People v. Floyd: An Argument against Intentionalist Interpretation of Voter Initiatives

Evan C. Johnson
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I. INTRODUCTION

The strategic use of direct democracy has been on the rise for some time, and is a dominant feature in the landscape of California politics. In 2003, the recall procedure resulted in the replacement of the state's governor. Additionally, voter initiatives have addressed a wide range of issues including ending affirmative action and creating the "Three Strikes" criminal law.

The California electorate has also successfully used the voter initiative to reject certain aspects of the "war on drugs."1

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2. See id. at 115 (noting that out of the twenty-one states that allow some form of direct democracy, California is the leader in "direct lawmaking").

3. See CNN Staff Writer, Davis Concedes, Schwarzenegger Wins, CNN.com, Oct. 8, 2003 (hereinafter Schwarzenegger), at http://www.cnn.com/2003/ALLPOLITICS/10/07/recall.main/ (last visited Aug. 5, 2005) (explaining how Arnold Schwarzenegger became governor of California after Gray Davis was recalled by the voters and Schwarzenegger received the greatest number of votes among the candidates for replacement governor).

4. Schacter, supra note 1, at 113 & n.22. A voter initiative allows the electorate to place proposed laws on a ballot if the initiative petition obtained the required number of signatures. Id. Once on the ballot, a majority vote decides whether the initiative passes.


6. See Bill Ainsworth, Meddling Tycoons or Visionary Activists: 3 Push
With these drug initiatives the electorate signaled its desire for the state to change its views and practices relating to drug use and dependency.7 In 2000, California voters passed Proposition 36, which mandates treatment, as opposed to incarceration, for individuals convicted of drug possession or use.8

Because an initiative originates directly from the people, it differs from a legislative enactment in several significant ways.9 Voters often do not comprehend an initiative's language or range of impacts, and an initiative is not subject to dissection in legislative committees.10 However, despite these differences, courts tend to interpret initiatives in the same manner as a statute, by attempting to determine "legislative intent"—that is, the intent of the voters.11

The California Supreme Court took this intentionalist12 approach in People v. Floyd,13 resulting in the defendant serving twenty-five years to life for possessing a quarter of a gram of cocaine.14 Therefore, to avoid future decisions that potentially thwart the objective of an initiative, California courts should rely upon purposive or dynamic theories of interpretation15 that are better suited for acknowledging an electorate's

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10. See Schacter, supra note 1, at 139-40. See also, Landau, supra note 9, at 490.
11. Id. at 491, 495.
14. Floyd, 72 P.3d at 821, 831 (affirming the sentence imposed by the trial court).
understanding and expectations.

Part II of this comment provides background information regarding Proposition 36, categories of direct democracy, theories of statutory interpretation, and canons of statutory construction. It also discusses the judicial developments of Proposition 36 implementation, including an overview of the holding and analysis in Floyd. Part III presents the problem of attempting to use intentionalist methods to construe voter initiatives. Part IV is an analysis and critique of the California Supreme Court’s textual and intentionalist decision in Floyd. Finally, Part V suggests that when faced with a voter initiative, California courts should reject an intentionalist view in favor of a purposive or dynamic approach, combined with the appropriate application of substantive canons of construction.

II. BACKGROUND

A. History and Goals of Proposition 36

On November 7, 2000, Proposition 36—The Substance Abuse and Crime Prevention Act of 2000 ("Act")—was approved by California voter initiative in the general election. It represents a substantial change in California drug enforcement policy by mandating treatment over incarceration for certain drug convictions. With its passage, a defendant convicted of drug possession or use must be offered entrance into a probationary addiction treatment program instead of facing incarceration.

Supporters of the Act focused on its potential for increas-

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16. See infra Parts II.C-II.E.
17. See infra Part II.F.
18. See infra Part III.
19. See infra Part IV.
20. See infra Part V.
ing public health and safety “by reducing drug-related crime and preserving jails and prison cells for serious and violent offenders, and . . . by reducing drug abuse and drug dependence through proven and effective drug treatment strategies.”25 A primary reason for accomplishing this goal is the Act’s anticipated effect on California’s “back door” parole system, “where 46% of all parole violations resulting in incarceration involve non-violent drug violations.”26

Support for the initiative was well funded and far-reaching,27 garnering 61% of the popular vote in the 2000 general election.28 Proponents for the initiative spanned the political spectrum, with views ranging from consideration of various drug addiction treatments, to more complex arguments regarding the personal liberty interests involved.29

Additionally, while Proposition 36 appealed to some voters’ intellect and emotions, it also posed a financial benefit for California’s treasury.30 The non-partisan Legislative Analyst’s Office (“LAO”) predicted that prison diversion would result in a $200- to $250-million annual cost savings in prison operations, and a $450- to $550-million one-time savings in prison construction.31

These initial predictions appear to have been vindicated with the release of the first annual study of Proposition 36 and its statewide impact.32 Conducted by UCLA, the comprehensive non-partisan study estimates state savings of $275

26. CALIFORNIA CAMPAIGN FOR NEW DRUG POLICIES, PAROLE SERVICES PROP. 36 FACT SHEET (2000) (stating that the “back door” parole system refers to parole violations, as opposed to initial criminal convictions, as the cause of incarceration), at http://www.drugreform.org/prop36/parole.tpl (last visited Mar. 25, 2005).
  
27. See Ainsworth, supra note 6.
31. Id.
million, exceeding the LAO’s predictions. The study reported that 37,495 individuals opted for drug treatment and placement assessment instead of jail or prison sentences. In the second year of implementation, this figure rose to 50,335.

Although the Act’s relatively recent enactment prevents a statistical understanding of its effect on societal welfare, positive benefits may be inferred by noting that there is a 66% reduction in repeat criminal activity when criminal drug abusers obtain drug treatment.

B. Support and Funding for Drug Initiatives

Financing for the initiative was spearheaded by three wealthy drug policy activists: University of Phoenix founder John Sperling, Progressive Auto Insurance Chief Executive Officer Peter Lewis, and billionaire financier/philanthropist George Soros. Along with smaller contributors, they spent approximately $3 million in their successful effort to pass the initiative, while the anti–Proposition 36 coalition mustered only $215,000. The bulk of contributions to the opposition campaign came from San Diego Chargers owner Alex Spanos and the California prison guards’ union.

The influential trio has been successful in reforming drug policy throughout the country by facilitating the passage of twelve out of thirteen ballot initiatives. They first came together in 1996, joining forces and financial clout to win passage of Arizona’s Proposition 200, on which Proposition 36 is modeled, and California’s Proposition 215, legalizing medical marijuana. Both propositions successfully garnered nearly

33. See id.
34. See id.
37. Ainsworth, supra note 6.
39. Ainsworth, supra note 6 (officially known as the California Correctional Peace Officers Association).
40. Id.
41. Bank, supra note 7 (providing an overview of the history and relationships between Soros, Lewis, and Sperling as they have used the voter initiative
two-thirds of the vote in the 1996 general election.\(^{42}\)

C. Fundamentals of Proposition 36

At its core, Proposition 36 requires that any individual convicted of a "non-violent drug possession offense" be given the option of entering a drug treatment program, with successful completion serving as the primary probationary condition.\(^{43}\) As defined by the Act, an offense of this type includes the "unlawful possession, use, or transportation for personal use" of any controlled substance.\(^{44}\)

However, the treatment option will not be offered if circumstances surrounding the offense are of a type specifically prohibited by the Act.\(^{45}\) For example, if within the previous five years the defendant was jailed, convicted of a felony, or convicted of a misdemeanor involving physical injury, benefits of the Act will be denied.\(^{46}\) Additionally, if the defendant uses a firearm in conjunction with the drug-related offense, or is clearly found to be unamenable to treatment, eligibility will be withheld.\(^{47}\) Finally, the Act's coverage will be denied to "any defendant who, in addition to one or more non-violent drug possession offenses, has been convicted in the same proceeding of a misdemeanor not related to the use of drugs or any felony."\(^{48}\) A "misdemeanor not related to the use of drugs" is defined as a misdemeanor not involving the "simple possession or use of drugs" and any similar activity.\(^{49}\)

Although modeled after Proposition 200, Proposition 36 differs significantly from its Arizona counterpart in how it addresses non-compliance and probation revocation.\(^{50}\) With a method mirroring California's increasingly punitive "Three Strikes" law, a probationer under the Act is allowed several drug-related parole violations, with each successive violation creating a greater risk of having probation revoked and im-

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42. O'Hear, \textit{supra} note 15, at 293; Bank, \textit{supra} note 7.  
44. \textit{Id.} § 1210(a) (providing definitions for key terms in the Act).  
45. \textit{Id.} § 1210.1(b).  
46. \textit{Id.} § 1210.1(b)(1).  
47. \textit{Id.} § 1210.1(b)(3)(a), 12.01(b)(4)-(5).  
48. \textit{Id.} § 1210.1(b)(2).  
49. \textsc{Cal. Penal Code} § 1210(a) (West Supp. 2005).  
50. \textit{See id.} § 1210.1(e); O'Hear, \textit{supra} note 15, at 295.
prisonment imposed.  

With the first probation violation, incarceration can result only if the state proves through a preponderance of the evidence that the defendant "poses a danger to the safety of others." Upon a second violation, the state must prove either the above condition or that defendant is unamenable to treatment. When a third violation occurs, the defendant loses probation eligibility altogether and may face incarceration.

D. Direct Democracy and Voter Initiatives

Direct democracy represents a form of raw government decision making that eliminates the conciliation and compromise inherent in the United States’ standard form of representative government, where our elected legislative body debates the objectives and intricacies of a proposed law before its final approval or rejection. Voters may directly express their will in three general ways: the recall, the referendum, and the initiative.

California’s recall election in 2003 was at the forefront of national discussion and debate, with the state’s electorate recalling then-Governor Gray Davis and replacing him with Arnold Schwarzenegger. By contrast, the referendum is a process in which the legislature refers a statute to the voters for approval, thus diversifying the responsibility for its impact between the elected representatives and the voters. Finally, the voter initiative bypasses the legislature altogether.

The District of Columbia and twenty-one states allow for the voter initiative. A critical first step in the process in-
volves collecting petition signatures for a proposition. If the requisite number of signatures is obtained, the proposition is placed on the ballot and voters decide by a majority vote if it will pass or fail.

As the popularity of the initiative process has increased, commentators have advocated that courts use new interpretive frameworks when facing initiative implementation questions. These proposals are based on the significant differences between the traditional legislatively enacted statute and the relatively unique voter initiative.

The difficulty of ascertaining voter intent, when voters may number in the millions, is one of the oft-cited problems when comparing a legislative statute to an initiative. Additionally, an initiative's language is not subject to careful refinement through a representative committee process, resulting in a take-it-or-leave-it dilemma for the voters.

Despite these differences, courts have not generally adopted new methods of interpretation when analyzing an initiative. They continue instead to rely upon traditional theories and canons of statutory interpretation.

E. Modern Statutory Interpretation

Because courts have resisted new approaches for direct

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62. See O’Hear, supra note 15, at 286-87; Schacter, supra note 1, at 128-30 (discussing the “initiative industry” and the role of business interests and political consultants in the initiative drafting process).

63. O’Hear, supra note 15, at 286; Schacter, supra note 1, at 128-30; see Richard B. Collins & Dale Oesterle, Structuring the Ballot Initiative: Procedures That Do and Don’t Work, 66 U. COLO. L. REV. 47, 59 (1995) (discussing a majority approach as justification for direct democracy). Petitions proposing initiative statutes must be signed by registered voters. The number of signatures must be equal to at least five percent of the total votes cast for governor at the last gubernatorial election. CAL. CONST., art. II, § A, cl. 8(b). See also CAL. ELEC. CODE § 9035.


65. Landau, supra note 9, at 489-90 (analyzing both Schacter’s and Frickey’s proposals for new initiative interpretation theories).

66. Schacter, supra note 1, at 124-25 (concluding that voter “intent” is impossible to determine because of the composition and qualities of the electorate).

67. Landau, supra note 9, at 488-90.

68. O’Hear, supra note 15, at 337.

69. Landau, supra note 9, at 488.
democracy cases, it is necessary to review the traditional interpretive theories generally employed in order to comprehend their resulting decisions. The common methodologies may be broadly grouped into two complementary classes: theories of interpretation and canons of construction. The canons function as tools and guidelines for the theories.

1. Traditional Theories of Interpretation

The prominent theories of interpretation may be separated into four general categories: textual, intentionalist, purposive, and dynamic (although it is unusual for a judge to reference a particular interpretive framework employed in a decision).

a. Textual Theory of Interpretation

Textual interpretation can be best described as an attempt to discern legislative intent through the "plain meaning" of the statutory text. A strict textualist judge will generally feel that the statute should be interpreted according to its facial language and that any exterior evidence of legislative intent is irrelevant. Supreme Court Justice Antonin Scalia, for example, is an avowed textualist. Justification for this theory lies in the assumption that legislators were deliberate in their choice of words and that the statute should reflect those choices.

b. Intentionalist Theory of Interpretation

The comparable, and most popular, theory of interpretation, the intentionalist approach, adopts similar assumptions about the legislature and may also employ some textual-

70. Id.
71. See O'Hear, supra note 15, at 297.
72. Id. (including a third class, "evaluative criteria").
73. See id.
75. Eskridge et al., supra note 74, at 223 (also discussing the "soft plain meaning" theory, which advocates that a court look beyond a strict textual reading so as to recognize legislative intent as well).
76. Id.
77. O'Hear, supra note 15, at 298.
78. Eskridge et al., supra note 74, at 223.
79. See Landau, supra note 9, at 491.
ist methodology, such as "plain meaning" construction. This theory is broader than textualism because an intentionalist court attempts to establish how the legislature would have wanted the statute applied in a particular case by using a variety of legislative history sources, including committee reports and floor speeches.

**c. Purposive Theory of Interpretation**

Not content to rely solely on legislative history, a purposive approach encompasses a more general recognition of a statute's objective, acknowledging the ambiguity often inherent when attempting to determine "specific" legislative intent. Purposivism asks the question, "what is the overall goal of the statute?" Additionally, a secondary goal of a purposivist is to interpret the statute such that it is "coherently and harmoniously" incorporated into the total legal body. This theory of interpretation was prominent in judicial decisions from the New Deal period.

**d. Dynamic Theory of Interpretation**

Lastly, a dynamic style of interpretation construes a statute according to society's evolving public values. The dynamic theory contends that a statute's meaning is somewhat "fluid" and should be applied differently over time, staying in line with social mores and principles. As with purposivism, a dynamic analysis endeavors to provide statutory meaning that will maintain consistency within the legal system as a whole. This goal may also be subordinated in the face of evolving public values that necessitate the abandonment of outdated precedents. Thus, a dynamic approach may help to explain many decisions that break precedent or

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80. ESKRIDGE ET AL., supra note 74, at 223.
81. Id. at 214.
82. O'Hear, supra note 15, at 297.
83. ESKRIDGE ET AL., supra note 74, at 220.
84. Id. at 221.
86. ESKRIDGE ET AL., supra note 74, at 221.
87. Id. at 237.
88. Id.
89. O'Hear, supra note 15, at 298.
90. Id. at 298-99.
are unjustified by traditional authoritative legal sources.\textsuperscript{91}

2. Canons of Construction

In applying the general interpretive theories, courts have developed common guidelines to aid in the deciphering of unclear or ambiguous statutory language.\textsuperscript{92} Under a textualist approach, some common canons address issues of sentence structure and semantics.\textsuperscript{93} An example of this type is the "rule of the last antecedent," under which qualifying words in a statute are meant to only refer to the last antecedent, unless punctuation or policy indicate otherwise.\textsuperscript{94} These linguistic canons may also be relied upon by intentionalists, on the premise that statute drafters make conscious and deliberate grammatical choices.\textsuperscript{95}

Of a different nature, the "rule of lenity" is a substantive canon.\textsuperscript{96} This rule instructs that if a criminal statute is ambiguous, it should be construed in a manner most favorable to the defendant.\textsuperscript{97} Because this canon embraces public values like the desirability of providing fair notice to would-be defendants,\textsuperscript{98} it may be used and justified by both dynamic and purposive interpretation followers.\textsuperscript{99}

An additional category of substantive canons, also applicable to both the purposive and dynamic frameworks, consists of the canons employed to promote legal coherence.\textsuperscript{100} This category may be divided into "internal consistency canons," or canons pertaining to the structure of the statute, and "continuity canons," or those canons that focus on the statute's fit into an overall statutory scheme.\textsuperscript{101}

\textsuperscript{91} See ESKRIDGE ET AL., supra note 74, at 237 (explaining that courts are reluctant to explicitly promote this theory due to the fear that it lacks sufficient constraints on judges and that it may not provide citizens with appropriate notice or guidance).
\textsuperscript{92} O'Hear, supra note 15, at 299.
\textsuperscript{93} Id.
\textsuperscript{94} ESKRIDGE ET AL., supra note 74, at 258.
\textsuperscript{95} See O'Hear, supra note 15, at 299.
\textsuperscript{97} Id.
\textsuperscript{99} O'Hear, supra note 15, at 300.
\textsuperscript{100} Id.
\textsuperscript{101} Id.
When applying an internal consistency canon to a statutory provision, a court will seek an interpretation that maintains coherence with the entire statute and its purpose, instead of viewing the provision as an isolated clause. Alternatively, a continuity canon will encourage an interpretation favoring the status quo by “not changing existing understandings [of the law] any more than is needed to implement the statutory objective.” This canon helps to reconcile the inherent tension in the dynamic theory caused by the competing interests of consistency, changing public values, and judicial restraint.

F. California Supreme Court Implementation of Proposition 36

To date, the California Supreme Court has handed down two Proposition 36 implementation decisions. One of these decisions, People v. Floyd, addresses the initiative’s retroactive application and is the subject of this comment. The other, In re Varnell, involves restricting a trial court’s discretion to dismiss or reduce charges, pursuant to Penal Code Section 1385, so that a defendant might remain eligible under Proposition 36.

The court is also currently reviewing questions concerning the interpretation of the ambiguous phrase “misdemeanor not related to the use of drugs.” People v. Ayele examines...
the issue of whether a defendant convicted of resisting arrest while under the influence of drugs should still retain Proposition 36 eligibility. Similarly, People v. Canty110 involves Proposition 36 applicability to a defendant convicted of driving under the influence of a controlled substance.

1. Background and Context of People v. Floyd

Prior to the Floyd holding, a lower court addressed one possible retroactive scenario regarding Proposition 36 application.111 With In re DeLong,112 the court of appeals determined that if a defendant was found guilty, but not sentenced until after the effective date of July 1, 2001, Proposition 36 would apply.113 The California Supreme Court, however, decided to address a slightly different retroactive applicability issue.114 Floyd, and its companion case for review, People v. Fryman,115 examined whether a defendant with a guilty verdict and sentencing prior to July 1, 2001, could still qualify for retroactive Proposition 36 eligibility.116

On April 30, 2000, Andre Floyd ("Floyd") was arrested for possession of a small bag containing 0.25 grams of cocaine.117 On November 7, 2000, the voters passed Proposition 36.118 Floyd had a criminal history consisting of five prior felony convictions, the last occurring in 1985.119 Two days after the election, a jury convicted Floyd of felony drug possession and gave him a third strike sentence of twenty-five years to life.120 Floyd's jury conviction occurred after the enactment of Proposition 36 in the general election, but before the initiative's effective date of July 1, 2001, raising the issue of whether a pending appeal on the effective date can permit a defendant to rely upon Proposition 36.121

111. Abrahamson & Abassi, supra note 13, at 519.
113. Id. at 564.
114. See Abrahamson & Abassi, supra note 13, at 519 (discussing the retroactive categories addressed by the courts).
116. Floyd, 72 P.3d at 817; Fryman, 97 Cal. App. 4th at 1315.
117. Floyd, 72 P.3d at 820-21.
118. Id. at 821.
119. Id.
120. Id.
121. Abrahamson & Abassi, supra note 13, at 3.
Appealing the trial court's sentence, Floyd argued for the application of Proposition 36 treatment to his non-violent drug possession offense, as his conviction was not yet final because of his appeal. His main theory relied upon the Estrada rule, which holds that "[i]f the amendatory statute lessening punishment becomes effective prior to the date the judgment of conviction becomes final then . . . it, and not the old statute in effect when the prohibited act was committed, applies." In People v. Estrada, the court allowed for a retroactive application of an amended statute that reduced the penalties for a non-violent prison escape. Floyd argued in the alternative that denying him retroactive eligibility is an equal protection violation; however, the latter contention is not discussed in this comment.

Unfortunately for Floyd, Estrada also held that its rule does not apply when there is a "saving clause" within the statute which indicates that it should only operate prospectively, with the old law applying to past acts. The court found that such a clause exists within Section 8 of the initiative. Section 8 reads: "Except as otherwise provided, the provisions of this act shall become effective July 1, 2001, and its provisions shall be applied prospectively." In light of the saving clause, the court posed the question, to "ascertain the legislative intent—did the [voters] intend the old or new statute to apply?" Thus, by relying upon traditional textualist and intentionalist interpretation

122. Floyd, 72 P.3d at 821.
123. In re Estrada, 408 P.2d 948, 951 (Cal. 1965).
124. Id at 948.
125. Floyd, 72 P.3d at 820, 822. Floyd's equal protection claim is the weaker of the two arguments and the California Supreme Court found there to be no constitutional violation when imposing different sentencing schemes on different classes of defendants based on the application of an effective date. Id. at 824-27. Additionally, Justice Brown's dissent does not address the equal protection argument. Id. at 827-30 (Brown, J., dissenting).
126. Issues pertaining to initiative constitutionality are beyond the scope of this comment.
127. Estrada, 408 P.2d at 952.
128. Floyd, 72 P.3d at 821.
130. Floyd, 72 P.3d at 821-22.
131. Estrada, 408 P.2d at 951.
theories in its analysis, the court found the presence of the saving clause to sufficiently indicate the voters' intent to deny Proposition 36 eligibility to defendants in Floyd's position. It reached this decision by employing canons of semantic construction and canons of coherence, while rejecting the rule of lenity. The saving clause was also used to reject Floyd's contention that he is "convicted" within the meaning of the Act only when his conviction becomes final with the conclusion of the appeal process.

In a dissenting opinion, Justice Brown argued for the application of the rule of lenity with regard to the saving clause and effective date of the Act. She also identified a prior supreme court case that conflicts with the majority's decision regarding Floyd's "conviction" status.

III. IDENTIFICATION OF THE PROBLEM

With the California Supreme Court's refusal to allow retroactive eligibility under Proposition 36, Floyd was sentenced to a twenty-five-year prison sentence for possession of one quarter gram of a controlled substance. This outcome resulted from the court's application of strict textual and intentionalist theories of statutory interpretation to the initiative. Because of the court's approach, and its failure to account for the differences between a legislatively produced statute and a voter initiative, Floyd's sentence serves to undermine the purpose and intent behind the voters' decision to pass the initiative, namely "[t]o divert from incarceration into community-based substance abuse treatment programs non-violent defendants, probationers and parolees charged with simple drug possession or drug use offenses."
The question then becomes, what should be the proper interpretation theories and constructive canons to be used by a court when determining rules of implementation for a voter initiative?

IV. ANALYSIS

The California voters enacted Proposition 36 by a significant sixty-one percent majority. As discussed, the chances that the average voter read either the text of the initiative or the ballot pamphlets produced by the office of the Secretary of State are low. However, it is reasonable to assume that voters in support of the initiative were at least aware of its general directive that "any person convicted of a non-violent drug possession offense shall receive probation." Yet, in spite of the numerous ways in which Proposition 36 is distinguished from a traditional statute, the supreme court sentenced Floyd to twenty-five years in prison for cocaine possession. With its rigid approach, focusing on textual and structural analysis, the court held the voters to standards of legal comprehension and decision-making authority that should be reserved solely for the legislature. Perhaps if Proposition 36 was a referendum, originating from the legislature, the court's reasoning could be justified. But Proposition 36 is an initiative, and the court misrepresented the intent of the electorate.

At the outset of its holding, the court recognized that Floyd's drug possession offense, taken in the abstract, qualified him for Proposition 36's benefits. However, because the Estrada rule could be nullified, and it might be interpreted that Floyd's "conviction" and sentencing occurred before July 1, 2001, the case presented the question of whether he re-

142. O'Hear, supra note 15, at 297.
144. O'Hear, supra note 15, at 313 (quoting CAL. PENAL CODE § 1210.1(a) (West Supp. 2005)).
145. Floyd, 72 P.3d at 821.
146. See id.
147. Schacter, supra note 1.
148. See Floyd, 72 P.3d at 829 (Brown, J., dissenting and addressing the incarceration costs that the majority's holding would impose on the state).
149. Floyd, 72 P.3d at 821.
mained eligible.\textsuperscript{150}

In his defense, Floyd primarily argued that the court's holding in \textit{Estrada} should apply to resolve the issue in his favor.\textsuperscript{151} He also contended that due to his pending appeal, his conviction was not yet final and he was therefore not "convicted," per the language of the Act, before the effective date.\textsuperscript{152} But the court rejected these arguments by rendering the \textit{Estrada} rule inapplicable with its intentionalist interpretation of the saving clause and by failing to acknowledge different meanings of the term "convicted."\textsuperscript{153}

\section*{A. The Saving Clause}

As an exception to its central holding that an "amendatory statute lessening punishment" should be applied in favor of the old statute, \textit{Estrada} acknowledged that the presence of a saving clause might indicate the legislature's intent to have the new statute applied prospectively.\textsuperscript{154} Otherwise, the case embraced the reasonable inference that because the new statute is ameliorative, the legislature will want it to apply to all defendants who may be constitutionally eligible.\textsuperscript{155}

In \textit{Floyd}, the court found that Section 8 of the Proposition 36 text represents the type of saving clause that may rebut the \textit{Estrada} rule.\textsuperscript{156} To determine whether Section 8 does indeed act to disqualify Floyd, the court decided to establish the "legislative intent" behind Section 8's inclusion in the initiative.\textsuperscript{157} Thus, at the outset of its analysis, the court embraced an intentionalist theory of interpretation and proceeded as if

\begin{footnotesize}
\textsuperscript{150} Id.
\textsuperscript{151} Id.
\textsuperscript{152} Id. at 823 (incorrectly citing subdivision (b)(1) in section 1210.1, which relates to disqualifying circumstances or conduct). California Penal Code section 1210.1(a) appears to be the subdivision the court is actually referencing: "Notwithstanding any other provision of law, and except as provided in subdivision (b), any person convicted of a non-violent drug possession offense shall receive probation." CAL. PENAL CODE § 1210.1(a) (West Supp. 2005).
\textsuperscript{153} Id. at 823, 828-29.
\textsuperscript{154} \textit{Estrada}, 408 P.2d at 952.
\textsuperscript{155} Id. at 950.
\textsuperscript{156} \textit{Floyd}, 72 P.3d at 823-24. Section 8 reads: "Except as otherwise provided, the provisions of this Act shall become effective July 1, 2001, and its provisions shall be applied prospectively."
\textsuperscript{157} \textit{Floyd}, 72 P.3d at 822 ("[w]hether Proposition 36 applies here requires us to ascertain the legislative intent—did the [voters] intend the old or new statute to apply").
\end{footnotesize}
Proposition 36 was a legislatively enacted statute.\textsuperscript{158}

By embracing this approach, the court made no reference to the unique circumstances surrounding a California voter initiative,\textsuperscript{159} circumstances that make it ill-suited to an intentionalist interpretation.\textsuperscript{160} The court failed to acknowledge that although California voters are the ones enacting the law, studies show that only a fraction of them actually read the initiative text.\textsuperscript{161} Moreover, in a study by David Magleby, it was shown that voters in Oregon and California would need a college to post-graduate equivalent reading level (possessed by less than twenty percent of voters) to comprehend the legal initiative language.\textsuperscript{162}

Yet, despite readily available knowledge of the California electorate’s limited comprehension abilities with regard to initiative ballot text,\textsuperscript{163} the Floyd court proceeded down a difficult path to find the elusive “popular intent”\textsuperscript{164} based on the inclusion of Section 8.\textsuperscript{165} Citing one of its previous holdings,\textsuperscript{166} the court laid out its reason for according determinative weight to Section 8: “The rule in Estrada, of course, is not implicated where the Legislature clearly signals its intent to make the amendment prospective, by the inclusion of an express saving clause or its equivalent.”\textsuperscript{167}

By proceeding from this basis, the court wrongly equated the voting populace with a legislature.\textsuperscript{168} It assumed the voters are cognizant of the judicial import of the inclusion of a saving clause,\textsuperscript{169} stating, “[w]e therefore conclude that this language, at least when read in isolation, reveals an intent to
avoid the Estrada rule."  This preliminary textualist conclusion was a faulty foundation upon which to support the court's remaining analysis.

1. Textual Interpretation of the Saving Clause

Regardless of the logical fallacies with an attempt to discern voter intent within the technical minutiae of initiative text, the court continued its intentionalist interpretation by undertaking a textual analysis of the saving clause. Obligated to defend under this approach, Floyd put forth his own textual argument based on the presence of Section 8's introductory clause: "Except as otherwise provided . . ." He claimed that this opening clause works to modify the second main clause in the section: "its provisions shall be applied prospectively." With this construction, he contended that the intent of the phrasing is to have Proposition 36 applied retroactively, as an exception, when the ameliorative circumstances of Estrada are present.

However, instead of acknowledging the possible legitimacy of Floyd's construction and exploring the applicability of the rule of lenity to the clause, the court relied upon its intentionalist and textualist canons and employed the last antecedent rule, casting doubt upon Floyd's reasonable interpretation of Section 8.

In the context of representative-produced statutes, a court's use of semantic canons may be justified by the assumption that a legislature is a sophisticated and educated group of decision makers. One may presume that legislators or their staff have a working knowledge of prominent ju-

170. Floyd, 72 P.3d at 821-22.
171. Schacter, supra note 1, at 139 (criticizing the importance that courts assign to ballot text in a pursuit of voter intent).
172. See Floyd, 72 P.3d at 822-23.
175. See Floyd, 72 P.3d at 822.
177. ESKRIDGE ET AL., supra note 74, at 258.
178. Floyd, 72 P.3d at 822-23.
179. Landau, supra note 9, at 501.
dicial methods of interpretation and will make a conscious effort to recognize prior judicial decisions and common constructive canons when drafting statutes.\textsuperscript{180}

Additionally, in accord with its reliance on a legislature's presumed wisdom, an intentionalist court will turn to legislative documentary evidence to assist in determining the intent of a statute.\textsuperscript{181} But with a voter initiative, the courts may only have ballot pamphlets to rely upon.\textsuperscript{182} Indeed, the \textit{Floyd} court supported its plain meaning interpretation of the saving clause with reference to the proponent's argument in the official ballot pamphlet.\textsuperscript{183}

Yet, by relying on ballot pamphlets and other campaign resources, not only did the court give weight to biased writings of the proponents and opponents,\textsuperscript{184} it further assumed that voters actually read and relied upon the pamphlets themselves.\textsuperscript{185} This is a leap of faith since statistical data suggests that a majority of voters do not read ballot pamphlets in addition to initiative text.\textsuperscript{186}

Therefore, when interpreting a voter initiative, the traditional underlying justifications for a textual or intentionalist framework must necessarily be abandoned because of the relatively plebeian makeup of the electorate.\textsuperscript{187} In light of Magleby's findings\textsuperscript{188} and a reasonable assumption that the majority of voters are unfamiliar with statutory drafting methods used to nullify the \textit{Estrada} rule, one can logically reach the conclusion that the saving clause was meant to benefit defendants in Floyd's position.\textsuperscript{189} By turning a blind

\begin{itemize}
\item[180.] \textit{Id.}
\item[181.] O'Hear, \textit{supra} note 15, at 297.
\item[182.] \textit{See Schacter, supra} note 1, at 141-42.
\item[184.] Schacter, \textit{supra} note 1, at 142.
\item[185.] Landau, \textit{supra} note 9, at 498-99 (discussing the informal hierarchy comparison between legislative history sources and voters' pamphlet materials).
\item[186.] MAGLEBY, \textit{supra} note 5, at 136; \textit{see} DUBOIS ET AL., \textit{supra} note 143, at 133.
\item[187.] \textit{See id.}
\item[188.] \textit{See MAGLEBY, supra} note 5.
\item[189.] \textit{Floyd}, 72 P.3d at 827-28 (arguing that the saving clause and the \textit{Estrada} rule can work to allow the initiative's benefits to encompass defendants
\end{itemize}
eye to this fact, the court misrepresented the voters’ true intent for Proposition 36.190

2. Internal Consistency and the Saving Clause

Not content to rest on its narrow textual analysis, the court continued to ignore Proposition 36’s purpose by proceeding to use substantive canons of coherence to justify the denial of Estrada’s ameliorative benefits.191 In response to Floyd’s contention that Section 8’s introductory clause “merely defines a nonexclusive class of defendants [who] are eligible for its provisions,”192 the court made use of an internal consistency canon193 to narrow the scope of exceptions beyond his reach.194 It held that Section 8 only addresses the Act’s explicit retroactive application to probationers or parolees who were convicted of nonviolent drug offenses prior to the effective date.195 The court justified this conclusion with a structural argument, proclaiming that Section 8’s “applied prospectively” clause would be devoid of meaning if Floyd’s broad reading of the introductory clause was correct:196 “We cannot embrace an interpretation that makes Section 8 mere surplusage.”197 This conclusion was also the basis for the court’s dismissal of Floyd’s contention that he was not “convicted” under the Act with his conviction not final on appeal.198

Thus, while the court’s use of a structural consistency canon produced a reasonable interpretation in isolation,199 the application was nevertheless faulty, because the statutory

whose convictions were not final as of July 1, 2001) (Brown, J., dissenting).
190. See generally id. at 827-30.
191. See id. at 823-24 (discussing other provisions in the Act and prior judicial precedent that may affect Section 8’s interpretation); O’Hear, supra note 15, at 300-01.
192. Floyd, 72 P.3d at 823.
194. Floyd, 72 P.3d at 823.
195. Id. at 822-23. If a person is on probation or parole for a nonviolent drug offense prior to the effective date, and then violates probation or parole with a nonviolent drug offense, Proposition 36’s benefits will be available. CAL. PENAL CODE §§ 1210.1(3)(D)-(F), 3063.1(d)(3)(C),(D) (West Supp. 2005).
197. See Floyd, 72 P.3d at 823.
198. Id. at 823-24.
199. Id.
purpose remains paramount when using that tool.200 The structural interpretation should give way if found to be in conflict with the overall objective of the voter initiative.201 Nevertheless, the court’s holding mandated a sentence for Floyd that went against the very core of Proposition 36.202

3. Continuity Canons and the Saving Clause

Continuing to disregard the initiative’s purpose, the court turned to another substantive canon as it attempted to interpret Section 8 in a manner least disruptive to the existing body of drug possession law.203 Applying a continuity canon,204 the court doggedly sought to enforce the old law, punishable as a felony, for as long as possible.205

Using judicial precedent to support that approach, it began by taking note of the voters’ “decision” to delay the effective date of the proposition by eight months from the date of its enactment.206 It then proceeded with a laundry list of cases which uniformly held that a legislature’s “decision” to postpone a statute’s effective date evinces a clear intent that it not have retroactive application.207

But this direction once again ignored the general intent of Proposition 36208 with a reliance upon the continuity canon to aid the interpretation.209 Although the aim of this type of canon is to preserve the existing legal regime, with its use in

200. O’Hear, supra note 15, at 301 (“[s]tatutory provisions should not be read in isolation but as part of a larger statutory scheme; courts should avoid interpretations that undermine other provisions or defeat the overall objectives of the statute”).

201. Id.

202. Ballot Text of Proposition 36, Substance Abuse and Crime Prevention Act of 2000, § 3(a) (“Purpose and intent”), available at http://www.drugreform.org/prop36/fulltext.tpl (last visited Apr. 9, 2004). One of the stated purposes of the Act was “[t]o divert from incarceration into community-based substance abuse treatment programs non-violent defendants, probationers and parolees charged with simple drug possession or drug use offenses.” Id.

203. See, e.g., Floyd, 72 P.3d at 824.

204. O’Hear, supra note 15, at 300-01.

205. See generally Floyd, 72 P.3d at 824.

206. Id. (addressing the eight-month gap between Proposition 36’s approval on November 7, 2000, and its effective date of July 1, 2001).

207. Floyd, 72 P.3d at 824.


209. See O’Hear, supra note 15, at 300-01.
Floyd, "those interests carry[y] little weight because they preserved legislative judgments that had been clearly rejected by the initiative."\(^{210}\) Therefore, as with an internal structure canon, these constructive guidelines are ultimately better suited for purposive or dynamic approaches and should influence a court's analysis up to the point when the interpretation would contradict the statute or initiative's ultimate goal.\(^{211}\)

Furthermore, the cases cited by the court involve the interpretations of actions taken by legislatures, not initiatives enacted by the voters.\(^{212}\) The voters were thus once more improperly assigned the same traits as a legislature: legal comprehension and foresight.\(^{213}\)

B. Justice Brown's Dissent

As Justice Brown illustrated in her lone dissent, even while using the substantive canons, the majority could have reached alternative, supportable conclusions regarding Section 8.\(^{214}\) As a foundation for her arguments, she relied upon the "Purpose and Intent" section of the initiative.\(^{215}\) Citing In re DeLong,\(^{216}\) she attacked the majority's narrow use of the retroactive probation/parole provisions in its structural interpretation.\(^{217}\) She argued that instead of showing an intent to restrict Proposition 36's applicability, the probation/parole provisions do just the opposite, as they indicate that the initiative was intended to have a broad, encompassing reach, consistent with its stated purposes.\(^{218}\)

Additionally, Justice Brown called into question the ma-

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210. See id. at 315.
211. See id. at 301.
212. Floyd, 72 P.3d at 824 (relying on a list of cases that never make reference to an initiative).
213. See Schacter, supra note 1, at 126-28.
216. In re DeLong, 93 Cal. App. 4th at 561 ("[N]o rationale appears to exclude from its wide reach the limited class of defendants who, as of the effective date, had been adjudged guilty and were awaiting sentencing").
217. Floyd, 72 P.3d at 827 (Brown, J., dissenting).
The majority's use of precedent to provide a prospective intent to the delayed effective date.\textsuperscript{219} She pointed out that the actual reason for the initiative's postponement was purely "practical."\textsuperscript{220} The eight-month delay was necessary to set up the required infrastructure of treatment facilities.\textsuperscript{221} This argument of a legitimate need is especially effective when compared to the majority's erroneous use of a Court of Appeals of New York case that held, "[i]f the amendments were to have retroactive effect, there would have been no need for any postponement."\textsuperscript{222} Justice Brown suggested that other reasons do exist for a statute's postponement than to merely indicate an opposition to retroactive application.\textsuperscript{223}

Finally, Justice Brown dismissed the majority's contention that Section 8 would be surplusage if read generously.\textsuperscript{224} She reasoned that the delayed date can be given meaning by reading it to preclude defendants with final convictions before July 1, 2001, because time was needed to implement the treatment program.\textsuperscript{225} This reasoning raised the subsequent question of whether Floyd was actually "convicted" prior to July 1, 2001, despite his appeal.\textsuperscript{226} But Justice Brown addressed this inquiry by pointing out that California does not have a "fixed definition" for the term "convicted," and the court could have relied upon prior case precedent, \textit{People v. Treadwell},\textsuperscript{227} which held that a "defendant has not been finally convicted if an appeal is pending."\textsuperscript{228}

Consequently, Justice Brown argued that in light of Proposition 36's purpose of reducing the number of defendants incarcerated in California for drug possession and use,\textsuperscript{229} the ambiguities in the case required the court to apply

\begin{itemize}
\item \textsuperscript{219} \textit{Floyd}, 31 72 P.3d at 827-28 (Brown, J., dissenting).
\item \textsuperscript{220} Id. at 828.
\item \textsuperscript{221} Id.
\item \textsuperscript{222} Id. at 824 (citing Deutsch v. Catherwood, 31 N.Y. 2d 487, 489 (1973)).
\item \textsuperscript{223} \textit{See} id.
\item \textsuperscript{224} Id. at 829 (Brown, J., dissenting).
\item \textsuperscript{225} \textit{People v. Floyd}, 72 P.3d 820, 829 (2003) (Brown, J., dissenting).
\item \textsuperscript{226} Id. at 829.
\item \textsuperscript{227} 5 P. 686 (Cal. 1885).
\item \textsuperscript{228} \textit{Floyd}, 72 P.3d at 829 (Brown, J., dissenting and citing \textit{Treadwell}, 5 P. at 987 (Cal. 1885)).
\item \textsuperscript{229} \textit{Ballot Text of Proposition 36, Substance Abuse and Crime Prevention Act of 2000,} § 3(a)-(c) ("Purpose and intent"), \textit{available at http://www.drugreform.org/prop36/fulltext.tpl} (last visited Mar. 15, 2005).
\end{itemize}
the rule of lenity to preserve Floyd's probation eligibility.\(^\text{230}\) Instead, with the majority's explicit refusal to use that public policy canon,\(^\text{231}\) its intentionalist interpretation "frustrate[d] rather than promote[d] the purpose and intent of the initiative."\(^\text{232}\)

V. PROPOSAL: PURPOSIVE OR DYNAMIC INTERPRETATIONS OF INITIATIVES

In light of the supreme court's questionable interpretations, it is evident that California courts should adopt purposive or dynamic interpretive approaches when addressing a voter initiative.\(^\text{233}\) The outcome of DeLong reflected analytical conclusions that succeeded in representing the will of the voters.\(^\text{234}\) The DeLong court's "purpose-oriented" approach\(^\text{235}\) allowed it to view the case, and the initiative, with an eye towards producing a result consistent with electorate expectations.\(^\text{236}\) Therefore, as implied by Justice Brown's support of the DeLong reasoning,\(^\text{237}\) when interpreting a voter initiative a court should first acknowledge its purpose, then proceed with its analysis from that foundation.

Alternatively, a court may adopt a dynamic theory of interpretation if it wishes to correctly construe voter intent. Because this theory accords more significance to the notion of changing public values than to legal coherence,\(^\text{238}\) it repre-

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\(^{230}\) Floyd, 72 P.3d at 829-30. (Brown, J., dissenting).

\(^{231}\) Id. at 824 (stating that, "[t]he rule of lenity applies 'only if the court can do no more than guess what the legislative body intended'" (quoting People v. Avery, 38 P.3d 1, 6 (Cal. 2002))).

\(^{232}\) Id. at 830 (Brown, J., dissenting).

\(^{233}\) See O'Hear, supra note 15, at 301. The author discusses the "evaluative criteria" to be used and weighed when deciding which interpretive theory is best-suited for the case: First, the "rule of law" factor addresses issues of predictability, ease of understanding for ordinary citizens, and neutral application of the statute. Second, the "democratic legitimacy" factor relates to the weight an interpretive approach gives to policy choices emanating from the democratic process, either through the legislature or directly from the voters. Third, the "pragmatism" factor looks to how an interpretive method will promote "legitimate public policy objectives."

\(^{234}\) Id. at 313.

\(^{235}\) Id.

\(^{236}\) In re DeLong, 93 Cal. App. 4th at 570 (stating that "[t]he voters delayed the effective date to July 1, 2001, so that treatment facilities could be in place, not out of a desire to preserve the stricter sentencing scheme for nonviolent drug offenders for a few more months").

\(^{237}\) See Floyd, 72 P.3d at 828 (Brown, J., dissenting).

\(^{238}\) See O'Hear, supra note 15, at 298-99.
sents a logical choice for a court faced with a voter initiative. This conclusion is justified by an initiative's very existence, which represents the electorate's decision to implement change. This is especially true in regard to Propositions 215 and 36, where the voters felt they needed to take certain drug law reform issues away from the legislature. Therefore, when using a dynamic base for analysis, a court will attribute more significance to the electorate's motives than to "outmoded legislative purposes."

A. Correct Use of Canons of Coherence

Along with using a dynamic or purposive approach, courts must employ the canons of construction that best complement these theories. When an initiative relates to criminal law reform, the rule of leni
ty should feature prominently in a court's analysis if ambiguity arises. This canon embodies public policy issues related to basic notions of justice, and, as explained above, Floyd represents an erroneous decision to avoid its use. Additionally, the invocation of substantive coherence canons, as discussed earlier, will serve to supply necessary measures of judicial restraint, structure, and continuity. However, when using them, courts should not allow consistency interests to trump the overall purpose of the initiative.

B. Judicial Constraint and Guidance Concerns

There is a fear that purposive or dynamic approaches may provide courts with too much leeway and subjective authority to fashion new rules. But this fear will always be prevalent if a court is to recognize that society's principles and concerns change over time, and it is not a valid reason to ignore the realities of the initiative process.

239. See Schacter, supra note 1, at 113.
241. See id.
243. See O'Hear, supra note 15, at 299-300.
244. See discussion supra Part IV.A.1.
245. See O'Hear, supra note 15, at 300.
246. See, e.g., Schacter, supra note 1, at 139 (discussing a study that found the majority of the electorate did not even read the text of ballot propositions).
An additional concern is that the declared "purpose" of an initiative will be subject to manipulation by an initiative's drafters, resulting in long and "strategically ambiguous" ballots. This concern seems exaggerated because courts should be capable of reconciling a possibly ambiguous "Purpose and Intent" section of an initiative with the overall message communicated to the voters during a campaign.

A challenge of this type faced the Floyd court again as it considered People v. Canty to determine if a misdemeanor conviction of driving under the influence of a controlled substance fell outside the reach of Proposition 36. A thin argument could be made that a misdemeanor of this type should be included, so as to keep another drug user from being incarcerated. However, in keeping with the unanimous holdings of the lower courts, the supreme court found that driving while under the influence of drugs is not included in Proposition 36's coverage. In contrast to Floyd, the Canty decision is consistent with what the voters understood to be the purpose of the initiative: Proposition 36 will not extend to defendants who jeopardize public safety with their criminal acts.

VI. CONCLUSION

The enactment of Proposition 36 is the result of the California electorate taking the "initiative" to effect a fundamental change in the state's approach to issues of drug dependence and the "drug war." A statute or initiative raises questions and challenges as to how it will be applied in a given situation. To resolve these issues and establish rules for implementation, courts rely upon various theories of interpretation to guide their analysis. The most widely used of these is the intentionalist theory, which seeks to identify the legislature's intended meaning for a statute.

Problems arise however, when an intentionalist approach is used to interpret an initiative, because there is no legisla-

247. Id. at 146-47 (arguing against a purposive approach).
248. 90 P.3d 1168, 1170 (Cal. 2004).
249. See id. at 1179.
250. See generally Abrahamson & Abbasi, supra note 13, at 517.
251. See O'Hear, supra note 15, at 291.
252. See generally Schacter, supra note 1, at 109-10.
253. See O'Hear, supra note 15, at 297.
254. Landau, supra note 9, at 491-92; Schacter, supra note 1, at 110.
tive intent to be found, only the popular intent of millions of voters. Unfortunately, this was the method used by the California Supreme Court in People v. Floyd, where its interpretation of Proposition 36 upheld a conviction and sentencing of twenty-five years to life for simple cocaine possession.

Because the court's decision contradicted the objective of the initiative, courts should engage in purposive or dynamic interpretation when construing voter initiatives. Either of these approaches, when used in combination with corresponding substantive canons of construction, will foster a decision that best comports with the expectations of the electorate.

255. See Schacter, supra note 1, at 117-18.
256. See generally People v. Floyd, 72 P.3d 820 (Cal. 2003).