some jurisdictions currently employ are sufficient to defeat these problems. Specifically, most jurisdictions already have procedures in place that are designed to provide ballot measures with clear, concise, and accurate titles and summaries, which are conveyed to the voters on initiative petitions and election ballots. In addition, some jurisdictions provide registered voters with ballot pamphlets that contain objective descriptions of proposed initiative measures, along with statements of support and opposition. Finally, a majority of jurisdictions that authorize the direct initiative limit the scope of each ballot measure to a "single subject" to avoid potential surprise or confusion and prevent the enactment of independently unsupported provisions. This section explains that such procedures may perform useful functions, but they are insufficient to avoid the bait-and-switch in direct democracy and minimize the collateral consequences of successful ballot measures. This is because the procedures do not adequately resolve textual ambiguity before an election and therefore do not genuinely clarify the specific consequences of proposed ballot measures for the voters.

The most obvious example of the failure of existing procedures to clarify the specific consequences of proposed ballot measures is provided by jurisdictions that wait to enforce single-subject rules until after an initiative has been enacted. This approach does not directly

104. See Waters, supra note 76, at 16-17.
105. See id. at 24-26; see also Peter Brien, Voter Pamphlets: The Next Best Step in Election Reform, 28 J. LEGIS. 87 (2002).
106. See generally Anne G. Campbell, In the Eye of the Beholder: The Single Subject Rule for Ballot Initiatives, in THE BATTLE OVER CITIZEN LAWMAKING 131, 131-64 (M. Dane Waters ed., 2001); Rachael Downey et al., A Survey of the Single Subject Rule as Applied to Statewide Initiatives, 13 J. CONTEMP. LEGAL ISSUES 579 (2004). For example, the Michigan Constitution provides that "[n]o law shall embrace more than one object, which shall be expressed in its title." MICH. CONST. art. IV, § 24. Because this provision is understood to apply only to statutory initiatives and not to initiated constitutional amendments, it will most likely not serve as a potential basis for invalidating Proposal 2. See Downey et al., supra, at 603.
107. See, e.g., Forum for Equal. PAC v. City of New Orleans, 881 So. 2d 777, 782-83 (La. Ct. App. 2004) (holding that in the absence of "unquestionable[e]" invalidity, an alleged violation of the state's single-subject rule should only be resolved if and when the proposal is ultimately enacted); Beechnau v. Austin, 201 N.W.2d 699, 701 (Mich. Ct. App. 1972) (holding that an alleged violation of the state's single-subject rule for statutory initiatives was premature because the court "will not pass upon the constitutionality of a proposed law before it is submitted to the people").
clarify the particular consequences of ballot initiatives before an election. If anything, the possibility that successful ballot measures could subsequently be modified or invalidated based on single-subject violations provides initiative proponents with incentives to formulate titles and statements of purpose at very high levels of abstraction. The postelection enforcement of single-subject rules is therefore unlikely to prevent voter surprise or confusion about the particular consequences of successful ballot measures. Although this approach could avoid collateral consequences that were arguably unsupported by a majority of voters, the same function would be performed more effectively by the adoption of appropriate interpretive techniques when the applicable text is ambiguous. Moreover, it is difficult to see how the judiciary could competently second-guess the electorate’s apparent preferences when an initiative’s text plainly resolves an issue. These considerations, along with the notorious difficulty of establishing a coherent standard for identifying a “single subject,” suggest that

108. See, e.g., Forum for Equal. PAC v. McKeithen, 893 So. 2d 715, 736 (La. 2005) (upholding a constitutional amendment that prohibited same-sex marriage and “[a] legal status identical or substantially similar to that of marriage for unmarried individuals” against single-subject challenge based in part on its broad title and a statement of purpose that incorporated each of the amendment’s substantive provisions); see also Daniel H. Lowenstein, California Initiatives and the Single-Subject Rule, 30 UCLA L. REV. 936, 965 (1983) (claiming that under a stringent test for enforcing single-subject rules, “[d]rafters will manipulate the provisions of a measure to meet (or appear to meet) whatever standard the court erects, sacrificing nothing or as little as possible of the substance of what they or their clients hope to accomplish”).

109. The judiciary’s reluctance to resolve difficult interpretive issues in a vacuum may, however, limit the ability of single-subject rules to perform this function. See infra notes 118-21 and accompanying text; Forum for Equal. PAC, 893 So. 2d at 736-37 & n.31 (failing to address whether the challenged constitutional amendment invalidated domestic partnership benefits, while endorsing the state’s concession that unmarried citizens could continue to enter enforceable contracts in Louisiana).

110. See infra Part III.B; Daniel H. Lowenstein, Initiatives and the New Single Subject Rule, 1 ELECTION L.J. 35, 43 (2002) (acknowledging that a “willingness to interpret ambiguous provisions of an initiative in order to avoid a single subject violation . . . seems a desirable and, indeed, an inevitable approach” to the enforcement of those rules).

111. See infra Part IV (acknowledging the difficulty of assessing the electorate’s preferences on subsidiary issues, but suggesting that a burden should be imposed upon initiative proponents to clearly articulate the particular legal consequences in the text of their measures).

112. See Campbell, supra note 106, at 132 (“The general conclusion that can be drawn from this review of the different requirements and the different applications of similar requirements in the initiative states, is that single subject restrictions have resulted in the judicial branch assuming a key, sometimes determinative, role in the initiative process.”); Lowenstein, supra note 108, at 938-42 (claiming that the parameters of a “subject” are in the eyes of the beholder); Lowenstein, supra note 110, at 44-48 (arguing that courts take on the illegitimate role of a “Council of Revision”
postelection enforcement of single-subject rules is inherently problematic and certainly not the most attractive option for avoiding the bait-and-switch in direct democracy.

The official provision of accurate ballot titles and summaries is a more promising way to notify voters of the contents of proposed ballot measures prior to initiative elections. The effectiveness of the existing procedures is frequently limited, however, to issues upon which an initiative's text is already clear. Most states, including Michigan, require the authors of ballot titles and summaries to provide "a true and impartial statement of the purpose of the amendment or question in such language as shall create no prejudice for or against such proposal." Such directives encourage the authors of ballot titles and summaries to draft their language in general terms. They also discourage or prohibit governmental officials from resolving ambiguities about the legal consequences of proposed ballot measures at an early stage of the process. While there may be good reasons for this limitation, it necessarily prevents ballot titles and summaries from clarifying the particular legal consequences of ambiguous ballot measures for the voters. Ballot pamphlets will sometimes contain allegations regarding such matters, but they are almost certain to generate more questions than answers about the specific legal

when they strictly enforce single-subject rules, partly because this approach "necessarily entails a subjective, standardless veto on the part of judges").

113. MICH. COMP. LAWS ANN. § 168.474 (West 2005); see also CAL. ELECT. CODE § 9051 (West 2003 & Supp. 2005) ("[T]he Attorney General shall give a true and impartial statement of the purpose of the measure in such language that the ballot title shall neither be an argument, nor be likely to create prejudice, for or against the proposed measure.").

114. See, e.g., Parrish v. Lamm, 758 P.2d 1356, 1363 (Colo. 1988) (explaining that "a[n] appropriate general title which is broad enough to include all the subordinate matters considered is safer and wiser than an enumeration of several subordinate matters in the title").

115. See, e.g., Advisory Opinion to the Attorney Gen. re: Fla. Marriage Prot. Amendment, Nos. SC05-1563 & SC05-1831, at 9-19 (Fla. Mar. 23, 2006) (upholding the ballot title and summary of a defense of marriage initiative because the "plain meaning" of the phrase "marriage or the substantial equivalent thereof" disclosed the amendment's chief purpose, and following precedent indicating that the "issue as to the precise meaning of [such a] term [is] better left to subsequent litigation, should the amendment pass" (quoting Advisory Opinion to the Attorney Gen. re: the Med. Liab. Claimant's Comp. Amendment, 880 So. 2d 675 (Fla. 2004)); see also supra note 37 and accompanying text; Collins & Oesterle, supra note 102, at 96 (pointing out that the Supreme Court of Colorado is careful not to "interpret the meaning of proposed language or suggest how it will be applied if adopted by the electorate" (quoting Dibble v. Bruce (In re Proposed Election Reform Amendment), 852 P.2d 28, 31-32 (Colo. 1993))).
consequences of proposed ballot measures. Accordingly, the foregoing procedures for informing voters about the contents of proposed ballot measures are generally insufficient to prevent collateral consequences or eliminate the bait-and-switch in direct democracy—which was vividly illustrated by the proceedings before the Board of State Canvassers and subsequent litigation in Michigan.

The enforcement of single-subject rules prior to initiative elections is subject to similar limitations in most jurisdictions that are willing to entertain such challenges. Thus, when the text of a proposed ballot measure is clear, some jurisdictions are willing to apply their single-subject rules to preclude the certification of measures with multifarious purposes for the ballot. This approach has the potential benefits of simplifying the measures presented to the voters and allowing them to cast separate ballots on independent questions that are likely to generate divergent opinions. Although the definition of a “single subject” will never be transparent, the benefits of this approach arguably outweigh the costs of requiring initiative proponents to narrow the scope of their proposed ballot measures; particularly, if they are not required to forego all of the costs of their successful initiative petitions. On the other hand, single-subject challenges cannot be fully resolved until governmental officials have authoritatively ascertained the meaning and scope of ambiguous provisions of ballot measures. Because the officials in most jurisdictions appear understandably reluctant to

116. See Schacter, supra note 73, at 141-44 (describing shortcomings of the information provided in ballot pamphlets and pointing out that the summaries and arguments that “form the centerpiece of the ballot pamphlet . . . can mislead—and are sometimes designed to mislead—voters about the effects and potential consequences of the vote”).

117. See supra notes 29-38 and accompanying text.

118. See, e.g., Korte v. Bayless, 16 P.3d 200, 201-02 & n.2 (Ariz. 2001); Outcelt v. Buckley (In re Title for 1999-2000 No. 44), 977 P.2d 856, 857 (Colo. 1999); see also Senate v. Jones, 988 P.2d 1089, 1096 (Cal. 1999) (distinguishing prior cases and holding that “when a court determines that the challengers to an initiative measure have demonstrated that there is a strong likelihood that the initiative violates the single-subject rule, it is appropriate to resolve the single-subject challenge prior to the election”); Campbell, supra note 106, at 144 (“Pre-election review of initiatives for single subject compliance by the courts is becoming the rule, rather than exception.”).

119. See Campbell, supra note 106, at 133 (explaining that “single subject rules seek to prevent what is today commonly referred to as ‘logrolling’ and to make it easier for both legislators and voters to inform themselves about policy changes being proposed”).

120. See Collins & Oesterle, supra note 102, at 111, 124-26 (endorsing the enforcement of single-subject rules in the early stages of the lawmaking process as “a useful limit on the scope of initiatives” and making recommendations that would limit the expenses incurred by initiative proponents).
perform this function before an election, initiative proponents have even further incentives to draft their measures in a broad and ambiguous fashion. In any event, the pre-election resolution of single-subject challenges will not ordinarily clarify the particular legal meaning of ambiguous ballot measures.

A restrained approach to using ballot titles and summaries or single-subject rules to resolve legal ambiguity prior to an election is not always followed. Nonetheless, the aggressive use of these procedures to clarify the specific legal consequences of proposed ballot measures presents other formidable difficulties. First, this approach raises nonjusticiability concerns by injecting governmental officials into substantive disputes about the meaning of proposed ballot measures before an election and forcing them to resolve legal issues in the absence of a concrete case or controversy. Second, the aggressive use of existing procedures to resolve legal ambiguity prior to an election potentially encourages partisan manipulation by the governmental officials who are typically responsible for their "impartial" and "non-prejudicial" implementation. Finally, this

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121. See, e.g., Aisenberg v. Campbell (In re Title for 1997-1998 No. 64), 960 P.2d 1192, 1197 (Colo. 1998) ("In determining whether a proposed initiative comports with the single subject requirement, "[w]e do not address the merits of a proposed initiative, nor do we interpret its language or predict its application if adopted by the electorate." (quoting Sutherland v. Campbell (In re Proposed Petitions), 907 P.2d 586, 590 (Colo. 1995))); see also Advisory Opinion to the Attorney Gen. re: Fla. Marriage Prot. Amendment, Nos. SC05-1563 & SC05-1831, at 3-9 (Fla. Mar. 23, 2006) (rejecting a single-subject challenge to a broadly phrased defense of marriage initiative without addressing its specific legal consequences because the proposal's language reflected a single dominant plan or scheme to restrict "the exclusive rights and obligations of marriage to legal unions consisting of one man and one woman as husband and wife").

122. For example, the Florida Supreme Court has occasionally considered the particular legal consequences of proposed ballot measures when it enforces these procedural safeguards. See, e.g., In re Advisory Opinion to the Attorney Gen., 632 So. 2d 1018, 1020 (Fla. 1994). Regardless of a jurisdiction's stated approach, there is likely variation in the extent to which courts and other governmental officials resolve interpretive issues when they implement these procedural safeguards because statutory ambiguity is necessarily a matter of degree. Cf. Advisory Opinion to the Attorney Gen. re: Fla. Marriage Prot. Amendment, Nos. SC05-1563 & SC05-1831, at 3-7, 9-19 (Fla. Mar. 23, 2006) (declining to resolve the specific legal consequences of a proposed defense of marriage initiative and distinguishing other cases in which proposed ballot measures were invalidated).

123. See, e.g., Lowenstein, supra note 110, at 43 (noting that one disadvantage of the aggressive application of single-subject rules is the need to resolve difficult interpretive problems in the abstract "when those most likely to favor a limited reach for the initiative are forced to argue for a broad interpretation, in hopes of a favorable single-subject decision").

124. For example, petitions were recently circulated to qualify an initiative in California that would prohibit same-sex marriage and forbid governmental agencies
practice arguably undermines the autonomy of initiative proponents in a manner that conflicts with the underlying premises of direct democracy. As a result, these procedures are not ideally designed for resolving textual ambiguity prior to an election and thereby discouraging the bait-and-switch in direct democracy.

The shortcomings of these procedural safeguards provide some important clues about what is needed to avoid the bait-and-switch in direct democracy and limit the collateral consequences of successful ballot measures. First, an ideal solution would provide incentives for the initiative proponents to resolve textual ambiguity and genuinely clarify the particular legal consequences of proposed ballot measures prior to an election. Second, it would avoid embroiling governmental officials in remaining disputes about the meaning or validity of ambiguous ballot measures until after they have been approved by the electorate and there is a concrete case or controversy. In contrast to existing procedures, the proposed solutions that follow would have each of these desirable characteristics.

B. Substantive Canons of Interpretation

The most basic way to avoid the bait-and-switch in direct democracy would be for the judiciary to interpret successful ballot measures in a manner that binds the initiative proponents to their positions during the election campaign. Thus, for example, when Michigan courts address whether Proposal 2 precludes public employers from offering domestic partnership benefits, they could rely upon the fact that the initiative proponents denied that the amendment would have such an effect to reach a negative conclusion. In essence,
the judiciary could adopt a substantive canon of interpretation, which would narrowly construe ambiguous ballot measures in accordance with the campaign statements of their proponents.

This new canon of statutory interpretation would admittedly raise a few difficult and far-reaching questions. First, it would be necessary to identify the initiative proponents and determine which of their statements should count. Most jurisdictions already provide for the designation of one or more initiative proponents. Although the campaign advertising and other “official” public statements by those individuals would be a fine place to start, the import of the proposed doctrine could easily be avoided if the judiciary refused to look any further. Jurisdictions that authorize the direct initiative would therefore ideally require the formal designation of a broader group of initiative proponents, which should include a ballot measure’s official sponsors, consultants, and major financial contributors. This registry could subsequently be utilized by courts to ascertain who was speaking on a measure’s behalf. Otherwise, courts could make similar determinations by using existing campaign finance disclosure requirements or evidence submitted by the parties. Because many public statements by these initiative proponents would be easily verifiable, their use by courts for interpretive guidance would seem unobjectionable. On the other hand, courts should be reluctant to utilize potentially unreliable hearsay, such as the private conversations of initiative proponents, when they interpret legal meaning. Press reports of the stated positions of

125. See William N. Eskridge, Jr. et al., Legislation and Statutory Interpretation 329-74 (2000) (describing substantive canons of statutory interpretation and explaining that they “attempt to harmonize statutory meaning with policies rooted in the common law, other statutes, or the Constitution”).


127. Major financial contributors should include those who contribute substantial funds to the official sponsors of the ballot measure, as well as those who make campaign expenditures in coordination with the initiative proponents. See Staszewski, supra note 3, at 420-21 n.106 (defining “initiative proponents”).

128. See Kang, supra note 94, at 1165-69 (explaining that “[c]ampaign finance disclosure is the principal regulatory mechanism currently directed toward informing the public about who supports and opposes various candidates and ballot measures” and claiming that “plentiful information is available to those interested enough to seek it”).

129. This is not to say that misrepresentations will not occur in an informal setting. See, e.g., Mich. Civil Rights Initiative v. Bd. of State Canvassers, 708 N.W.2d 139 (Mich. Ct. App. 2005) (directing the Board of State Canvassers to certify an initiative that would prohibit affirmative action for the election ballot and holding that the Board lacked statutory authority to investigate whether fraudulent
initiative proponents, which are made available to the general public but might reasonably be subject to dispute, would likely present the greatest challenges in this regard, and their probative value would necessarily depend upon the circumstances presented in a particular case.

In addition to these practical concerns, the adoption of a special substantive canon of interpretation for successful ballot measures implicates more fundamental questions about the appropriate interpretive methodology in this context. Leading legislation scholars have recognized that the characteristic problems of the dominant approaches to statutory interpretation are magnified in the ballot initiative context. For example, the familiar difficulty of attributing a coherent intent to a multimember body is magnified when the electorate consists of millions of voters—particularly when they cannot reasonably be expected to comprehend some of the specific details of what they are voting upon. Professor Jane Schacter has demonstrated that while courts typically claim to ascertain the intent of the voters when they interpret successful ballot measures, the judiciary routinely ignores the advertising and media accounts that most heavily influence voting decisions and relies instead upon formal sources of legal meaning that are systematically inaccessible to the electorate. As the previous discussion begins to suggest, any genuine effort to ascertain the “popular intent” by making extensive use of advertising and media reports would be fraught with difficulty. Because the formal sources of legal meaning used by courts are accessible to—and largely constructed by—the initiative proponents who draft ballot measures, courts are in reality privileging the intentions of the proponents of

\[130.\] See, e.g., Frickey, supra note 73; Schacter, supra note 73; see also Staszewski, supra note 3, at 406-11 (describing the problems associated with the interpretation of successful ballot measures). But cf. Michael M. O’Hear, Statutory Interpretation and Direct Democracy: Lessons From the Drug Treatment Initiatives, 40 Harv. J. on Legis. 281 (2003) (critiquing Frickey’s and Schacter’s proposals based on case studies involving the interpretation of ballot measures that require treatment rather than incarceration for certain nonviolent drug offenders).

\[131.\] See Schacter, supra note 73, at 123-28.

\[132.\] See id. at 130-44. These formal sources of legal meaning include the language of the ballot measure, the language of related statutes, canons of statutory construction, legal precedent, and information from ballot pamphlets, which is sometimes used in lieu of legislative history. See id. at 119-23.

\[133.\] See supra notes 126-29 and accompanying text; see also Schacter, supra note 73, at 130, 144-47 (concluding that a judicial inquiry into the media accounts and advertising that actually influenced the voters is unlikely to yield any unbiased or determinate answers to the interpretive questions facing courts).
ballot measures in the name of voter intent when they rely upon formal sources of legal meaning to interpret direct democratic measures.134

The overwhelming influence of initiative proponents would only be exacerbated if the judiciary discarded "intentionalism" in favor of other interpretive methodologies in this context. Thus, in addition to its other characteristic problems, strict textualism and its reliance on the "plain meaning" of an enactment would seem particularly unjustifiable when it is well established that most voters do not read or fully comprehend the language of initiative measures—which are often ambiguously drafted in the first place.135 To the extent that textualism is justified by the federal constitutional structure and its requirements of bicameralism and presentment,136 there would be no reason to extend its application to a lawmaking process where those structural safeguards are carefully omitted. The same consideration would undermine heavy reliance on "purposivism" in this context because this approach to statutory interpretation is based largely upon benign presumptions of coherent action by elected representatives in an ongoing deliberative process, which cannot plausibly be extended to the one-shot process of direct decision making on a single issue by the electorate.137 In addition, routinely construing ambiguity in a generous fashion to promote an initiative's broad underlying purpose would further privilege the intentions of the initiative proponents, increase the collateral consequences of successful ballot measures, and potentially facilitate the bait-and-switch in direct democracy.138

134. See Schacter, supra note 73, at 128-30; Staszewski, supra note 3, at 432-33; see also supra note 87 and accompanying text.

135. See Schacter, supra note 73, at 149-50 (explaining that the "animating, yet often untenable, idea that there is a single ordinary or plain meaning" is especially problematic in the ballot initiative context). For a summary of the major critiques of textualism, see Eskridge et al., supra note 125, at 230-36. For discussions of the poorly drafted nature of many initiative measures, see supra note 90 and accompanying text; Eule, supra note 3, at 1516 ("Considering the complexity and obtuseness of some measures, it's a wonder that anyone knows what he or she is voting on."); Frickey, supra note 73, at 481 ("For a variety of reasons, direct democracy is probably more likely than legislative lawmaking to produce ambiguous statutory text.").


137. See Garrett, supra note 87, at 32-33; Frickey, supra note 73, at 486-87, 506. For a comprehensive discussion of the constitutional underpinnings of the "absurdity doctrine" and other strongly purposive approaches to statutory interpretation, see generally Glen Staszewski, Avoiding Absurdity, 81 IND. L.J. (forthcoming 2006).

138. See Schacter, supra note 73, at 159 (recognizing that "a broad-purpose approach" could encourage "abuse of the initiative process" and that an appropriate rule of narrow construction "would reduce the incentives for initiative proponents to
Because the leading approaches to statutory interpretation do not translate well to the initiative process, it seems necessary and appropriate for courts to adopt substantive canons that are specifically designed for interpreting ballot measures. These canons should, in turn, seek to ameliorate the structural shortcomings of the ballot initiative process by resolving statutory ambiguity in ways that promote normatively attractive principles of democracy. Professor Schacter has therefore advocated the narrow interpretation of ambiguous language when it seems especially likely that a ballot measure was tainted by the manipulation of "highly organized, concentrated, and well-funded interests." Similarly, Professor Philip Frickey has recommended the establishment of a strong preference for continuity in the ballot initiative context based on republican principles of government, whereby "pre-existing law is displaced by the ballot proposition only when the clear text or evident, core purposes of the electorate so require." The adoption of a substantive canon that narrowly construes ambiguity in accordance with the campaign statements of initiative proponents would further improve the democratic legitimacy of the ballot initiative process in one particularly draft long, intricate, and ambiguous laws, the complexity of which can effectively be shrouded by slogans and soundbites.

139. See id. at 153; see also Jane S. Schacter, Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation, 108 Harv. L. Rev. 593, 595 (1995) (claiming that in addition to assigning legal meaning in a particular case, statutory interpretation also produces "‘democratizing’ effects—that is, institutional or social effects that correspond to a particular image of democracy"); Staszewski, supra note 137 (justifying the judiciary’s practice of interpreting statutes contrary to their plain meaning to avoid absurd results based on a particular political and constitutional theory).

140. See Schacter, supra note 73, at 156-61. Professor Schacter also suggested that courts should encourage deliberation regarding the implementation of direct democratic measures by making the process of litigating the meaning of ambiguous ballot measures open to a broader range of perspectives. See id. at 155-56.

141. Frickey, supra note 73, at 522; see also id. at 517 ("[A] preference for republican lawmaking should suggest that statutes in derogation of republican processes—both because they were adopted as ballot propositions and because they might displace existing laws adopted through representative channels—should not be broadly construed."). Frickey’s proposals were designed to promote judicially underenforced constitutional norms, including republican principles of government, in the ballot initiative context. He therefore also suggested that the practice of interpreting ambiguous statutory provisions to avoid constitutional difficulties should lead courts to interpret ballot measures narrowly on “subsidiary issues” that raise constitutional concerns when a broad interpretation is not mandated by the initiative’s text or core purposes. See id. at 512-16. Finally, he claimed that “to the extent a ballot proposition runs up against specialized canons, such as the rule of lenity, those canons should have somewhat more force than they would in the context of legislatively adopted law.” Id. at 522-23.
troubling set of circumstances. Indeed, the use of these canons, in tandem, would alleviate the problem of faction, promote deliberation about the details of legislation, and discourage initiative proponents from seeking to mislead the electorate about the intended consequences of their proposals.

Not coincidentally, these interpretive techniques would also provide effective avenues for avoiding the bait-and-switch in direct democracy and minimizing the collateral consequences of successful ballot measures. The story of Proposal 2, in fact, provides a textbook example of the applicability of each of the foregoing substantive canons of interpretation. First, the warning signs of potential manipulation by initiative proponents were readily apparent in this situation. Even in the absence of a “bait-and-switch,” the broad language of Proposal 2 was tailor-made to create confusion among the electorate regarding its specific legal consequences, while simultaneously providing initiative proponents or their allies with plausible grounds to lobby public officials for an expansive interpretation of the measure based on formal legal sources of meaning. Proposal 2 explicitly targeted a socially marginalized group, which further increased the potential for exploitation by inflaming popular passions about same-sex marriage and thereby distracting the electorate’s attention from the proposal’s other possible consequences. Because these factors militate “in favor of a narrow construction of the law, one that declines to permit ambiguous language to work major changes in the law when there are strong reasons to doubt that voters considered and approved specific changes,” the conclusion that Proposal 2 does not affect domestic partnership benefits would be inescapable under this analysis.

The same conclusion would certainly follow, albeit for somewhat different reasons, if courts adopted “a general working presumption in favor of narrow construction when directly adopted laws are in tension with pre-existing law.” This presumption would preclude an interpretation of Proposal 2 that prohibits public employers from granting domestic partnership benefits because neither its clear text nor the evident, core purposes of the electorate would compel this outcome. Despite the attorney general’s advisory opinion to the contrary, it seems fair to say that the language of Proposal 2 does not clearly prohibit domestic partnership benefits. If the text itself were not conclusive, one should be persuaded by the nature of the debate on this issue during the ballot campaign, as well as by the apparent consensus on the eventual need for a judicial resolution of the controversy and the trial

142. See Schacter, supra note 73, at 157-58.
143. Id. at 158.
144. Frickey, supra note 73, at 522.
court’s competing decision. These considerations, together, nicely demonstrate that Proposal 2 has no “plain meaning.” Moreover, the evident, core purpose of the electorate was to prohibit same-sex marriage and its functional equivalent, not necessarily to invalidate domestic partnership benefits. Because this “core purpose” will undoubtedly be achieved by any plausible construction of the constitutional amendment, Proposal 2 does not need to be broadly construed to eliminate domestic partnership benefits in order “to give the electorate their due.”

A strong preference for continuity in the ballot initiative context would put the initiative proponents on notice that if they want a proposal to have broad legal effects on subsidiary issues, they will be expected to draft their measures so that those legal consequences are readily apparent. Not only would this obligation limit strategic drafting and misleading behavior by the initiative proponents, but it would also provide an opportunity for more meaningful deliberation about the specific ramifications of a ballot measure that could be considered by the electorate. For example, even though it was readily apparent from the election campaign that Proposal 2 could potentially eliminate domestic partnership benefits, the textual ambiguity focused the debate almost exclusively on whether the proposal would have such an effect. Because 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. Meanwhile, the initiative opponents never fully articulated their argument for why public employers should be allowed to continue to provide such benefits. If the elimination of domestic partnership benefits had been clearly presented to the voters, a debate would almost certainly have occurred on the merits of this proposal. Regardless of the quality of the resulting deliberations, initiative proponents should be compelled to provide accurate explanations of their proposed legal reforms, rather than being allowed to engage in lawmaking by obfuscation.

The clarity of the text is particularly important in the ballot initiative context because initiative proponents are precluded from fine-

145. See id. at 521 (“In the final analysis, judicial consideration of ballot propositions should have two distinct goals: to give the electorate their due and to protect public values.”).
146. See id. at 522-23.
147. See id. at 523.
148. The most extensive arguments in favor of the continued legality of domestic partnership benefits were apparently articulated by the opponents of Proposal 2 after the election. See Kaplan & Moss, supra note 7; Compl. for Declaratory Relief, Nat’l Pride at Work, Inc. v. Granholm, No. 265870 (Mar. 21, 2005).
tuning their proposals in response to concerns that arise during the lawmaking process or "codifying" their stated positions on interpretive questions.\textsuperscript{149} This limitation, in particular, allows initiative proponents to curtail debate on subsidiary legal issues and potentially to perform a "bait-and-switch." Thus, for example, when the initiative proponents denied that Proposal 2 would have any effect on existing domestic partnership benefits, there was little reason for extended deliberation on the merits of this course of action. Despite the absence of a meaningful debate, the attorney general has interpreted the amendment broadly to prohibit domestic partnership benefits, thereby completing the bait-and-switch in direct democracy.\textsuperscript{150} A substantive canon that narrowly interprets ambiguous ballot measures in accordance with the campaign statements of their proponents would foreclose precisely this sequence of events by holding that Proposal 2 does not affect domestic partnership benefits. This canon would therefore undermine the ability of initiative proponents to mislead voters about the intended consequences of their proposals, and create potential incentives for them to be more candid during ballot campaigns.

The foregoing interpretive techniques would also provide a sensible way to achieve some of the legitimate goals of single-subject rules.\textsuperscript{151} Because the proposed canons apply only to the interpretation of ambiguous text on subsidiary issues that were not necessarily resolved by the voters, they will by definition result in the narrow construction of ballot measures that might otherwise appear problematic under single-subject rules. The proposed interpretive techniques would therefore have the potential virtue of allowing courts to avoid the resolution of many single-subject challenges, which are of a constitutional dimension in many jurisdictions.\textsuperscript{152} Thus, when the canons are invoked, they would also preclude initiative proponents from achieving a disfavored form of logrolling, whereby the electorate approves a proposal with unsupported consequences based on the majority's approval of the central purpose of the measure.\textsuperscript{153} Because

\textsuperscript{149} See supra notes 99-101 and accompanying text.
\textsuperscript{150} See Same-Sex Domestic Partnership Benefits, supra note 10, at 17.
\textsuperscript{151} See supra Part III.A.
\textsuperscript{152} See, e.g., Mich. Const. art. IV, § 24 ("No law shall embrace more than one object, which shall be expressed in its title."). The canons are therefore also supported by the widely accepted proposition that when fairly possible, courts should interpret statutes to avoid constitutional difficulties. See Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).
\textsuperscript{153} Kurt Kastorf has recently pointed out that logrolling can either broaden support for a measure by increasing the size of its supporting coalition or weaken support for a measure by "piling on" outcomes favored only by its most extreme
the clear provisions of an initiative will generally be implemented regardless of its potential multiplicity of purposes, these interpretive techniques may not completely prevent logrolling. In those situations, however, the canons will have helped to avoid voter confusion because the full range of the ballot measure’s consequences would be discernible from the plain meaning of its text. The single-subject challenges that still occur would therefore ultimately require less speculation about the precise meaning of the ballot measure at issue. This could, in turn, render the enforcement of existing single-subject rules more effective.

Although the foregoing interpretive techniques would alleviate the structural shortcomings of the ballot initiative process and respect the apparent policy preferences of voters, they would not definitively resolve every case or provide the true structural reform that may be necessary.154 The limitations of these interpretive techniques become

proponents. See Kurt G. Kastorf, Logrolling Gets Logrolled: Same Sex Marriage, Direct Democracy, and the Single Subject Rule, 54 EMORY L.J. 1633, 1646-55 (2005). He argues that because logrolling in the legislature is more likely to have the former attributes, while logrolling in the ballot initiative process is more likely to have the latter attributes, courts should enforce single-subject rules more aggressively in the ballot initiative context. See id.

154. Perhaps the greatest difficulty that would be presented by the adoption of the proposed interpretive techniques would be to ascertain the “core purpose” of a successful ballot measure. Cf. Note, Legislative Purpose, Rationality and Equal Protection, 82 Yale L.J. 123 (1972) (providing a classic criticism of the purpose inquiry mandated by the rational basis test). Unlike single-subject rules, which raise a similar problem, these canons of interpretation do not foreclose the initiative proponents from achieving any outcome as long as the text of a measure is clear. Moreover, while the application of the canons would require some judgment, courts have utilized the concept of a “legislative purpose” with reasonable success in a variety of contexts. See Stephen Breyer, On the Uses of Legislative History in Interpreting Statutes, 65 S. Cal. L. Rev. 845, 865 (1992) (“In practice, we ascribe purposes to group activities all the time without many practical difficulties.”). Thus, most courts would certainly agree that a “Defense of Marriage” initiative does not invalidate the application of a domestic violence statute to an unmarried defendant who cohabited with the victim. See supra note 13 (citing conflicting judicial decisions in Ohio on this issue). Conversely, the canons would not preclude a court from holding that the provisions of an initiative that mandated rehabilitation rather than incarceration for certain drug possession convictions extended to the convictions of otherwise similarly situated offenders for possession of drug paraphernalia. See State v. Estrada, 34 P.3d 356 (Ariz. 2001). But cf. O’Hear, supra note 130, at 283-84 (claiming that the drug treatment cases highlight important difficulties with Schacter’s and Frickey’s proposals). First, this is not the type of initiative that likely provides “fertile terrain” for manipulation by powerful special interests who are well situated “to strategically propound, package, and draft initiatives in ways that enable them . . . to create a phantom popular intent and thus to appropriate the political authority of the largely passive electorate.” Schacter, supra note 73, at 156-57. On the contrary, drug paraphernalia convictions obviously created a “loophole” that was almost certainly unanticipated by its sponsors. Second, a strong presumption of continuity in the ballot initiative context could easily be overcome in
apparent if one considers the potential judicial response to a couple of variations on Proposal 2's story. In the first scenario, the initiative proponents expressly claim in their campaign advertisements that their proposal will not have any effect on domestic partnership benefits, but the text of the measure provides that "state actors shall not provide any benefits for the unmarried domestic partners of governmental employees." In the second scenario, Proposal 2's actual text is presented to the voters, but the initiative proponents expressly proclaim during the ballot campaign that the measure will prohibit public employers from providing domestic partnership benefits. Conventional wisdom suggests that the judiciary should defer to the clear text in the former scenario, while a strong preference for continuity in this context and the dangers of potential manipulation by initiative proponents would point toward a narrow interpretation of the ballot measure in the latter situation. This resolution of the first case is very troubling, however, because it ignores blatant misrepresentation by the initiative proponents. Although the proposed outcome of the second case is defensible on the grounds that initiative proponents should be encouraged to be clear about particular legal consequences in the text of their measures, the inability to amend a proposal's language in response to concerns that arise during the lawmaking process could make this result appear somewhat harsh or contrary to the goals of implementing voter preferences and promoting reasoned deliberation.

These hypothetical variations on the story of Proposal 2 illustrate that a complete resolution of the structural shortcomings of the ballot initiative process may demand a more comprehensive, structural

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_Estrada_ based on the judiciary's continued obligation to implement the core purpose of a successful ballot measure. See Frickey, _supra_ note 73, at 521-22 (asserting that giving the electorate their due should be one of the goals of judicial consideration of ballot propositions). As the court explained, a refusal to provide the benefits of this initiative to otherwise eligible offenders who were convicted of possession of drug paraphernalia could effectively negate the utility of the entire ballot measure because most defendants who are charged with drug possession could also be charged with possession of drug paraphernalia. See _Estrada_, 34 P.3d at 361. Finally, it is virtually inconceivable that the proponents of the drug treatment initiative issued any public statements denying that their measure would have an effect on the sentencing of possession of drug paraphernalia. Accordingly, a canon that narrowly construed ambiguous ballot measures consistent with the public statements of initiative proponents would almost certainly be inapplicable.

155. See Staszewski, _supra_ note 3, at 458-59 & n.232 (claiming that courts should be skeptical of the statements made by initiative proponents about the meaning of a measure outside of an official lawmaking record). In combination, the proposed canons would narrowly construe ambiguity consistent with the campaign statements of the initiative proponents, while also requiring them to clearly articulate the intended legal consequences in the text of their measures. This combination would significantly limit the opportunities for strategic manipulation by the initiative proponents.
solution. While interpretive techniques can minimize these problems and create better incentives, they are incapable of constructing a formal lawmaking structure that is specifically designed to clarify the intended consequences of ballot measures and promote reasoned deliberation. Nor do they provide opportunities for initiative proponents to modify the language of their proposals in response to legitimate concerns that arise during the lawmaking process. The following section identifies formal structural safeguards that would promote these objectives, in addition to avoiding the bait-and-switch in direct democracy and minimizing the collateral consequences of successful ballot measures.

C. Improved Structural Safeguards

The ballot initiative process is not the only form of lawmaking that is controlled by unelected citizens who operate without the constraints of bicameralism and presentment. On the contrary, legislative rulemaking by administrative agencies has proliferated since the New Deal, despite concerns about the constitutionality of this practice that stem largely from these characteristics. Unlike the ballot initiative process, however, administrative law has developed alternative structural safeguards to facilitate careful deliberation and reasoned decision making in the rulemaking process. In particular, administrative agencies must follow the notice-and-comment rulemaking procedures of the Administrative Procedure Act, and their decisions must withstand hard-look judicial review. These safeguards have substantially improved the legitimacy of administrative lawmaking

156. See supra note 103 and accompanying text.
158. See Staszewski, supra note 3, at 445-46; see also Sidney A. Shapiro & Richard E. Levy, Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions, 1987 DUKE L.J. 387, 388 (explaining that hard-look judicial review “is best understood as a form of heightened scrutiny of the rationale of agency decisions and that the doctrine of separation of powers requires such scrutiny because of the unique position of administrative agencies in terms of the constitutional structure of government”); Cass R. Sunstein, Interest Groups in American Public Law, 38 STAN. L. REV. 29, 60-61 (1985) (“Much of modern administrative law is a means of serving the original purposes of the nondelegation doctrine, and of promoting Madisonian goals, without invalidating regulatory statutes . . . .”).
by ensuring that it adequately reflects republican principles of
government.160

I have previously argued that the same basic structural safeguards
that presently constrain administrative agencies should be adopted in the
ballot initiative context.161 Thus, after qualifying a measure for the
ballot, the initiative proponents should be required to provide the
general public with notice of their proposal and an opportunity to
submit written comments and proposed amendments.162 The initiative
proponents should be allowed to amend their proposal in response to
any legitimate concerns that arise, but they should also be required to
promulgate a general statement of the basis and purpose of their final
proposal that explains any major changes, in addition to their reasoning
for rejecting various objections and proposed amendments.163 Finally,
courts should be authorized to engage in hard-look review of the
validity of successful ballot measures under an arbitrary and capricious
standard,164 which would allow them to ascertain whether the initiative
proponents engaged in reasoned decision making during the lawmaking
process.165

The adoption of this proposal by a state legislature or municipality
would routinely foreclose the bait-and-switch in direct democracy by
encouraging initiative proponents to take official positions on
foreseeable interpretive issues, and providing effective mechanisms for
holding them to their statements during the ballot campaign. The
former objective would be achieved by providing the public with an
opportunity to comment on initiative proposals, and requiring the
initiative proponents to respond to those comments in the materials
accompanying their final proposal. Thus, for example, if this
procedure had been followed prior to the enactment of Proposal 2, the
opponents of the measure would undoubtedly have submitted comments

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160. See Staszewski, supra note 3, at 446-47; see also Mark Seidenfeld, A
Civic Republican Justification for the Bureaucratic State, 105 Harv. L. Rev. 1511,
1512 (1992) (arguing that “the political theory of civic republicanism, with its emphasis
on citizen participation in government and deliberative decision-making, provides the
best justification for the American bureaucracy”); Sunstein, supra note 158, at 57-59
(describing administrative law doctrine as “classically republican” because of its
requirements of “deliberation” and “reasoned analysis”).

161. See Staszewski, supra note 3, at 447-59 (advocating the application of an
“agency model” to direct democracy).

162. Id. at 449.

163. Id. at 449-50.

164. Id. at 450.

165. See Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43; Ernest Gellhorn &
1997) (summarizing the development of hard-look review and attributing the term
“reasoned decisionmaking” to Judge Leventhal of the D.C. Circuit).
objecting to the proposal’s potential effect on domestic partnership benefits. The proponents would subsequently have been required to respond to those comments “on the record” in their general statement of basis and purpose. If the initiative proponents failed to satisfy this obligation, the measure would be subject to judicial invalidation based on their failure to consider the important aspects of the problem and respond in a reasoned fashion.166

This proposal would also provide effective mechanisms for binding the initiative proponents to their stated positions during a ballot campaign. In particular, the creation of a formal lawmaking record would provide an authoritative resource for the judiciary in subsequent interpretive disputes.167 This development would benefit the initiative proponents by greatly improving the prospects that their stated positions on particular interpretive issues would be adopted by the judiciary and other governmental officials responsible for implementing successful ballot measures.168 At the same time, however, this development would almost certainly foreclose the initiative proponents or their allies from persuading decision makers to adopt a contrary interpretation after the election. Indeed, if the public statements of the initiative proponents during the ballot campaign could not be squared with their official positions in the lawmaking record, a successful ballot measure could be invalidated based on their failure to engage in reasoned decision making under the applicable standard of review.169

The foregoing combination of carrots and sticks would allow this proposal to overcome the limitations of using interpretive techniques to avoid the bait-and-switch in direct democracy. First, the proposal would authorize the initiative proponents to amend the text of a ballot measure prior to the election to correct unanticipated problems, clarify the measure’s intended scope, and perhaps codify the positions articulated in their general statement of basis and purpose. As a result, textual ambiguity regarding the intended resolution of reasonably foreseeable interpretive issues could be nearly eliminated. Under this approach, the text of Proposal 2 could have been amended prior to the election to clarify its intended effect on the legality of domestic partnership benefits. Second, an effective remedy would be available if the public statements of the initiative proponents during a campaign flatly contradicted the plain meaning of the text of their measure.

166. See Motor Vehicle Mfrs. Ass’n, 463 U.S. at 43 (explaining that an agency rule would be deemed arbitrary and capricious under the APA if the agency had “entirely failed to consider an important aspect of the problem”).
167. See Staszewski, supra note 3, at 455-56.
168. See id.
169. See id. at 458 & n.232.
Thus, for example, if the text of Proposal 2 clearly prohibited public employers from providing domestic partnership benefits and the campaign advertising of the proponents was to the contrary, the judiciary would have a basis for invalidating the measure under the arbitrary and capricious standard of review.

Given the animating purposes of applying an "agency model" to direct democracy, it is important to recognize that the adoption of this proposal would also facilitate reasoned deliberation regarding the substantive merits of a proposed ballot measure during the lawmaking process. The notice-and-comment proceeding would provide interested parties with an opportunity to communicate with each other about the best course of action for promoting the public good.

By allowing the initiative proponents to amend their initial proposal in response to concerns that arise, a new opportunity would be established for compromise on areas of apparent disagreement and for otherwise improving the substance of a proposed measure. In any event, the initiative proponents would be compelled to provide a reasoned explanation for their actions in the general statement of the basis and purpose for their final proposal, which could later be subject to judicial review. Accordingly, the proponents of Proposal 2 would not only have been required to take an official position on the legality of domestic partnership benefits under this approach, but they would also have been obligated to consider the competing perspectives of other interested parties and to give a coherent explanation for their decision.

The official lawmaking record that would be generated by this proposal would therefore improve the quality of the deliberations during a ballot campaign. For starters, this material could be made available to the general public on the Internet or by incorporation into the ballot pamphlets that are already distributed to the voters in some jurisdictions. The public comments on a measure and the responses of the initiative proponents would provide more useful information to the voters than is currently available in most ballot elections. Even if voters did not directly consider this material, an official lawmaking record would provide valuable information to the media and other elites, which could be conveyed to the voters through news stories, endorsements, and editorials. Finally, by encouraging an initiative's proponents and opponents to clearly articulate their positions on the record at an early stage in the lawmaking process, a more meaningful

170. See id. at 451-52.
171. See id.
172. See id. at 452.
173. See id. at 449-50.
174. See id. at 451-52 & n.220, 490-91.
debate of the merits of a proposed ballot measure could take place during the subsequent campaign because the stakes of the election would already be apparent. If, for example, Proposal 2's proponents had expressly declared that their constitutional amendment would invalidate domestic partnership benefits, the merits of this particular course of action would almost certainly have been the subject of vigorous debate during the ballot campaign.

In sum, the application of an agency model to the ballot initiative process would avoid the bait-and-switch in direct democracy and limit the collateral consequences of successful ballot measures. By allowing the initiative proponents to amend their proposals while holding them accountable for their actions during a ballot campaign, this proposal would also avoid the inherent limitations of relying solely upon interpretive principles for such purposes. Meanwhile, the democratic legitimacy of this form of lawmaking would be bolstered by establishing structural mechanisms to facilitate reasoned deliberation in the ballot initiative process and the accurate expression of voter preferences.

IV. BROADER IMPLICATIONS FOR POLITICS

An observer of candidate elections and the traditional legislative process may question the particular concern with direct democracy and a call for reform based on the events surrounding Proposal 2. After all, everyone knows that candidates for public office are not always forthcoming about the details of their political agendas and that elected officials are routinely chastised for breaking "campaign promises." Moreover, participants in the ordinary legislative process are not necessarily precluded from seeking to mislead legislators about the potential consequences of the large number of proposals about which our elected representatives are personally uninformed. Finally, voters in direct democracy may already have sufficient information in high profile elections to cast votes that accurately reflect their preferences. Because this could conceivably have been true of Proposal 2, it is possible that critics of the ballot initiative process may seize on this story as a basis for reform that is only required by their own competing normative perspective of democracy.

175. See id. at 452.
176. See Bernard W. Bell, Legislative History Without Legislative Intent: The Public Justification Approach to Statutory Interpretation, 60 OHIO ST. L.J. 1, 55-56 & nn.202-04 (1999) (pointing out that "most legislators give little thought to any particular statute, and certainly do not formulate a position on the numerous specific issues that will confront courts and agencies in applying the statute").
While more candid and well-informed deliberation is desirable in each of these contexts, there are times when the ballot initiative process combines passionate voting (by the electorate) and instrumental lawmaking (by initiative proponents or others) in a way that is especially prone toward divergence (based on the absence of representation and other structural safeguards). Therefore, the structural dynamics of direct democracy create a special problem that should be addressed regardless of the quality of the deliberations in candidate elections and the legislature. Because this problem undermines the ability of the ballot initiative process to accurately reflect the “will of the people,” the proposals to eliminate the bait-and-switch in direct democracy should be fully embraced by the strongest advocates of this form of lawmaking. Because the same proposals would facilitate reasoned deliberation by the initiative proponents, they would also improve the democratic legitimacy of this form of lawmaking from the main competing normative perspective. My proposal for structural reform, in particular, could therefore bridge the divide between modern populists who continue to praise direct democracy and this generation’s progressives who tend to be critical of the initiative process based on republican principles of government.¹⁷⁷

The primary distinction between the ballot initiative process and candidate elections for present purposes is that while the former may result in the enactment of a new statute or constitutional amendment, the latter is simply not a form of lawmaking and is therefore not directly instrumental. Moreover, once a candidate is elected to the legislature, she cannot implement any of her own policy objectives without the agreement of a large number of fellow representatives.²⁸

Although this characteristic of the legislative process can make promise

¹⁷⁷. See Miller, supra note 74, at 1039 (distinguishing between populist and progressive conceptions of direct democracy and claiming that “[m]any modern-day Progressives are disenchanted with the initiative process and seek through reforms to constrain its Populist characteristics”); cf. Clark, supra note 102, at 450 (observing that “nice theoretical distinctions are unlikely to alter the debate over direct democracy unless they can be couched in terms that resonate with those whose priority is not fidelity to some particular interpretation of eighteenth-century liberal theory, but rather giving the people of today a voice in governing themselves”). On the other hand, strong advocates of direct democracy may prefer the use of interpretive techniques to avoid the bait-and-switch in direct democracy based on the potentially severe consequences and unpredictable nature of arbitrary and capricious review. See Staszewski, supra note 3, at 482-91 (responding to these potential concerns and emphasizing the importance of republican principles of government and the need to legitimize the ballot initiative process).

¹⁷⁸. See U.S. CONST. art. I, § 7, cl. 2 (“Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States.”).
keeping and its enforcement difficult by creating a potential tension between constituent preferences and legislative outcomes, this is an essential feature of representative democracy. In any event, the need to stand for reelection provides a potential mechanism for holding representatives accountable for their prior statements and actions. The point is not that political candidates always keep their word or that choosing self-interested representatives would be unproblematic, but rather that the act of electing a representative is fundamentally different from lawmaking and there are safeguards to prevent individual lawmakers from acting contrary to a salient conception of the public good.

It is largely those safeguards, moreover, that distinguish the ordinary legislative process from the ballot initiative process for present purposes by providing conditions that reduce the likelihood that representatives will be deceived about the specific contents of a law and give them opportunities to resolve their particular concerns. In theory, of course, professional legislators would have the leisure to learn about the problems of the day and reflect upon appropriate solutions through a process of deliberation and debate. The reality, however, is that representatives are very busy and must therefore rely on other individuals and groups for much of their information. Fortunately, there is reason to believe that legislators have ready access to a variety of relatively reliable sources, including knowledgeable and trusted staff,

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179. See Sunstein, supra note 158, at 44 ("The system of checks and balances within the federal structure was intended to operate as a check against self-interested representation and factional tyranny in the event that national officials failed to fulfill their responsibilities.").

180. Indeed, if most representatives were self-interested, the legislature could operate contrary to the public good. This is, of course, one of the central lessons of public choice theory. See Daniel A. Farber & Philip P. Frickey, Law and Public Choice: A Critical Introduction 12-37 (1991) (discussing public choice theory’s focus on the role of interest groups in the political process and explaining that “[i]n place of their prior assumption that legislators voted to promote their view of the public interest, economists now postulate that legislators are motivated solely by self-interest”).

181. See Cass R. Sunstein, Beyond the Republican Revival, 97 Yale L.J. 1539, 1558-61 (1988) (claiming that the framers of the U.S. Constitution “stressed that their system was likely to attract and produce representatives who would have the virtue associated with republican citizens”).

182. See Bell, supra note 176, at 55-56 (reporting that a majority of legislators rely upon voting “cues” and recommendations from others to make their decisions); see also Bank One Chicago, N.A. v. Midwest Bank & Trust Co., 516 U.S. 264, 276 (1996) (Stevens, J., concurring) (“Legislators, like other busy people, often depend on the judgment of trusted colleagues when discharging their official responsibilities.”).
colleagues, party leaders, and interest groups.\textsuperscript{183} Even if an elected representative mistakenly believed that she and her sources shared common interests, the ongoing nature of the legislative process, limited opportunities to influence decision makers, and the need for coalition-building create incentives for those sources to provide accurate information.\textsuperscript{184} This incentive is bolstered by the capacity of legislators to verify what they are told by their sources during the lawmaking process.\textsuperscript{185}

Moreover, once a legislator identifies a potential concern or has it brought to her attention, action can ordinarily be taken to clarify or resolve the problem.\textsuperscript{186} Thus, for example, if one elected representative

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\item \textsuperscript{183} See generally Alan L. Feld, Congress and the Legislative Web of Trust, 81 B.U. L. REV. 349 (2001).
\item \textsuperscript{184} See id. at 353 (explaining that "trust" arises in the legislative process from the "personal interactions and rational incentives" of participants, who are typically engaged in an ongoing process rather than a single transaction).
\item \textsuperscript{185} Indeed, political scientists have recently suggested that elected representatives can be "enlightened" by other participants in the legislative process who have knowledge of the relevant issues and external incentives to tell the truth. See Arthur Lupia & Mathew D. McCubbins, The Democratic Dilemma: Can Citizens Learn What They Need to Know? 39-71 (1998) (describing the conditions for persuasion and enlightenment in the political process).
\item \textsuperscript{186} I do not mean to suggest that legislators are \emph{always} capable of identifying problems with proposed legislation or resolving their concerns within the legislative process. My claim is merely that representatives have a greater ability to understand legislation and influence its content than voters in the ballot initiative process. This claim is, of course, strongest when one compares the ballot initiative process to the traditional or textbook legislative process where each member of the legislature can typically seek to influence the contents of the laws that are enacted. See William N. Eskridge, Jr. \textit{et al.}, Legislation: Statutes and the Creation of Public Policy 24-38 (3d ed. 2001) (describing how a bill becomes a federal law). In recent years, Congress has frequently deviated from the textbook process when it has enacted major legislation. See generally Barbara Sinclair, Unorthodox Lawmaking: New Legislative Processes in the U.S. Congress (2d ed. 2000). The procedures that are used for the enactment of such "unorthodox legislation" have a tendency to limit the ability of individual members of Congress to understand and influence the contents of legislation in ways that are reminiscent of the ballot initiative process. See id. at 9-81 (describing unorthodox lawmaking and documenting its frequency). The similarities seem particularly striking in the budget process and when Congress enacts "omnibus legislation." See id. at 70-81 (describing omnibus legislation, the budget process, and legislative-executive summits); see also Glen S. Krutz, Hitching a Ride: Omnibus Legislating in the U.S. Congress 1-7 (2001) (explaining that omnibus packages "typically contain a nucleus that has widespread support in Congress" and that controversial attachments can be "tucked away" in such measures because members "are seldom aware of the minutiae of omnibus packages").
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was concerned about the potential impact of a proposed statute that prohibited same-sex marriage "or similar unions for any purpose" on the legality of domestic partnership benefits, she could request interpretive guidance from the sponsors of the legislation or other seemingly knowledgeable sources. She could proceed to take further action to assess the reliability of this information and, if necessary, seek an amendment to clarify the proposal's treatment of the issue. The fate of a proposed amendment would not only provide some measure of the preferences of the legislative chamber on this particular issue, but it would also provide interested parties with meaningful guidance about the likely consequences of the enactment. This information could ultimately be utilized by representatives to formulate their positions on the legislative proposal and determine how much effort to devote to any potential opposition.

initiative process for which there are readily available solutions. Indeed, the story of Proposal 2 could be understood as a cautionary tale about any lawmaking process that lacks reasoned deliberation, is effectively controlled by a small group of people, and precludes ordinary voters from understanding and influencing the specific contents of the resulting product. To the extent that unorthodox legislation has these characteristics, reform proposals like those set forth in this Article (and particularly the interpretive techniques endorsed in Part III.B) may be entirely appropriate. Moreover, the use of unorthodox procedures appears more common in the U.S. Congress than in state legislatures, which are the most directly relevant unit of comparison for present purposes. Unlike Congress, most states have single-subject rules and line-item vetoes that limit the ability of the legislature to adopt unduly extensive packages of legislation on a take-it or leave-it basis. Finally, it is widely understood that for better or for worse, majoritarian preferences are significantly filtered by the ordinary legislative process. To the extent that a similar dynamic occurs in the ballot initiative process (perhaps overwhelmingly for the worse), it is worthwhile to recognize that direct democracy does not accurately reflect the "will of the people."

187. When the legislature is operating under open rules, an individual representative may propose an amendment directly on the floor of the chamber. If, however, the chamber is operating under relatively restricted rules, the member may need to enlist the support of a well-placed colleague, such as a member of the relevant committee or the party leadership. See Eskridge et al., supra note 186, at 32 (distinguishing between the House Rules Committee's decision to grant "an open rule permitting amendments, a closed rule prohibiting all floor amendments, or a modified closed rule permitting specified floor amendments and structuring the order of their introduction").

188. Some legislators may, however, vote contrary to their true preferences for strategic reasons or because they believe that an amendment is unnecessary. See Farber & Frickey, supra note 180, at 40-41 (pointing out that "strategic behavior" by legislators and other factors complicate the task of identifying legislative preferences and suggesting that the outcomes of "clarifying amendments" may be particularly unpredictable).

189. See Clark, supra note 102, at 450-63 (criticizing direct democracy on the grounds that "single-issue votes cannot take into account that, for each person, some issues will be more important than will others" and explaining that "legislative processes allow minorities to engage in coalition building through logrolling and thus
Although much has been said about how bicameralism and presentment affect legislative bargaining and the expression of voter preferences, the point here is simply that those safeguards, along with opportunities to amend proposed legislation, increase the likelihood that representatives will be able to understand and potentially influence the specific content of legislative proposals. Given the significance of the issue, one might therefore predict that Proposal 2’s potential effect on domestic partnership benefits would have been foreseen and resolved if this proposition had emerged from the ordinary legislative process—and, in fact, this is reportedly what occurred when the joint proposal to amend the Michigan Constitution was unsuccessfully initiated in the legislature. Nonetheless, even when the legislature does not foresee or expressly resolve every important issue, elected representatives can still be held accountable for their decisions precisely because the same individuals who enact a law have the ability (and, indeed, the responsibility) to understand and attempt to influence its content.

The special problems that are posed by direct democracy stem largely from the fact that the voters who enact initiated laws do not have the same ability to understand or influence their content. The story of Proposal 2 suggests that in certain situations, voters will be inclined to cast their ballots based on strongly held opinions about the central issue that is presented in an initiative election. Indeed, there is no apparent reason to doubt that a majority of voters in Michigan were opposed to the legal recognition of same-sex marriage on November 2,
2004. At the same time, however, the story also suggests that some of the initiative proponents hoped that their broadly drafted measure would also be interpreted to prohibit public employers from providing domestic partnership benefits. The immediate concern is not only that this latter issue was never squarely presented to the voters, but also that there was no opportunity for interested participants in the lawmaking process to have ensured that this occurred. Moreover, there is a good chance that such an opportunity would have led to a different outcome if, for example, a sufficient number of moderate voters held (or were perceived by the initiative proponents to have held) the following table of preferences: (1) prohibition on same-sex marriage with no effect on domestic partnership benefits; (2) status quo (which, incidentally, already included a statutory prohibition on same-sex marriage); and (3) prohibition on same-sex marriage and domestic partnership benefits. Based on this analysis, there is a significant risk that the prevailing interpretation of Proposal 2 has allowed a few initiative proponents to achieve their own instrumental objectives in a manner that conflicts with the preferences of Michigan voters.

An obvious objection to this claim is that there is no “proof” that the views of the median voter corresponded with the foregoing table of preferences. One might infer from the statements of the initiative proponents, however, that they shared the very same intuition because otherwise they could have been more forthcoming about the intended consequences of their proposal. In any event, the burden of establishing the electorate’s alleged desire to prohibit domestic partnership benefits should be placed on the initiative proponents who were in a position to place this issue squarely on the voting agenda. Because the existing initiative process provides no means of pitting two alternative changes to the existing status quo against one another, we have no other way of ascertaining the electorate’s preferences among the competing interpretive choices absent another ballot initiative. These considerations provide additional support for the proposed

193. This helps to explain the rise of “counter-initiatives” in recent years, which do provide some opportunity to modify the content of the measures that are presented to voters. See David B. Magleby, Let the Voters Decide? An Assessment of the Initiative and Referendum Process, 66 U. COLO. L. REV. 13, 24 (1995) (“Many groups facing an initiative that they think they cannot defeat have begun to sponsor their own counter-initiative, a measure that goes part way in addressing the concerns of the original initiative but is more acceptable to the opponents of the original initiative.”). Given the difficulty and expense associated with proposing a ballot initiative, this is too high a burden to impose upon those seeking to modify the electorate’s choices.

194. Even if voters preferred option three to the existing status quo, the inability to amend a proposed ballot measure may have precluded the electorate from satisfying its true preferences as long as a majority preferred a prohibition on same-sex marriage with no effect on domestic partnership benefits to either of those choices.
canons of interpretation that would narrowly construe ambiguous ballot measures in appropriate circumstances. 195

A more subtle objection to this claim would be that sufficient information was available during the ballot campaign for voters to accurately express their preferences, and if they were concerned about Proposal 2's potential effect on domestic partnership benefits, they would have voted against the measure. Political scientists have recognized for some time that voters have a conservative tendency to vote against ballot measures when they are uncertain of the potential consequences. 196 Moreover, recent empirical literature has questioned the notion that the absence of detailed knowledge about the substance of ballot measures prevents the electorate from voting consistent with its preferences. 197 In essence, this literature suggests that voters can rely on information shortcuts, such as the known positions of public figures or interest groups on an initiative measure, to cast sensible ballots that may even replicate more fully informed decisions. 198 In combination with a default rule that resolves doubt in favor of the status quo, this literature suggests that longstanding concerns about voter competence in direct democracy may be unjustified.

The implications of this literature for the story of Proposal 2 are not entirely clear. The central purpose of the amendment may have been apparent to voters who entered the booth with little or no previous information about the measure based on the statement that appeared on the ballot. As long as those voters could correctly ascertain the effect of a yes or no vote, 199 they may not have needed any further

195. See supra Part III.B.
196. See, e.g., Todd Donovan et al., Contending Players and Strategies: Opposition Advantages in Initiative Campaigns, in Citizens as Legislators, supra note 85, at 80, 99 (claiming that initiative proponents "must overcome voter tendencies to 'just vote no' when in doubt").
198. See generally Lupia & McCubbins, supra note 185; Bowler & Donovan, supra note 94; Arthur Lupia, Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections, 88 AM. POL. SCi. REV. 63 (1994). For an article that canvasses this literature and argues for reforms that would make voting cues more readily available to the electorate, see Kang, supra note 94, at 1141.
199. This basic requirement of voter competence is not always a foregone conclusion. See Thomas E. Cronin, Direct Democracy: The Politics of Initiative, Referendum, and Recall 61-62, 89 (1989) (recognizing that "many analysts who study populist democracy practices develop considerable reservations about them after finding that citizens and voters often do not fully understand the process, frequently vote with limited information, and sometimes vote contrary to their own policy preferences," but concluding that the charge of voter incompetence is "usually exaggerated"); Magleby, supra note 74, at 142 (reporting that "studies of
information to cast a ballot that accurately expressed their preferences on the legal recognition of same-sex marriage. The difficulty is that those voters could not have expressed any meaningful preference about the continued validity of domestic partnership benefits.

For other voters, learning either that Proposal 2 was proposed by an organization of conservative activists (Citizens for the Protection of Marriage), vigorously supported by the Roman Catholic Church, or opposed by the state’s chapter of the ACLU, would likely have enabled them to cast a ballot that accurately expressed their preferences on the measure regardless of its treatment of domestic partnership benefits. Still other voters would presumably remain, however, who would not automatically defer to one of the preceding organizations and for whom Proposal 2’s treatment of domestic partnership benefits would matter. If those individuals were aware from the campaign debate that the amendment was ambiguous on this point, they would presumably have voted against the measure. Accordingly, we might conclude that the electorate truly preferred Proposal 2 to the existing status quo as long as relatively ignorant voters who supported the measure would not have changed their votes upon learning more about the amendment’s ambiguous treatment of domestic partnership benefits in sufficient numbers to change the result of the election. If this were a fair bet, we could then conclude that a majority of voters preferred Proposal 2 to the existing status quo regardless of how its ambiguity regarding domestic partnership benefits is resolved.

The foregoing analysis may portray the enactment of Proposal 2 in its most favorable light, but several features of this explanation are unsatisfying. First, of course, we do not know how many relatively uninformed voters would have cast a different ballot if they were aware of the debate over Proposal 2’s potential effect on domestic partnership benefits. Second, the assumption that voters who were aware of this debate and cared about domestic partnership benefits would have voted against Proposal 2 may be unwarranted. On the contrary, a significant number of those voters may have believed the claims by initiative proponents that Proposal 2 would not affect domestic partnership benefits. Accordingly, they may have dismissed the concerns of the ACLU as a “scare tactic” or “diversion from the real issue” precisely as some of the initiative proponents suggested. In other words, some voters may have been deceived into voting contrary to their true voting on statewide propositions have generally found that 10 percent or more of the voters cast incorrect or confused ballots”).

200. See supra notes 21-28 and accompanying text (identifying the most visible supporters and opponents of Proposal 2).

201. See supra note 28 and accompanying text.
preferences based on the statements of the initiative proponents during the ballot campaign. Even the most optimistic political science literature on voter decision making recognizes that this is a possibility, particularly when voters believe that they have the same interests as a speaker and there are insufficient incentives for the “expert” to tell the truth.202

One of the central lessons of the story of Proposal 2 is that the electorate may be especially vulnerable to deception about the specific consequences of proposed ballot measures in some circumstances. In this case, for example, it is easy to imagine that a majority of voters would perceive their own interests as aligned with those of “Citizens for the Protection of Marriage.” It probably also bears noting that a significant percentage of the relatively moderate voters who would be deciding this election do not necessarily hold the ACLU in particularly high esteem.203 Unlike the ordinary legislative process, the existing ballot initiative process lacks sufficient incentives for initiative proponents and other advocates to provide accurate information during election campaigns.204 Nonetheless, some voters could mistakenly believe that initiative proponents are obliged to tell the truth about the intended consequences of their measure. Although the accuracy of some statements about the content of a ballot measure could be challenged during the course of an election campaign, voters are unlikely to be capable of verifying the accuracy of many interpretive claims. Thus, for example, no one could definitely say whether Proposal 2 prohibited domestic partnership benefits because of the patent ambiguity of the proposed amendment’s text. The key point is not that voters are uninformed or incapable of learning, but rather that the environment created by the ballot initiative process is not conducive to enlightenment.

In any event, the usual tendency of voters to prefer the status quo when they are in doubt about the potential consequences of a measure may have been overcome in this case by the simplicity of the central question and the passionate views of many voters on the issue of same-sex marriage. In other words, it could be that the strong feelings of many voters who opposed same-sex marriage overwhelmed potential

202. See Lupia & McCubbins, supra note 185, at 70-74 (identifying “conditions for deception” when voters rely upon information shortcuts to make their decisions).

203. See David Cole, Are You Now or Have You Ever Been a Member of the ACLU?, 90 Mich. L. Rev. 1404, 1404-05 (1992) (book review) (describing the senior Bush campaign’s characterization of Michael Dukakis as “a ‘card-carrying member of the ACLU’” and explaining that “[a]lmost by definition, the ACLU’s clients stand outside of, and threaten, the mainstream”).

204. See supra Part II.
concerns about Proposal 2’s ambiguous treatment of domestic partnership benefits. While we could conclude that such voters expressed a strong desire to preclude the legal recognition of same-sex marriage, we have absolutely no way of knowing whether they actually preferred to eliminate the ability of public employers to provide domestic partnership benefits. Any claim that the voters have already expressed their preferences on this issue is simply disingenuous.

Although the extent of the bait-and-switch in direct democracy merits closer empirical study, the complexities associated with ascertaining the preferences of the voters who enacted Proposal 2 do not eliminate the ability to make some preliminary observations. On the one hand, it is possible that a majority of voters preferred a constitutional amendment that precluded the legal recognition of same-sex marriage and had ambiguous consequences for domestic partnership benefits to the existing status quo. On the other hand, one cannot be certain of this conclusion because numerous voters who favored the existing treatment of domestic partnership benefits may have been unaware of this issue or deceived into believing that Proposal 2 reflected their preference. There is certainly no basis for concluding that a majority of voters who enacted Proposal 2 favored the elimination of domestic partnership benefits. Indeed, the amendment may only have prevailed because the electorate’s strong opposition to same-sex marriage overwhelmed potential concerns about such “details.” Finally, the ballot initiative process and the existing political science literature that favorably portrays it are both fundamentally flawed for failing to appreciate the possibility that most voters would have preferred an alternative that was never presented.

The proposals that are endorsed in the previous Part would increase the probability that the results of an initiative election will accurately represent the preferences of a majority of voters. First, they would provide incentives for the initiative proponents to clearly articulate the particular consequences at stake in the text of ballot measures. The application of an agency model to direct democracy would also create a formal lawmaking record where the important aspects of a problem must be considered and resolved at an early stage in the initiative process. The information generated by these reforms

205. To the extent that this technique was successfully employed here, it is likely that initiative proponents will employ similar tactics in the future.

206. See Bowler & Donovan, supra note 94, at 26-28 (depicting the decision faced by voters in direct democracy as a question of whether the ballot initiative or the existing status quo is closer to their ideal preferences); Lupia & McCubbins, supra note 185, at 106-08 & tbl.7.2 (describing an experimental design where “the principal chooses between two alternatives, called x and y” (emphasis omitted)).
would not only allow very conscientious voters to identify their interests, but it would also improve the reliability of the information shortcuts that are available to the electorate by increasing the ability of interested parties to verify the claims that are made during election campaigns. Moreover, initiative proponents would be subject to "penalties" for seeking to mislead voters if courts adopted an interpretive canon that narrowly construed ambiguity consistent with their campaign statements or were authorized to review the validity of successful ballot measures under an arbitrary or capricious standard. Because these reforms would improve the quality of the decision-making environment for the electorate, they should be fully embraced by advocates of direct democracy who believe that public policy should reflect the prepolitical preferences of a majority of voters.

There are, of course, many critics of direct democracy who do not believe that public policy should necessarily reflect the unmediated preferences of a majority of voters. Indeed, the federal constitutional structure was designed to ensure that lawmaking was the product of thoughtful deliberation by elected representatives, rather than the passions or narrow self-interests of the people. The safeguards of representation and bicameralism and presentment therefore encourage lawmakers to achieve a broad consensus on ways of promoting the public good that take the views of political minorities into account. Because these attributes of republican government are absent from direct lawmaking, contemporary advocates of deliberative democracy tend to believe that the existing initiative process is inherently problematic. These concerns are significantly magnified by the inability of voters to understand and influence the specific content of proposed ballot measures, as well as by the absence of effective mechanisms for holding the initiative proponents who have this capacity accountable for their actions. The bait-and-switch in direct democracy is particularly troubling from this perspective because it allows the initiative proponents to capitalize on the passions of the electorate to achieve their own instrumental objectives without providing any


209. *See Staszewski, supra* note 137.
meaningful opportunity for reasoned deliberation or debate about whether a particular course of action would serve the public good.

The substantive canons of interpretation endorsed in the preceding Part would respond to the normative deficiencies of the initiative process by alleviating the problem of faction, providing an incentive for initiative proponents to be honest about the intended consequences of their measure, and preventing the displacement of preexisting law that was enacted through the legislative process on subsidiary issues that were not clearly at stake in the ballot election.\textsuperscript{210} As explained above, they would also provide an incentive for the initiative proponents to clearly articulate the intended consequences in the text of their measure. The ability of some members of the electorate to ascertain the specific content of a proposal would likely improve the quality of the deliberations during the ballot campaign. Thus, for example, a more vigorous debate about the substantive merits of prohibiting public employers from providing domestic partnership benefits would almost certainly have occurred if this issue had been squarely presented by the text of Proposal 2.

It is admittedly unrealistic to believe that most voters will have the time or interest to function as deliberative democrats in the ballot initiative process.\textsuperscript{211} The use of heuristic cues to make voting decisions in this context may ironically operate as a form of second-rate representation because voters are really delegating their decision-making authority to some agent with greater expertise.\textsuperscript{212} If we do not want to resolve complex issues of public policy pursuant to a process that resembles junior high school student council elections,\textsuperscript{213} we should ensure that the unelected and otherwise unaccountable initiative proponents who have the exclusive authority to control the specific content of successful ballot measures engage in a process of reasoned deliberation.

\textsuperscript{210} See text accompanying supra notes 139-41.
\textsuperscript{211} See Kang, supra note 94, at 1143 ("Voters, quite simply, choose rationally to be ignorant about politics.").
\textsuperscript{212} See Staszewski, supra note 3, at 412-35 (claiming that the privileged status of initiative proponents in direct democracy resembles a delegation of lawmaking authority); cf. Clark, supra note 102, at 471 (pointing out that proposed reforms of direct democracy tend to resemble representative government and claiming that, in general, it may be better to use the real thing).
\textsuperscript{213} See James Kuklinski & Norman L. Hurley, On Hearing and Interpreting Political Messages: A Cautionary Tale of Citizen Cue-Taking, 56 J. POL. 729, 732 (1994) ("[A]lthough the rationality and economy of cue-taking are now well established, it is very possible that citizens-as-cue-takers focus so heavily on the ‘who’ that the ‘what’ recedes to the background.").
This objective could be achieved by subjecting initiative proponents to the same procedural obligations that presently constrain administrative lawmaking. Because notice-and-comment rulemaking and hard-look judicial review effectively replace the structural safeguards that are provided by the Constitution to promote republican principles of government, the application of an agency model to direct democracy would substantially improve the democratic legitimacy of the ballot initiative process from the same normative perspective. Moreover, the deliberation that took place in the official lawmaking record would clarify the intended scope of a proposed ballot measure and perhaps increase its likelihood of promoting the public good. It is conceivable, for example, that Proposal 2’s proponents would have taken the potential elimination of domestic partnership benefits off the table if they were obligated to consider the policy’s adverse consequences for the health care of families or the ability of state universities to recruit the highest caliber employees. In any event, the initiative proponents in a deliberative democracy should at least be required to consider competing perspectives and respond to the important aspects of a problem in a reasoned fashion. Otherwise, it would be difficult to say that the subsequent results of the ballot initiative process were a meaningful reflection of the will of the people.

CONCLUSION

One proponent of direct democracy in Oregon exemplified the popular distrust of elected officials when she declared that the initiative process “is the only thing we have to protect ourselves from the abuses of big government. I hate to see people taken advantage of by shyster lawyers, crooks, and smooth-talking, conniving politicians.” Yet, the proponents of Proposal 2 assured the people of Michigan prior to the initiative election that “the proposal will not affect benefits offered to people living together or in same-sex relationships.” When the final votes were counted, however, some of the same proponents proclaimed that “[b]enefits only to homosexuals are a formal recognition of a homosexual relationship as equal or similar to marriage. . . . And the voters have said they don’t want that.” This Article has suggested that the people should have something to protect themselves from the abuses of the special interests that dominate the ballot initiative process.

214. See Broder, supra note 84, at 201 (quoting Loren Parks).
215. See Kaplan & Moss, supra note 7.
216. See Range, supra note 9.
In particular, the Article has claimed that the judiciary should adopt interpretive canons that would narrowly construe ambiguous ballot measures in appropriate circumstances. Moreover, jurisdictions that authorize direct democracy should adopt structural reforms that would facilitate reasoned deliberation in the ballot initiative process and hold initiative proponents accountable for their actions. For reasons explained above, these proposals could eliminate the bait-and-switch in direct democracy and minimize the collateral consequences of successful ballot measures. Because they would also simultaneously increase the ability of voters to accurately express their preferences and improve the quality of deliberations during the lawmaking process, such reforms should be fully embraced by advocates of fundamentally different normative perspectives.