

## **Direct Democracy and Public Choice**

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Direct democracy encompasses two methods of providing voters with direct lawmaking authority – the initiative and the referendum – as well as a third method of directly influencing lawmakers outside of the regular electoral process – the recall. The initiative allows a certain percentage of the electorate to petition to place a statute or constitutional amendment on the ballot for a vote of the people. With the direct initiative, the proposed statute or constitutional amendment is placed on the ballot automatically once proponents of the initiative gather the required number of signatures. With the less common indirect initiative, the proposal is submitted to the legislature before it is placed on the ballot so that lawmakers have an opportunity to pass the proposed law or amendment before the people vote. If the legislature fails to pass it, or adopts a significantly changed version, then the proposal is placed on the ballot for a vote of the people. The referendum allows the people to intervene after the legislature has acted on a proposal; in this process, voters are asked to approve or disapprove a law or constitutional amendment that the legislature has already passed. The popular referendum, like the initiative, provides for a vote on a law already passed by the legislature upon the gathering of a sufficient number of signatures in a petition drive. In the more common legislative referendum, the legislature places before the electorate a proposed law or constitutional amendment for the voters' approval or disapproval. For example, state constitutions may require a referendum on constitutional amendments or certain bond proposals before they can go into effect. Finally, the recall allows the people to vote on whether an elected official can continue her service until the next regular election. Again, a petition drive is the method used to trigger a recall. The recall is much more common on the local level than on the state level; indeed, fewer than one-third of the states allow for the recall of state-level public officials (Cronin 1989).

In the United States, direct democracy is available only on the state and local levels. The mechanisms of direct democracy date back to 1898 when South Dakota adopted the initiative as part of its state constitution. Historically, support for direct democracy is associated with the Progressive and Populist movements at the turn of the 20th Century. It represented part of these reformers' response to the view that legislatures were controlled by political machines and business interests, such as the railroad companies, mining interests and public utilities, and therefore legislators were not appropriately responsive to ordinary people or the will of the majority (Cronin 1989; Magleby 1984). Progressives sought a way for the people to circumvent these interests and directly, through popular votes, to adopt certain substantive policies as well as government reforms, such as the direct primary, direct election of U.S. senators and nonpartisan elections.

Twenty-seven states provide for the initiative, the popular referendum or both (Waters 2003, p. 12); and the legislative referendum is required in every state for adoption of constitutional amendments. When one considers that about half of the nation's cities also provide for some form of direct democracy, it is not surprising to find that 70 percent of Americans live in a state or city or both that allows them access to direct democracy (Matusaka 2004, p. 1). At the state level, the initiative process is mainly a Western phenomenon, with 60 percent of the initiative activity taking place in six states: Arizona, California, Colorado, North Dakota, Oregon

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and Washington (Waters 2003, p. 7). From 1904, when the first statewide initiative appeared on Oregon's ballot, through 2006, there have been 2,231 statewide initiatives, and 909 (41 percent) of these passed (Initiative and Referendum Institute 2006).<sup>1</sup> Since the success of California's Proposition 13 that cut property taxes in 1978, the use of the initiative has increased substantially; indeed, more initiatives were proposed and passed in the 1990s than ever before, and the first decade of the 21st Century may be the busiest ever. The use of the direct constitutional initiative has increased much more substantially than the use of the direct statutory initiative during this time, within the sixteen states that offer both forms of lawmaking (Krislov and Katz 2008, p. 307).

The increasing use of direct democracy at the state level, including the successful statewide recall of California's governor in 2003 and simultaneous election of movie star Arnold Schwarzenegger to the position, has increased the scholarly attention on this form of governance. Much of the current work is interdisciplinary in nature, with political scientists, economists and legal scholars bringing their various approaches to the study of initiatives and referendums. Public choice, with its focus on interest groups, relationships among institutions, and the importance of procedures and institutions in shaping policies, has been a significant influence on this literature. A more sophisticated understanding of direct democracy has led to the awareness that the initiative process cannot be assessed meaningfully in isolation, but rather it must be studied as it interacts with representative institutions. Moreover, legislators and the traditional legislative process are profoundly affected by the presence of robust direct democracy in the states and localities that have active initiative, popular referendum or recall mechanisms. In short, the appropriate frame for any analysis of direct democracy is that of 'hybrid democracy' (Garrett 2005a). The notion of hybrid democracy – democracy that is neither wholly representative nor wholly direct, but a mixture of the two – captures the complex combination of direct and representative institutions at the state and local levels, which also influences national politics.<sup>2</sup>

The influence of public choice can be seen as well in the less negative view of the initiative process in recent scholarship. Initially, scholars were often extremely critical of direct democracy, arguing that it allowed the majority to tyrannize minority groups and was almost certain to lead to suboptimal policy outcomes (see, for example, Eule 1990; Linde 1994; Magleby 1984). They affirmed the view put forward by Madison in *Federalist #10* that direct democracy was not only unworkable on a large scale, but also undesirable because it empowered majority factions swayed by prejudice and emotion to oppress unpopular minorities. Public choice literature, with its emphasis on the ability of minority factions to disproportionately influence legislatures and agencies, draws into question whether representative institutions are much better at protecting the public welfare against rent-seeking special interests or at encouraging reasoned deliberation (Garrett 2008). Recent scholarship realistically contrasts representative bodies and the initiative process, analyzing the strengths and weaknesses of both. The conclusions do not necessarily point in the direction of eliminating direct democracy. Instead, a focus on both kinds of governance institutions through the lens of hybrid democracy suggests that they could interact

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<sup>1</sup> Use of referendums is also on the rise worldwide; they have been held recently on every continent except Antarctica (DuVivier 2006). The United States is one of the few major democracies never to have held a national referendum.

<sup>2</sup> In their comparative analysis, Mendelsohn and Parkin (2001) use the term 'referendum democracy' to capture this idea: The reality that world wide 'referendums ... [are] intricately intertwined with the institutions and agents of representative democracy,' including being used by 'competing elites (including elected representatives) ... to further their own agendas' (p. 4).

in positive or negative ways for the public welfare – and that reforms might be possible that would strengthen both parts of our hybrid system.

This chapter will discuss the contributions of public choice to our understanding of direct democracy in three areas: 1) the role of organized interest groups and the influence of money; 2) the ability of citizens to vote competently on initiatives and therefore enact policies that align with their preferences; and 3) the strategic behavior of political actors in a hybrid democracy where initiatives can shape candidate elections and where the successful implementation of direct democracy depends on the actions of often hostile elected and public officials. Much of the work discussed here is theoretical analysis by public choice scholars. Empirical work remains in the early stages, but it represents one of the most promising avenues for future studies from the political economy perspective. Throughout this chapter, I will mainly discuss the direct initiative process, which tends to be the institution of direct democracy primarily studied in the United States.

## **I. Interest groups and the role of money**

Although the progressive and populist reformers responsible for adoption of mechanisms of direct democracy were active long before public choice became influential in the academy, both groups offer similar diagnoses of the problems hindering legislatures from passing public-regarding legislation. Both the reformers and public choice scholars point to the disproportionate influence of relatively small, organized and wealthy special interests on the policy choices made by legislators. While they may not have articulated the elegant theory of Mancur Olson (1965) to explain why such interest groups could effectively exercise clout in the legislative branch, proponents of direct democracy at the turn of the last century believed that state legislators, together with party bosses, were systematically favoring well-heeled corporate interests such as the railroads and mining companies. Their solution was to establish governance mechanisms that they believed could be used effectively only by majorities. They believed that the initiative, referendum and recall allowed ordinary citizens as a group to bypass a legislature beholden to special interests, forcefully reminding lawmakers of the will of the majority outside the regular election cycle.

I do not intend to claim here that the progressive and populist advocates for direct democracy were the first public choice theorists or would have subscribed wholeheartedly to the conclusions many public choice scholars reach about the political process. For example, these reformers supported direct democracy as a way not just to open up the political process to greater majoritarian influence, but also to enable voters to educate themselves on policy and encourage them to become more civically engaged (Smith and Tolbert 2004, p. xvi). Public choice scholarship leads us to be skeptical of claims that adopting the initiative will motivate voters to spend a great deal of time trying to influence political outcomes, given the small likelihood that their particular contribution will make a difference to any outcome and the reality that any benefits of political action will be shared widely, including by those who free-ride on the activist's costly effort. This was not the analysis of the twentieth-century reformers, who emphasized the pedagogical possibilities of direct democracy.

This section focuses on the concern shared by the early proponents of direct democracy and public choice scholars: the influence of relatively small interest groups in the political process. First, I will discuss scholarship that suggests the initiative process succeeds in influencing the legislative process so that policy outcomes are closer to the preferences of the majority. Second, I will turn to the flip side of hybrid democracy and assess the role of organized interest groups in using the methods of direct democracy. Although organized groups continue to play a disproportionately influential role in the initiative process, the kind of group that can take advantage of this process may be different from the kind of group that succeeds in achieving its

objectives through traditional legislation. Finally, I will address a related aspect of direct democracy: the role of money in the initiative process. To the extent that large amounts of money can influence aspects of direct democracy, organized groups or wealthy individuals deploying economic resources will exercise disproportionate influence in this realm of politics.

#### **A. Empowering majorities through direct democracy**

One of the main focuses of scholarly attention has been to provide theoretical frameworks to predict whether the presence of the initiative affects policy outcomes – adopted through both direct democracy and the traditional lawmaking process – so they are more closely aligned to the preferences of the majority, and then to test those theories empirically. This preoccupation with the question of whether the initiative benefits the many or the few, to use Matsusaka's (2004) phrasing, is not surprising because empowering the majority against special interests was the primary objective of those who advocated for adding direct democracy to the political process in the states. Generally, the literature predicts that direct democracy will influence policy outcomes toward the preferences of the majority, and the findings of empirical studies support that conclusion. The general tendency toward majoritarian outcomes depends on certain conditions, however, such as the representativeness of the people who turn out to vote in an initiative race and the ability of voters to cast their ballots competently, that is, in line with their preferences.

Using game theory, Gerber (1996) explains why the possibility of the initiative process not only results in direct legislation that aligns with the preferences of the majority (or, more precisely, the median voter) but also influences legislators to move policy outcomes closer to the will of the majority.<sup>3</sup> The idea is intuitively appealing: strategic legislators, knowing that an initiative could force policy to a position favored by a majority of voters but far from their own preferences, will move policy closer to that favored by the median voter in order to head off the initiative. The policy they choose will not be as extreme as reformers favor, but it will be close enough to the median voter's preference to eliminate the threat provided by recourse to direct democracy. Thus, the mere possibility of an initiative will influence policy outcomes adopted through the traditional legislative process without the need for an actual popular vote. As Gerber concludes, the initiative process therefore acts as a constraint on legislative actors to shape their behavior so that outcomes are closer to the preferences of the voters – it is a mechanism to reduce principal-agent slack.

Divergence between the principals (voters) and their agent-lawmakers is likely for various reasons: voters face substantial monitoring costs, and they may not be able effectively to sanction wayward lawmakers, depending on the amount of competition in a particular race (a function of the political institutions that incumbents design). In addition, candidates are 'bundles' of issues, so a voter might decide to support a candidate because, on balance, her positions more closely track the voter's preferences even though the lawmaker's position on a particular issue is far from the voter's (Besley and Coate 2000). The initiative process, which allows citizens to separate out individual policies and threaten to vote on them individually, provides a mechanism to reduce principal-agent slack on a few issues. More empirical work is required to identify those issues that are not likely to play a determinative role in a candidate election but which will spark the possibility of an initiative. A third reason for divergence between lawmakers' decisions and initiative outcomes may be that they reflect the preferences of different groups of people. Although outcomes on ballot measures reflect the median voter (at least of the group that turns out to vote in that election), lawmakers may take account of the preferences of residents in their districts, a group that includes people who voted in the last election and people who may vote in

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<sup>3</sup> See also Romer and Rosenthal 1978 (discussing importance of agenda-setter in determining outcomes of take-it-or-leave-it offers).

the future. Although they will certainly weigh more heavily the views of those who go to the polls to vote, representatives have incentives to consider the preferences of their constituents more generally.

The influence on the legislature from the presence of an initiative process is the “indirect” influence of direct democracy, and it underscores the need for the perspective of hybrid democracy to fully understand the effect of the initiative or referendum. Indeed, game theory suggests that if legislators and initiative proponents have full information about voter preferences, no direct legislation will be necessary because legislators will always move policy outcomes to the point where majority of voters will be satisfied and therefore unwilling to pass direct legislation on the topic. Of course, initiatives appear in the real world, sometimes frequently, suggesting that political actors do not have full information and may make mistakes in predicting the reaction of policy entrepreneurs who are willing to bankroll an initiative campaign or of the voters who will turn out to vote on the proposal. Even with full information, lawmakers may allow certain issues to be decided by popular vote because they wish to avoid the responsibility for making a controversial decision. Moreover, in most states, certain decisions, such as issuing bonds, have to be ratified or made initially by the people.

Matsusaka and McCarty (2001) use a similar theoretical approach as Gerber, but they introduce the assumption that legislators may be uncertain about voter preferences. Given uncertainty, under some conditions, the presence of an initiative process may actually result in legislatures enacting policies farther from the median voter’s preference than would be the case in the absence of direct democracy. When the legislator is uncertain about voters’ preferences, a group with extreme views may be able to successfully use the threat of an initiative to force legislative outcomes close to its preferences – but ever further from the median voter’s ideal point than the status quo. Under these conditions, ‘when moderate interest groups make the proposals, the voters are better off, but voters can be made worse off when extreme interest groups appear’ (p. 415). The Matsusaka/McCarty model leads to the conclusion that conditions under which the initiative makes voters worse off are probably less frequently present than conditions under which voters benefit. But the authors underscore that the political environment – including uncertainty, the extent of the principal/agent slack between voters and their representatives, and the extent of divergence among the preferences of lawmakers, voters and interest groups – matters to the outcome. Introducing uncertainty into the model also provides an explanation for why initiatives ever make it to a popular vote instead of always being successfully headed off by a legislative response moving policy closer to the median voter’s preference.

Understanding that an initiative process has both direct and indirect effects, influencing policy outcomes even when an initiative is not actually enacted but is only threatened, shapes the empirical work testing whether outcomes in initiative states differ systematically from outcomes in states without a robust initiative process. Researchers must compare all legislation – direct and traditional – between initiative states and non-initiative states to determine whether the initiative process leads to different outcomes. Not surprisingly given the influence of public choice, one area of focus for such studies is state fiscal policies. Public choice scholars have long argued that relatively small, organized groups have disproportionate influence over tax and spending decisions of state legislators, which leads to greater spending and either higher taxes or larger deficits (or both) than the majority of voters would prefer (see, for example, Buchanan and Tullock 1962; Niskanen 1971).

Matsusaka (2004) provides the most extensive empirical test of whether direct democracy exerts influence over state fiscal decisions and, if so, whether that influence is in the direction of the majority’s preferences or of some other organized, relatively small interest groups that use the initiative to their advantage. Using data from the states and several large cities in a cross-sectional analysis, Matsusaka finds that the presence of the initiative process has led to three

systemic effects on fiscal policy in the last three decades of the twentieth century: lower overall spending by state and local governments; decentralization of spending as spending shifted away from state government control and toward local governments; and a reduction of broad-based taxes with an increased use of user fees and charges (Chapter 3). Using opinion poll data, he then concludes that these changes in fiscal policy correspond to the preferences of a majority of the public, thereby demonstrating that the initiative process favors majoritarian outcomes with respect to tax and spending decisions rather than favoring powerful special interests.

Although public choice leads naturally to a focus on fiscal policies, other empirical studies aim to discern systematic differences in other sorts of policies between initiative and non-initiative states. Some studies, discussed further in Section III.B., assess differences in the design of political institutions; these are motivated by the suspicion that a particularly powerful special interest in the traditional legislative process is the legislators themselves. They favor political institutions which increase the possibility of their continued reelection and which systematically exclude new entrants into the political market. A subset of these studies target differences among features of institutional design primarily aimed to constrain lawmakers in their spending and taxing decisions, and so are related to studies like Matsusaka's that identify fiscal issues as particularly fertile environments for special interest influence and agency problems. For example, Tolbert finds that states with initiatives are significantly more likely to have tax and expenditure limits and supermajority voting rules for tax increases than non-initiative states (1998). Matsusaka's analysis of opinion poll data suggests that these fiscal limitations reflect majority preferences about the level of spending and taxation and the structure of taxation; however, the evidence that these institutions succeed in reducing spending independently of legislative will to do so is weak at best (see, for example, Kousser, McCubbins and Rozga 2008).

Recently, other empirical work has studied particular social policies, and again scholars have found that the outcomes are closer to the preferences of the median voter in states with direct democracy than in states without such institutions. For example, Gerber (1999) obtains this result with respect to death penalty laws and parental consent for abortion laws (pp. 122-35); and Matsusaka (2007a) finds the laws concerning seven policy issues, including various abortion laws, death penalty laws, English-only laws, job discrimination laws and same-sex marriage laws, are different in initiative and non-initiative states, with the former having policies closer to the outcomes favored by a majority. When he assesses these issues, along with a few others like term limits and the estate tax, he finds that policies in states with the initiative process were 17 to 19 percent more likely to converge with majoritarian preferences than policies in states without direct democracy (Matsusaka 2007b). These conclusions with respect to social issues, many of which have implications for racial and ethnic minority groups, women, and gays and lesbians, bring up the question that primarily concerned legal scholars writing about direct democracy before the current rigorous analysis provided by those working from a political economy perspective (Bell 1978). Namely, the concern raised is whether these policies that appear to more closely reflect the preferences of the majority inappropriately burden the rights of minorities. In short, how do we know when vindicating the will of majority becomes the oppression of the rights of the minority?

One answer to this concern is that judicial review is available with respect to direct legislation, just as it is with respect to traditional legislation, some of which may be affected by the presence of direct democracy. Just as legislators may sometimes pass legislation that violates the equal protection or due process guarantees of the Constitution, so can the people. In those cases, courts have the power to invalidate all or part of the statute or state constitutional provision that ignores constitutional protections. The frequency of judicial invalidation of direct legislation suggests that judges are willing to exercise their power of judicial review in this arena, notwithstanding demonstrated popular support for the policy. Between 1960 and 1999, for

example, more than half (52 percent) of 163 statewide initiatives in California, Oregon, Washington, and Colorado approved by voters were challenged in court after the election, and courts nullified more than half (55 percent) of the challenged measures in part or in their entirety, for a total invalidation rate of 28 percent. (Miller 2005, pp. 155-56). Nevertheless, direct democracy would be open to criticism if the evidence suggested a systematic tendency to enact unacceptably oppressive laws relative to the legislative process. One reason Madison and the founders favored representative democracy characterized by political institutions designed to make enacting laws difficult was to guard against the tyranny of the majority. The vetogates throughout the legislative process – including committees, bicameral consideration, rules governing debate and amendment, and some supermajoritarian voting requirements – are designed to slow legislation and even to block enactment of the vast majority of proposed bills. In practice, they also operate to empower economic or social minority groups to protect their interests through strategic use of the vetogates to block proposals that would affect them negatively. The design of the legislative process also allows those with intense preferences about particular policies to exercise significant influence over outcomes (Cooter 2000, pp. 193-96). The initiative process lacks these vetogates; thus, it allows less filtering of the immediate desires of the majority, potentially exposing minorities to discriminatory and unfair legislation that would never survive the legislative process.

While the evidence on this issue is mixed, studies increasingly cast doubt on the proposition that minorities systematically fare more poorly in the direct democracy realm than in the legislative realm. One of the first studies found that, of all ballot measures discriminating against minority groups, over three-fourths of them passed, a figure well above the passage rate for initiatives generally (Gamble 1997). However, Donovan and Bowler's study (1998) of anti-gay and anti-lesbian initiatives finds a much lower passage rate at 27 percent, with only 18 percent having anti-minority policy outcomes (p. 1022). This rate is significantly lower than the general passage rate for all initiatives. Moreover, the virtually all of the few initiatives that have passed and can be characterized as anti-minority have been invalidated by courts (Donovan and Bowler 2004, p. 104). Another study focusing on all initiatives in California, not just those that were explicitly aimed at racial minorities, demonstrates that the majority of Latino, Asian American and African American voters were on the winning side of the vote, although Latinos were less likely to vote for the winning side than the other two racial groups (Hajnal, Gerber and Louch 2002). This study also determines that the few initiatives in California that were targeted at particular minority groups were more likely to aim at Latinos than at blacks or Asian Americans, providing additional evidence that Latinos may do relatively less well in the direct democracy realm.

One limitation of these studies is that they assess the influence of initiatives solely through the passage rate of the initiatives themselves and thus do not also take account of policies enacted by the legislature. This narrow focus limits the results in at least two ways. First, '[i]f the threat of direct legislation makes legislators more responsive to anti-minority views in the population, then analyzing only direct effects will understate the anti-minority potential of direct legislation institutions' (Gerber and Hug 1999, p. 7). Second, '[i]f votes on anti-minority direct legislation lead legislators to compensate affected minorities by passing more protective legislation, then analyzing only direct effects will overstate the anti-minority potential of direct legislation institutions' (ibid). In short, the lens must be focused on all aspects of hybrid democracy to obtain a full sense of the interplay between initiatives and minority rights. However, these studies are challenging and few have been done. A related analysis by Wenzel, Donovan and Bowler (1998) examines how direct democracy, and the campaigns surrounding anti-minority initiatives, may affect public opinion about those groups. Using data about citizens' views before and after initiatives related to racial groups, they conclude that public opinion does change to be less tolerant, particularly the opinions of Republican voters toward immigrants.

These effects on the political environment cannot be undone by judicial review that strikes down anti-minority initiatives which run afoul of constitutional protections.

Much more theoretical and empirical work is required before we can reach confident conclusions about any systematic effects of direct democracy on minority groups. That work must do more than compare passage rates of initiatives and referendums; it must analyze indirect effects as well. In further empirical work, special attention should be paid to whether there is a disproportionate negative impact on particular minority groups. For example, the studies so far raise a particular concern about the effects of direct democracy on Latinos and the views of voters toward immigrants. Again, the lens of hybrid democracy suggests that a full understanding requires a focus on all aspects of governance. Some have argued that one consequence of the use of initiatives in California to target racial groups in the 1990s was a voter backlash against the Republican Party, which was seen as the main force behind that strategy (Bowler, Segura and Nicholson 2006; see also Smith and Tolbert 2007, pp. 426-29). This reaction benefited the Democratic Party, and therefore enhanced the ability of the legislature to enact policies that tend to be supported by the groups that were the targets of the initiatives. In short, the consequences for minority groups of a robust initiative process as part of the institutions of governance are complicated and mixed, and they require further rigorous study by public choice scholars employing a sophisticated awareness of interest group interaction and voter behavior.

#### **B. Interest groups that succeed in the initiative process**

One of the key contributions of public choice scholarship is the importance of collective action in shaping policy outcomes. Although this insight was hardly original, public choice theorists have developed a rich literature describing the characteristics of groups likely to exert policy-making influence. This scholarship undermines any simple-minded view of direct democracy as necessarily empowering individual voters against organized and well-funded interest groups. On the contrary, just as in the traditional legislative realm, organized groups are likely to have a disproportionate effect on the outcomes adopted as a result of the initiative process. Organization and money are crucial to petition drives, for example, as well as to successful campaigns. Instead, the crucial question is whether different sorts of interest groups from those with clout in the legislature are able to harness the power of the initiative process, and whether those groups are more likely to reflect the preferences of most voters. In that case, the majority of voters are empowered by the presence of direct democracy because the process strengthens interest groups that better represent them, and perhaps because the initiative encourages the formation of groups reflecting broader-based concerns than the groups that tend to dominate the traditional legislative arena.

Gerber (1999) has produced the most systematic scholarship identifying the kinds of interest groups that wield the power of direct democracy most effectively to adopt new policy either directly through popular lawmaking or indirectly by pressuring lawmakers to adjust their policies. She concludes that groups reflecting broader citizen interests are better able to use the tool of the initiative than can groups representing narrower economic interests, which more effectively use the vetogates in the legislature to block proposals they oppose or benefit from logrolling to obtain targeted benefits through legislative compromise. This conclusion is consistent with the results of the theoretical and empirical studies discussed above, which demonstrate that the initiative process moves policy outcomes closer to the preferences of the median voter. If, in the end, success of a ballot measure depends on obtaining majority support at the polls, then only those groups supporting policies likely to attract majority support will be able to deploy the initiative as a method to influence policy.

Gerber views interest groups as choosing among the various methods of influence and selecting those that promise them the greatest chance of achieving their policy objectives.

Different kinds of groups have different kinds of monetary and human resources, and they will use their assets to intervene in the policy process in the ways most likely to maximize their influence. Economic groups – like business interests and trade associations – have substantial monetary resources but relatively restricted membership bases. In contrast, citizen groups – like broad-based ideological groups and, in Gerber’s classification system, labor unions – have substantial human resources and in some instances monetary resources. Not surprisingly, these two types of groups will use direct democracy in very different ways. With sufficient financial resources, broad-based citizen groups can effectively use the initiative process to change policy so that it is closer to their preferences either through actually passing direct legislation or credibly threatening to do so. Economic interests are better suited to deploying their substantial financial resources to block change proposed through the initiative and therefore to preserve the status quo. Although occasionally economic interests will try to use the initiative process to enact change they favor, they should fare systematically less well in the realm of direct democracy than citizen groups will.

Gerber’s empirical work supports these conclusions. Her survey of six hundred interest groups revealed that interest groups rationally selected mechanisms to influence policy depending on which were best matched to their characteristics. Citizen groups relied more frequently on direct democracy to change policy (Chapter 5). Her analysis of campaign spending by the various types of groups found that ‘initiatives that received majority support from citizen interests passed at a significantly higher rate than those that received majority support from economic interests’ and that ‘the set of successful initiatives received a greater share of supporting contributions from citizen interests than from economic interests, whereas unsuccessful initiatives received a much larger share of supporting contributions from economic interests’ (pp. 119-20).

I will return to these findings both in the discussion of the role of money in the initiative process in the next subsection and of the information that voters glean from knowing about financial support for or against an initiative from particular groups in Part II.A. For the purposes of this discussion of the nature of collective action, Gerber’s work demonstrates that the groups empowered by direct democracy may be systematically different from those who can exert substantial influence in the traditional legislative realm. Indeed, if a citizen group finds its objectives stymied in the legislature because a well-heeled economic group has effectively bottled up a vetogate, then the citizen group in an initiative state can take advantage of the possibilities of hybrid democracy by turning to the realm of direct democracy to adopt policy. This change in strategy may not be available to an economic group that cannot rely on the support of the voters if it is forced to resort to the polls. Although the citizen group must also command sufficient financial resources to overcome some of the hurdles to direct legislation like signature gathering, its ability to propose a policy that resonates with the majority of voters and its command over substantial human resources may allow it to succeed in a way that economic interests cannot. Although some have questioned Gerber’s classification of groups (see, for example, Smith 2004, p. 104), her conclusions that interest groups choose to pursue policies through the governance institutions that play to their strengths and that we should expect certain types of groups to succeed more often in the initiative process and others to succeed more often in the legislature are persuasive. Additional work in the public choice tradition that disaggregates interest groups into distinct types and tries to develop a better understanding of which groups can use initiatives to set policy and which must try to resist direct legislation that impairs their interests will shed greater light on collective action in a hybrid democracy.

Not only can the presence of direct democracy provide certain groups greater leverage to influence policy, but the initiative process itself shapes interest groups. As public choice’s emphasis on the effect of institutions on the nature of collective political action suggests, hybrid democratic institutions lead to a different constellation of interest groups than do purely

representative democratic institutions. One extension from Gerber's work is to analyze whether the presence of the initiative process actually increases the mobilization of citizen groups in states with robust mechanisms of direct democracy relative to states without popular lawmaking. Boehmke (2002) has found that not only are citizen groups more active in states with the initiative process because they have access to a powerful policy-making tool that benefits them relative to other interest groups, but that initiative states also have a greater diversity of interest groups with more active citizen groups in the mix. 'The numbers indicated that direct initiative provisions increase the proportion of citizen groups from 28% to 33% of a state's total interest group population' (p. 842).<sup>4</sup> A change of this sort in the interest group environment of a state will affect both parts of hybrid democracy, as the new groups are also able to exert influence in the legislature through mobilizing voters, shaping campaigns, and using the threat of direct legislation. After all, the strengths of citizen groups – that their policy objectives are shared by many voters – will influence re-election-minded lawmakers if they believe the groups have influence over the decisions of voters in candidate elections as well as initiative battles.

Moreover, leaders of interest groups understand that they can use the initiative process to change the internal dynamics of their groups, as well as to affect the fates of competing interest groups. Citizens who become engaged with an issue in a petition drive or through involvement in a ballot measure campaign may stay engaged with the interest group as it pursues other objectives on its agenda, or they may provide financial resources that can be spent by group leaders on other projects. Indeed, citizens who live in initiative states are more likely to contribute money to interest groups, but not more inclined to contribute to political parties or candidates, than are citizens of non-initiative states (Smith and Tolbert 2004, p. 110). Of course, one way to better understand the role of interest groups in a hybrid democracy is to follow the money that they spend, and we thus next turn our attention to the role of money in the initiative process.

### C. The influence of money in the initiative process

Wherever interest groups are involved in politics, money can be found as well. And it can be found in substantial quantities in the initiative process: in 1998, \$400 million was spent nationwide on ballot questions, compared to \$326 million spent in the 2000 presidential campaign overall (Matsusaka 2005a, p. 191). In direct democracy, fewer campaign laws restrict the flow of money to initiative campaigns than in candidate campaigns, where limitations on contributions are the norm. The Supreme Court has consistently held that the First Amendment forbids states from limiting the amount of money spent in support of or in opposition to a ballot measure and from restricting contributions to issue committees (*Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981)). The Supreme Court has also ruled that states cannot prohibit advocates of a ballot measure from paying petition circulators (*Meyer v. Grant*, 486 U.S. 414 (1988)) although some lower courts have allowed states to prohibit compensating circulators on a per-signature basis (Gloger 2006). The primary regulation in initiative and referendum campaigns is disclosure, and states vary with respect to the effectiveness of their laws in ensuring timely and full disclosure of the groups behind the expenditures in direct democracy. The increasing involvement of candidates with ballot measure campaigns may provide an opportunity to justify restriction on campaign contributions, at least when applied to candidate-controlled issue committees, through the state interest in eliminating *quid pro quo* corruption or the appearance of such corruption.<sup>5</sup> If a candidate views a ballot measure campaign as vital to her election or as a

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<sup>4</sup> See also Smith and Tolbert 2004, pp. 99-102 (also finding greater diversity of interest groups in states where there is more usage of the initiative process).

<sup>5</sup> This is the traditional state interest justifying campaign finance regulation in campaign elections. See *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (per curiam); *McConnell v. Federal Election Commission*, 540 U.S. 93, 150-52 (2003).

way to enact her agenda over the opposition of other political actors, she will presumably be grateful to those who support her position and likely to reward them with access and other special treatment (Garrett 2005a, pp. 1105-10; Hasen 2005).

It also seems consistent with Supreme Court jurisprudence to regulate money spent in recall elections. Indeed, some local governments apply relatively stringent restrictions on campaign contributions in such campaigns.<sup>6</sup> Because elected officials and candidates are vitally involved in a recall – as the target of the recall and as hopeful successors – recalls clearly present the possibility of actual *quid pro quo* corruption and the appearance of such corruption. This is particularly true in states like California where the vote on whether to recall an elected official occurs simultaneously with the election of a successor, should the recall succeed (Garrett 2004, pp. 254-62). Certainly, the target of a recall effort will be very attentive to the identities of the donors to committees opposing the recall and will likely harbor the same warm feelings toward those donors as she would toward supporters of her election campaign. Moreover, the committees supporting a recall will often have a successor candidate in mind, and perhaps even directly involved, who will appreciate the financial contributions of groups and individuals supporting the recall. Even if a successor candidate is identified only after the recall drive has begun, he is likely to be very aware of the forces behind the recall. In addition, he can use pro-recall committees to raise funds that can be deployed to help his candidacy succeed on Election Day. In short, recalls are inherently hybrid democratic processes with elements of ballot measures and candidate elections, occurring simultaneously in some states, and therefore they can likely be regulated constitutionally in the same way that candidate elections can.

To accurately gauge the influence of money spent in direct democracy, it is important to focus on each of the two stages of an initiative campaign – the petition drive and the election campaign – because money has different effects depending on the stage. One substantial expense for proponents of a ballot measure is money spent to qualify a question for the ballot through signature gathering. In campaigns with little broadcast media, signature gathering is generally the largest expense in the campaign. For example, data from California reveal that in 65 percent of initiatives qualifying for the ballot between 1990 and 1988, proponents spent more during the qualifying stage than for any other aspect of the campaign (Donovan, Bowler, McCuan and Fernandez 1998, p. 97, citing Price 1988). Petition drives using paid circulators can cost \$2-3 million in California, and some firms will offer money-back guarantees for a sufficient price (Gloger 2006; Garrett 1999, pp. 1852-52). Although some grassroots groups can still mount successful petition drives using volunteer circulators, many resort to paid workers because their use provides greater certainty of ballot access. Quite simply, money is a sufficient, though not yet necessary, condition for ballot access.

Groups and individuals with sufficient funding can therefore play the important role of agenda-setter in this realm of policy – a role that public choice teaches provides a substantial advantage in the formulation of policy (Romer and Rosenthal 1978). The questions that are put before voters are determined in large part by wealthy groups and individuals; thus, although the policies enacted are those supported by a majority of voters, they do not necessarily reflect the voters' priorities. For example, it may be that a substantial majority of voters favor various reforms to the state's educational system, including smaller classes, merit pay, and better technology, but the measure that well-heeled interests work to qualify for the ballot focuses only on charter schools. While voters will pass that ballot measure because they prefer robust charter

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<sup>6</sup> For example, San Diego limits the campaign contribution an individual may make in a recall to \$250 or \$300, depending on the office that is the subject of the recall. San Diego, Calif., Mun. Code ch. 2, art. 7, div. 29 § 27.2935 (2008). See also Santa Rose, Calif., City Code, tit. 10, ch. 10-34.040 (2008) (campaign contribution limitation of \$500 for city recalls).

schools to the status quo, they would have preferred to have been asked to approve a different sort of reform.

Although qualification for the ballot does not ensure that a proposal will be enacted, ballot access itself carries several advantages (Garrett and Gerber 2001). A successful petition drive can draw the attention of the public and policymakers to an issue, thereby affecting the state and sometimes the national policy agendas. Term limits for state and federal legislators became a prominent issue in the 1980s and 1990s because of the initiative process, and the debates on other social issues like affirmative action and same-sex marriage have been fueled and shaped by initiative campaigns. The public tends to pay more attention to issues when they are framed by the excitement of a contest. In addition, only groups that can credibly threaten to qualify an initiative for the ballot can benefit from the indirect effects that direct democracy exerts on the traditional legislative process. Although some groups with substantial grassroots resources will be able to mount successful petition drives, the groups that can point to an ample warchest coupled with a policy issue likely to resonate with a majority voter will be able to bargain most effectively with the legislature. Ballot access is a prerequisite to a vote, so unless a group can credibly demonstrate that it is likely to qualify the measure, the legislature will not feel much pressure to change the status quo. Perhaps the clearest example of this occurred in 1998, when a group of Silicon Valley entrepreneurs spent \$3.5 million to qualify a charter schools initiative and accumulated millions more to spend in a campaign (Garrett 1999, pp. 1859-61). The group agreed to pull the measure from the ballot if the legislature and Governor adopted a compromise proposal over the opposition of another interest group that is particularly influential in the legislative process – the teachers' unions. Given the entrepreneurs' demonstrated ability to navigate through a petition drive, their access to the resources necessary to mount a formidable campaign, and their advocacy of an issue that was likely to garner voter approval, the compromise was enacted, and the initiative did not appear on the ballot.

Consistent with Gerber's (1999) work, then, only certain groups that advocate issues that will appeal to voters can wield indirect influence to change legislative outcomes, but those citizen groups also need access to resources that will enable them to mount a successful petition drive. The surest way to success in gathering signatures, even for groups with lots of human resources, is money. This reality may suggest that only a subset of Gerber's citizen groups – those that can afford to pay petition gatherers – will be able to play the bargaining game with the legislature and win. Further study differentiating among citizen groups on the basis of their access to some level of financial resources as well as grassroots support may shed further light on this question. Of course, grassroots support may translate into access to funding, especially as the Internet allows groups to raise significant money through small donations from many interested citizens (de Figueiredo and Garrett 2005). Sophisticated use of web-based fundraising, however, also demands expertise and financial commitment.

Reformers often decry the influence of money in ballot access, but the typical reform proposal – to increase the number of signatures required to put a measure on the ballot – would only increase the power of well-heeled groups who could continue to pay the higher price of admission. A public choice perspective suggests that other reforms would be more likely to combat the problem directly. For example, Lowenstein (1999) has proposed reducing the number of signatures to qualify a measure, but to require that the petitions be located a certain public buildings, like fire stations, libraries, and schools, so that voters would have to travel to sign the petition (pp. 2007-08). Although wealthy groups could still promise transportation to potential signers, only those who really supported placing the measure on the ballot would be likely to spend the time necessary to sign the petition. Alternatively, reforms could reduce the cost of obtaining signatures so that more groups, particularly those with grassroots appeal, could afford it. For example, if petitions could be signed on the Internet, then groups would not need to pay

petition gatherers but could use much less expensive techniques to encourage voters to visit the virtual petition and add their support. If the logistical challenges of such a reform (for example, verification of the authenticity of the signature and other anti-fraud devices) can be overcome, only then should the number of signatures required for access be substantially increased to ensure that measures with significant support are presented to the voters on Election Day.

The second stage of the initiative process is the campaign itself, which begins during the petition drive and stretches to Election Day. Money also plays a role in the outcomes of ballot contests, but the picture here is more complicated. Public choice scholars have been at the forefront of studying the role of money in determining whether a measure wins or loses, and recent work is beginning to provide a more nuanced view of the influence of money in this respect. In an early influential study inspired by public choice methods, Lowenstein (1982) found that between 1968 and 1980 in California, where spending levels exceeded \$250,000 and one side had a two-to-one spending advantage, opposition committees defeated 90 percent of the measures they opposed, and proponents won 64 percent of the time. Other studies replicated these findings (Owens and Wade 1986, pp. 684-87; Magleby 1984, p. 147). Recently, however, one public choice scholar has drawn these long-accepted conclusions into question. Stratmann (2006) focuses on the money spent for media advertisements and, most crucially, he includes the endogeneity of spending in his analysis of initiative campaigns. Spending in initiative campaigns is endogenous because a group supporting a measure that is not doing well will spend less, while a group sponsoring an initiative that is likely to succeed may spend more to ensure that victory. Previous studies had not considered this endogeneity, nor had they used the sort of detailed information on television advertising on which Stratmann relies. He concludes that both opposing and supporting campaign spending has a statistically significant impact on outcomes, with supporting expenditures having a larger marginal impact than spending by opponents (p. 798). This last conclusion is in sharp contrast to the earlier studies which found only opposing spending to affect outcomes. It is clear that more work is required to fully understand the relationship between spending and electoral outcomes in direct democracy. For example, it may be that the timing of the expenditures affects outcomes; one could hypothesize that the ability to infuse money into an initiative campaign at a particularly crucial time, perhaps close to the election or in response to the other side's spending, could be particularly influential.

Studies have also shown that who is spending the money may have as much to do with its effect as does the amount of funding, relative to the spending by the groups on the other side. Gerber's analysis of different kinds of interest groups concludes that economic interests most effectively deploy their financial resources in the context of direct democracy to protect the status quo by defeating popular initiatives and referendums (Gerber 1999, pp. 101-20). Through substantial negative spending, economic groups can convince voters that the proposed policy change may have unexpected deleterious results and thus provoke a 'defensive no' vote as the electorate opts to keep the status quo that they know (Bowler and Donovan 1998, pp. 53-55). Indeed, 'voters prefer to stick with policies whose consequences they have experienced, ... rather than risk voting for a new initiative whose consequences may be very bad. Thus, spending vast sums of money to defeat an initiative may make voters sufficiently confused and uncertain that they vote against it' (Lupia and Matsusaka 2004, p. 471). This result is consistent with the earlier studies by Lowenstein and others on the influence of spending by opponents in direct democracy.

In addition, however, Gerber further discovers that significant spending by economic groups in favor of a ballot measure may actually increase the chance that the initiative will be defeated. To test this, Garrett and Gerber (2001) have studied 63 statewide ballot measures in California and determined whether the spending was mainly from large contributions (\$10,000 and higher), which tend to come from economic interests, or from money provided through smaller contributions, which they assume were more consistent with citizen interests. They again

find that the greater the share of large opposing contributions, the lower the support the ballot question receives. Interestingly, although not statistically significant, the findings also suggested that ‘measures that receive a greater share of large supporting contributions are less successful than those that receive relatively more small contributions’ (p. 89). This conclusion supports the argument made by Bowler and Donovan (1998) that heavy, one-sided spending to support an initiative may actually cause voters to vote ‘no’ if the spending reveals that an unpopular economic group, such as a cigarette manufacturer, a gambling interest, or an insurance company, is behind the initiative (p. 147). Thus, disclosure of spending in an initiative campaign by groups with well-known reputations provides information to voters that helps them cast their ballots competently – the topic to which I turn to next.

## **II. Voters and direct democracy**

In direct democracy, voters make law either by passing a statute or a constitutional amendment. The perspective of public choice has been necessary to move away from the idealized vision of the voter that undergirded the Progressive movement’s support of the initiative process and to develop a more realistic view of voters’ capabilities. Given the high cost of becoming informed about every issue presented on the ballot, it is unlikely that many voters will develop the knowledge to reach an informed judgment before they vote. Even a voter who is civically engaged with respect to one or two ballot measures is unlikely to have full information on all the questions and races on the ballot. Indeed, one of the most influential insights from public choice is that, in light of information costs and the low probability of being influential in policy making, it would be irrational for voters to spend their time to become experts (Downs 1957). The conclusion, however, is not necessarily the pessimistic one that voters cannot vote in accordance with their preferences. Instead, public choice scholars have worked to understand the role of voting cues, or heuristics, in enabling voters to vote competently. A second issue relating to voters is how the decisions they make are structured. Social choice theory teaches that decision making on one issue at a time, presented as a binary choice between each proposal and the status quo, may lead to irrational outcomes as a result of sequential elimination agendas (Kousser and McCubbins 2005). Reforms to respond to this decision making pathology are less straightforward than those empowering voters to vote competently with limited information, but they may still be possible if we take advantage of the institutions of hybrid democracy.

### **A. Voter competence and voting cues**

Voters are competent ‘if they cast the same votes they would have cast had they possessed all available knowledge about the policy consequences of their decision’ (Gerber and Lupia 1999, p. 149). If voters have full information and the capacity to assess the validity of that information, they can vote competently; yet public choice scholarship underscores that few voters will have or develop this level of knowledge and understanding. In the absence of encyclopedic information, voters must find effective substitutes to allow them to make competent decisions. Scholarship on voting cues initially focused on candidate elections; drawing on public choice work, Popkin (1994) develops a theory of low-information rationality that emphasizes voters’ use of shortcuts drawn from information they encounter in the course of their everyday lives and other readily available information. Initiative campaigns may provide even less information for voters than candidate races because ballot measures are not often explicitly linked to political parties, denying voters the cue of partisanship. Moreover, candidates may not be visible in an initiative campaign, depriving voters of cues linked to personalities and ideology. As I will discuss in Part III.A., political parties and candidates are not entirely absent from direct democracy as these strategic political actors increasingly use the initiative process to further their policy agenda or to improve their chances of winning in candidate elections. Thus, voters who know of candidate or party endorsements may be able to use these shortcuts to decide whether to support or oppose a

ballot measure, but these cues will not be provided directly on the ballot, and they are not necessarily part of every initiative campaign.

In initiative elections, an effective voter shortcut is provided by information revealing the positions of various groups with respect to the ballot measure. In his study of the 1988 California insurance initiatives, Lupia (1994) demonstrates that voters can learn from endorsements publicized during initiative campaigns. Voters faced multiple, likely confusing, insurance initiatives, but the presence of well-funded campaigns and known endorsers with publicly recognizable reputations enabled uninformed voters to use shortcuts to vote as if they were informed. Total spending for the insurance campaigns in 1988 was more than \$82 million, revealing an aggressive campaign to publicize positions. For voting cues to promote voter competence, the voter must be able to identify which groups support or oppose a particular initiative and then determine the group with whom the voter has common interests. In these campaigns, the various interest groups and campaigners were identifiable as members of one of three main groups: the insurance industry, trial lawyers or consumer activists. Lupia compares voters who knew nothing about the initiatives' details but knew the insurance industry's position with voters who were models of civic virtue in that they consistently gave correct answers to detailed questions about the ballot measures. He also includes in the study a third group of voters who knew nothing about the ballot questions or about the insurance companies' preference. The first two groups exhibited similar voting patterns – demonstrating that the voting cue substituted for encyclopedic information – while the ignorant voters had entirely different voting patterns.

Not all endorsements will promote voter competence. The general conditions under which voters can learn from endorsements are derived and tested experimentally by Lupia and McCubbins (1998). They demonstrate that for a voter to learn from the statements of an endorser, the voter must believe that an endorser is both knowledgeable and trustworthy. Trust requires one of four additional conditions: 1) the listener and endorser must have common interests; 2) there must be a threat of verification imposed upon the endorser; 3) the endorser must face penalties for lying; or 4) there must be observable, costly effort on the part of the endorser. The conditions for trust must be established between a speaker and a specific audience, which need not include the voter who is observing the interaction. For learning to occur for the voter, however, it is critical that she understands the relationship between an endorser and the audience to whom he is speaking. If a speaker makes a statement to an audience that regards him as trusted endorser, then all listeners can be 'flies on the wall' and learn from that statement as long as they are aware of the relationship between the speaker and audience and know that the conditions for trust are met (Boudreau, Lupia, McCubbins and Rodriguez 2007). The presence of the conditions for trust is a separate requirement from whether an observer knows the conditions are met; both are necessary. Further, the presence of the conditions for trust does not guarantee that the observer knows about the conditions.

At least two kinds of groups might provide effective voting cues. First, ideological groups actively work to develop reputations and to publicize clear-cut positions on particular issues. Groups like the National Rifle Association, the Sierra Club, Common Cause and the National Organization for Women have an incentive to make sure that the public knows what they stand for so that they can attract members who will pay dues and so they can influence policy. Leaders of these groups can be trusted to take positions on ballot measures consistent with their ideological commitments because inconsistency will undermine the effectiveness of their organization by diluting their brand name. Further, they face punishment from their members who will cease to support them with monetary and human resources if they stray from their ideological commitments. The amount of money that they spend in an issue campaign is a signal to voters of the intensity of their support or opposition, another valuable piece of information. Because legal doctrine has been understood to prohibit states and localities from

placing contribution limits on money spent in initiative campaigns, voters can glean significant information by the amount of money spent by groups active in direct democracy (Garrett 2002, p. 680). If voters know what interests these groups represent and whether they have common (or opposing) interests, they can use such information as a voting shortcut when the groups have taken a public position on a ballot measure.

Second, the endorsement of economic groups, like the insurance industry in Lupia's study of ballot measures, can serve as an effective voting cue. Again, citizens can often determine whether they have common interests with an economic group that has taken a position on a ballot measure and can therefore use this information to vote competently. For example, voters may be able to make accurate decisions about their vote if they know the position of Philip Morris on an initiative dealing with regulating smoking; indeed, in a 1994 initiative campaign, many voters decided to oppose the so-called 'antismoking' measure when they learned that Philip Morris had spent \$13 million in support of the measure. Other cues were available in that election as well, including the opposition of former U.S. Surgeon General C. Everett Koop, who had a reputation for seeking ways to reduce smoking (Bowler and Donovan 1998, p. 61). Koop may be a rare example of an individual with a brand name whose communications could meet the conditions for trust; his career in public health was characterized by unrelenting work to reduce the incidence of smoking among Americans.

Additional work on voting cues, particularly those available in the environment of direct democracy, is required to determine which cues are most likely to promote competent decision making and which may lead voters to choices that are not consistent with their preferences. For example, Lau and Redlawsk (2006) study voting cues used in candidate elections and find that certain heuristics 'do seem to contribute to the probability of a correct vote, but only in particularly difficult choice situations and/or only for political experts' (p. 250). It is not surprising that those who are more politically sophisticated are better able to use shortcuts to cast their ballots competently. The key questions are which shortcuts can also help ordinary voters, and how that information can be provided in useful ways that catch their attention. With the increasing importance of the Internet in political campaigns, public choice scholars must also turn their attention to this new method of communication to determine whether it facilitates the use of effective cues, or whether it introduces untrustworthy information into the political environment or threatens information overload. Moreover, Lupia's influential study of insurance initiatives was based on campaigns where spending was high so voting cues were well-publicized. Future work most focus on issue campaigns that provide less salient or less trustworthy voting cues or cues on only one side of the measure; for example, direct democracy often determines how local governments deploy resources for infrastructure, but the information environment may be very different on the local level than on the state level (Garrett and McCubbins 2008). Further scholarship might also work to determine whether certain individuals other than politicians might provide effective voting cues. For example, under what conditions, if any, can the endorsement of someone like Bill Gates or Barbra Streisand serve as a shortcut to competent decision making, and how often do voters rely on such endorsements, whether or not they are trustworthy?

Public choice scholarship on voting shortcuts should form the foundation for disclosure laws regulating direct democracy. Some groups will eagerly and widely disclose information about their financial and other support of ballot measures because they want to provide signals to voters who share their preferences. Mandatory disclosure laws of the groups active in initiative races and the amount of money they are spending remain important, however, to ensure disclosure in all cases that will enhance voter competence. First, some groups know well that their endorsements of initiatives provide shortcuts for voters who disagree with them, as well as to those who share their interests. Groups such as the National Rifle Association or NARAL Pro-Choice America understand that publicizing their positions beyond the members of the group, or

beyond the universe of voters disposed favorably toward their objectives, may work counter to their objectives. Thus, they may seek to target their endorsements so that the information only reaches supporters, perhaps by publicizing support mainly in member newsletters or in emails sent only to members. Other interests, like cigarette manufacturers, insurance companies, and the oil and gas industry, know that many citizens perceive their economic interests as divergent, and thus widespread publicity of their positions may produce a voter backlash. Wider and systematic dissemination is crucial, therefore, to improve the competence of all voters, including those who would react negatively to the signal because they are aware they have opposing interests to the group.

Second, some have dismissed the need for disclosure laws because rational voters will disregard statements that cannot be attributed to credible sources (see, for example, *McIntyre v. Ohio Election Commission*, 514 U.S. 334, 348-49 (1995)). According to this argument, knowing that they will only influence voters when there is evidence that the information is credible, most groups will voluntarily disclose their identities. Those that do not disclose will find their messages have little effect on voter decisions. The flaw in this reasoning is that it overlooks what public choice scholarship teaches: when voter competence is the objective, then disclosure of the source of the communication is not primarily justified on the ground that it allows a citizen to judge the accuracy of the content of the endorsement. Rather it is the identity of the source and the amount of money it is spending to communicate (evidence of the cost and therefore the credibility of the signal) that provide voters the cues they need to determine whether the ballot question is in their interest (Kang 2003, p. 1172). This information has value independent of its bearing on validity of the arguments made in the advertisement.

Furthermore, well-crafted disclosure laws are required to combat deception. Case studies of group endorsements in initiative campaigns reveal instances of groups hiding behind innocuous sounding names or names that sound like groups with established brand names to send misleading signals to voters. In 2002 in California, for example, developers contributed substantial amounts of money to support several initiatives through a group called the Conservation Action Fund (Garrett and Smith 2005, pp. 314-15). Of course, voters could have dismissed endorsements from this unknown group as untrustworthy; however, the concern is that they may be misled by certain names, or that they may be denied useful information through the use of these veiled political actors. Had voters known that the so-called environmental initiatives were really bankrolled by developers, they might well have been able to vote more competently on the basis of common (or opposing) interests. In some cases, these deceptions would be unveiled even without mandatory disclosure laws; for example, if a group tries to misappropriate the brand name of an existing group, then the legitimate group will work to correct any misinformation and protect its valuable reputation. Properly designed disclosure laws, however, seek to ensure accurate information even in cases where no credible ideological group or other information intermediary works to correct the record.

The study of voting cues, particularly recent work that draws on cognitive studies that describe the limits of rationality, also provides guidance for the structure of any disclosure statute. Public choice has long been influenced by the realization that people are 'boundedly rational information processors' (Simon 1956); in short, ordinary people have cognitive limits and cannot understand and use unlimited amounts of information. The use of shortcuts is ubiquitous in life as a response to an abundance of information, from a variety of sources, about virtually every decision people must make. If disclosure laws merely add to the noise in the political environment, then they may be counterproductive, overwhelming voters and drowning out

trustworthy endorsements in the cacophony.<sup>7</sup> Given that attention is limited and must be selectively focused, disclosure statutes should be designed to provide limited credible information that can serve as the basis of effective voting cues.

Furthermore, additional work is required to understand the relationship between widespread use of certain voting cues and harmful information cascades. Information cascades, which are not necessarily harmful phenomena, can occur when individuals act on the basis of others' behavior, rather than on their own information and judgment (Bikhchandani, Hirshleifer and Welch 1998). In many cases, individuals take actions that are informative to others and therefore produce positive externalities; however, at some point, an information cascade occurs when more and more people begin only to 'follow the herd' (Talley 1999). Disclosure statutes that promote the use of shortcuts could exacerbate the appearance of harmful cascades if the availability of this information causes people who now develop private information about electoral choices instead to just use the voting cue. The effect of disclosure statutes on cascades is complicated: although the literature suggests that sometimes disclosure leads to more voters merely following the herd, resulting in negative cascades, in other circumstances, disclosure may disrupt herding because it provides new trustworthy information (Garrett 2003, pp. 1045-47).

More study on voting cues is required to inform this issue of institutional design, but some conclusions are possible now. For example, it is worth expending considerable effort to draft a law that sees through veiled political actors to discover the real interests bankrolling them. Although piercing the veil is challenging, we have experience drafting such laws in other contexts, such as tax and commercial law, where interests also seek to conceal their identities behind layers of shell organizations. Laws should target disclosure of information that can form the basis for effective heuristics – for example, the extent of the financial support provided by groups – and structure this disclosure so that salient information is highlighted. For example, knowing the identity of individuals who have given small amounts of money to an issue campaign is unlikely to improve voter competence, although knowing that there are significant amounts of small contributions might signal that the measure has strong grassroots support.<sup>8</sup> In addition, more study is needed to understand the role played by information intermediaries – the press, opponents, interest groups, political parties – in structuring public information so that it can more easily serve as effective voting cues. In some cases, for example, these intermediaries may act as verification agents by signaling to voters that the cue is a credible one (Lupia and McCubbins 1998, p. 42). A more sophisticated understanding of voting cues, developed by public choice scholars familiar with research in cognition and communication, can lead to the drafting of more effective disclosure laws and can justify resisting the cries of some reformers for more and more disclosure for the sheer sake of transparency.

Another factor affecting voter competence is the structure of the questions presented to voters. Initiatives in the United States are presented in a binary fashion, asking the voter to choose between the status quo and a particular proposal. Public choice scholars, especially those working in the social choice tradition, have provided crucial insights about how the structure of decision making in direct democracy affects outcomes. It is to that arena of study that I turn next.

## **B. The structure of decision making in direct democracy**

One response to the problem of complexity that threatens to undermine voter competence has been to impose single subject rules on initiatives. Most states with the initiative process require that each initiative contain only a single subject; and many localities that allow or require citizen involvement in certain kinds of lawmaking restrict ballot measures to one subject or one project

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<sup>7</sup> Compare Grossman 1981 (discussing similar issues in context of disclosure about economic goods).

<sup>8</sup> For recommendations with respect to design of disclosure laws, see Garrett and Smith 2005, pp. 323-28.

to be bond-financed. Increasingly, at least on the state level, courts are more aggressively enforcing single subject requirements (Lowenstein 2002). Although the purpose behind the single-subject rule may be laudable, the requirement is not particularly effective at achieving this purpose, and it may structure voters' decisions in ways that lead to sub-optimal policy.

The single subject rule is a blunt instrument to combat voter confusion: very complicated initiatives may encompass only one subject, and relatively simple proposals may involve more than one subject (Hasen 2006). Moreover, voter confusion often results from the appearance on the ballot of competing ballot initiatives on the same subject, a tactic often used by opponents of the first initiative. Because savvy political actors know that voters frequently react to confusion by voting 'no' on both measures, opponents of a particular initiative work to qualify a competing measure in the hope that it will either result in both being defeated or that the more favorable competing measure will be enacted instead of the initial proposal. Thus, voter confusion that results from competing ballot initiatives is left untouched by single subject requirements.

One effect of single subject rules is that they make it difficult for voters to make tradeoffs among various policies. Just as with the single subject rule that is often applied in the state legislative environment, the rule targets logrolling. It eliminates, or at least diminishes, the ability of initiative drafters to place before the people a proposal that includes tradeoffs among supporters of several different policies that cannot be unraveled but must be accepted or rejected in its entirety. This prospect may be most disturbing when drafters combine a very popular proposal with one that could not garner majority support, forcing voters to take the bitter with the sweet. Instead, with the protection of the single-subject rule, people are allowed to vote 'yes' or 'no' on each aspect of the deal presented to them as individual initiative proposals on the ballot. This format also ensures that the decision on each ballot measure more likely reflects the preference of the median voter who has been asked to decide on a unidimensional policy (Cooter 2000, pp. 145-47).

The problem posed by the ubiquity of single subject rules, however, is the mirror image of this benefit. A voter's preference on an individual ballot measure may be determined by the result on the other measures being voted on simultaneously; yet, the single subject requirement prevents the proposals from being tied together, and the simultaneity of decision making denies voters important information. Consider a ballot with three bond measures: one to construct a hospital, one to build a museum, and one to fund a park. A voter might prefer to fund only one, and she also might prefer that the project funded be the hospital. But if the hospital bond is going to fail, then perhaps the voter would favor funding the park but not the museum. How is she to vote if all three are on the ballot at the same time, and she cannot be sure that the bond for the hospital will receive sufficient support (often a two-thirds majority with respect to local bond infrastructure measures)? The very structure of American direct democracy that protects this voter from being presented with a take-it-or-leave proposal that has already made tradeoffs among subjects also prevents her from making informed tradeoffs when she votes. Importantly, this is a problem distinct from cues and voter competence, previously discussed. A voter may have sufficient cues to know how she would vote on each initiative and how she would prioritize among measures, but the format of direct democracy does not allow her the information she requires to implement her priorities and does not provide a structure conducive to policy tradeoffs.

Kousser and McCubbins (2006) have characterized initiatives as prone to the social choice problem of sequential elimination agendas. This pathology occurs 'when votes are held one after another, defeated options are removed from consideration, and the winning issue moves on to the next round of voting. The core problem with sequential elimination agendas is that they do not allow citizens to compare directly all of the alternatives and, therefore, do not allow them to make tradeoffs among their options' (pp. 963-64). Not surprisingly, this structure of decision

making can lead to suboptimal outcomes that a majority of voters would not support, even if a majority supported each individual outcome. Moreover, when citizens are presented sequential elimination agendas over time and do not adequately consider tradeoffs, not only among initiatives on the same ballot but those that appear across several elections, they are very likely to adopt policies that are contradictory and likely to result in welfare-reducing economic, social or political consequences.

Garrett and McCubbins (2008) argue that the problem of sequential elimination agendas is exacerbated in the context of local direct democracy where there are often overlapping jurisdictions, all with the ability to present voters with bond measures to fund infrastructure or different assessments for specific projects. Given the reality of some limit on bond capacity created by state law, bond-rating agencies or voters' unwillingness to be taxed above certain levels, the structure of direct democracy can often lead to a race to the polls as each jurisdiction works to ensure that its projects will be funded before the limit is reached. Strategic political actors understand that the order of voting will largely determine which projects can go forward, because the voters are not able to make tradeoffs among all the projects that will be proposed for funding over a particular time period. The consequence is a potentially severe misallocation of tax resources in local infrastructure decisions.

Legislatures more easily solve these problems, even when single-subject rules apply, because legislators can craft compromises, make tradeoffs, and logroll either within an omnibus bill or across bills. Solutions are more difficult in direct democracy, where even a repeal or relaxation of the single subject rule would not eliminate the existence of sequential elimination agendas. One possibility is to combine the initiative process with an independent commission that would consider various proposals, make tradeoffs among related options, and then present the resulting compromise to the people for ratification. This reform also has the advantage of vesting authority in an entity with expertise, whose support for a particular proposal can provide a voting cue. Commissions have been combined with direct democracy in one area of complex policy tradeoffs where legislators suffer from a conflict of interest that may keep them from adopting policies that voters prefer: the design of electoral and other democratic institutions. In New Zealand, for example, voters discarded the first-past-the-post (FPTP) system for parliamentary elections in favor of a mixed member proportional (MMP) system through a two-stage referendum process that presented them with several options for reform. In 1986, a commission on the electoral system recommended that MMP, based on the German system, replace the FPTP process (Palmer and Palmer 2004, p. 13). In 1992, voters were asked in a non-binding referendum two questions: first, whether they wanted to replace FPTP, and, second, which among four possible alternatives they preferred. In this election, 85 percent rejected FPTP, and 70 percent chose the commission's recommendation as their first choice among the alternatives. In the binding referendum the following year, voters were presented the binary choice between the status quo and the MMP system; 54 percent voted in favor of the new arrangement. Interestingly, this unusual structure for decision making may have been devised by incumbent politicians seeking to retain FPTP (Nagel 1994, p. 526). However, the voters chose to change the electoral system, probably in large part because the commission's support provided a credible signal that change would improve representative institutions.

Another possible structure would combine a Citizens' Assembly, like that used in British Columbia in 2004-05 to consider complex electoral reform, with a popular vote on any recommendation (Archer 2004). The Citizens' Assembly allows a representative sample of voters to consider complicated tradeoffs and to be informed by expert staff and witnesses. The resulting proposal can then be presented to the voters in a binary format, allowing them to retain the status quo or adopt the proposed reform. Single subject rules should not restrain the Assembly from making tradeoffs among various aspects of electoral reform or presenting a

comprehensive proposal to voters, although the arena of possible compromise should be clearly defined in the initial charge to the Assembly. The experience of British Columbia in its use of the Citizens' Assembly is noteworthy because the resulting referendum did not receive the support required for passage. Although it received over 57 percent support overall and a simple majority in all but two districts, the voting rule required it to garner 60 percent support (as well as a simple majority in 60 percent of the 79 electoral districts) (Warren and Pearse 2008, pp. 6-7). However, the strong support for the change to the single transferable vote system proposed by the Assembly sparked an ongoing discussion about significant reform of British Columbia's FPTP electoral system, and the government will submit the proposal again to the people in a May 2009 referendum which will be accompanied by a government-funded campaign on both sides (Warren and Pearse 2008).

These examples suggest that there is nothing inherent in direct democracy that requires voters to make binary decisions sequentially if such a structure is likely to lead to sub-optimal policy. Some choices can be competently made through such a structure; others, like reform of electoral or democratic institutions or questions about the appropriate mix of infrastructure projects to be funded through public indebtedness, may require the use of a commission or other body to first consider all the alternatives and then to present a package of proposals to voters. The New Zealand referendum process also demonstrates that voters can be presented with more than just two options – a particular reform or the status quo – and still reach a sensible conclusion. Another response to the need to make complex tradeoffs but still allow some element of popular input would be to adopt a structure that ensures legislative involvement, like the indirect initiative. Garrett and McCubbins (2007) have proposed a 'dual path initiative process' in which reformers qualify a brief policy statement, and then the actual statutory or constitutional text is drafted during a period before the vote in which other groups and the legislature are provided opportunities for input and counterproposals. Under this proposal, initiative proponents need not accept changes suggested by the legislature or other groups, although this period provides the opportunity to catch drafting errors, discover consequences of the proposal that may have been initially overlooked, or compromise with lawmakers to enact a mutually acceptable reform. These are institutional options that are possible because hybrid democracy allows interaction among representative and direct institutions, as well as among elected and appointed entities. A key question for further study is how to structure these more elaborate decision making arrangements, particularly when the pathologies targeted arise from the presence of overlapping jurisdictions proposing competing ballot measures (Kogan and McCubbins 2008).

### **III. Political interactions in hybrid democracy**

Public choice scholars pay particular attention to the interplay among political institutions; they understand that political actors work to achieve their goals no matter what structures they face and will strategically use various institutions in that effort. In a hybrid democracy, there are many possibilities for interactions between institutions of representative government and direct democracy. Indeed, the previous discussion suggests one important relationship: the initiative process can be changed so that the legislature is provided a formal role or so that independent commissions can consider complex policy tradeoffs before a measure is submitted for a popular vote. In this section, three more interactions between institutions of direct and representative democracy will be described and assessed: 1) the relationship between candidates and ballot measures in campaigns; 2) the promise of direct democracy as a way to enact reforms of democratic institutions; and 3) the problem of implementing policies enacted through the initiative process given the likely opposition to the reform by political actors charged with execution of policy.

#### **A. Initiative spillover effects in candidate elections**

It is increasingly clear that in hybrid elections with both candidates and initiative races on the same ballot, the two parts of the election significantly affect each other. For example, initiatives increase overall voter turnout. Smith and Tolbert (2004) found that in presidential elections, each ballot measure boosts turnout by half a percentage, and, in midterm elections, each ballot measure increases turnout by 1.2 percent (p. 40). Studying high-salience initiatives, Smith (2001) found a larger effect on turnout in midterm elections, about four points, but no boost in turnout from initiatives on the ballot during presidential elections. The additional voters are motivated to come to the polls by the topic of the initiative, so the increased turnout will not affect other races randomly but will disproportionately benefit particular candidates whose ideology corresponds to that of the additional voters. Furthermore, initiatives on the ballot during a candidate election make certain issues salient and thus shape voters' evaluation of the candidates in races up and down the ballot, even if the issues would not otherwise be part of the campaign for that particular office (Nicholson 2005). This priming effect underscores the importance of ballot access discussed previously in Part I.C. If access is guaranteed to groups with sufficient financial resources, it means that these well-funded groups not only have an advantage in placing their issue before voters for adoption, but it also results in their having substantial impact on the issues that will shape the campaign agenda for candidates. To the extent that this agenda does not reflect the real concerns of ordinary people, this influence does not result in a campaign defined by issues that most voters would prefer to see addressed.

Strategic political actors are very aware of the possibility of spillover effects from initiative campaigns to affect candidate races. Some public choice scholars have emphasized the negative consequences of these effects. For example, Kousser and McCubbins (2005) decry the effect of 'crypto-initiatives' on public policy; crypto-initiatives are ballot measures used by candidates, parties, and other political actors solely or primarily to influence the outcomes in candidate elections. Politicians using crypto-initiatives are mainly attentive to the initiatives' effect on the dynamics of the campaign, such as voter turnout or the content of the issue agenda, not whether they are well-drafted or represent beneficial reform. Therefore, according to Kousser and McCubbins, the policies embodied in these measures are unlikely to enhance public welfare or to effectively achieve beneficial goals.

Kousser and McCubbins identify as an example of crypto-initiatives the measures in 11 states in 2004 that defined marriage as a relationship only available to heterosexual couples. Although these initiatives had grassroots support in many states, and were a reaction to the legalization of same-sex marriage in Massachusetts and the attempt in San Francisco to allow these marriages, it appears that there was also a coordinated effort to ensure that they appeared on the ballot in battleground states in the presidential race so that they might affect turnout in ways that would benefit President George W. Bush. Some political strategists and scholars have identified the ballot measure as crucial to Bush's victory in Ohio, a state necessary for his Electoral College victory (Garrett 2006). Certainly, the initiatives helped reinforce the "values" agenda that the Republican Party hoped would shape the national debate in ways that would benefit its candidates at all levels of government. Furthermore, focus on this issue of same-sex marriage worked to distract voters' attention from arguably more significant issues in the presidential race – for example, the wars in Iraq and Afghanistan, the burgeoning budget deficit, and growing economic inequality – that did not benefit Republican presidential or congressional candidates. The anti-same-sex marriage measures almost certainly determined the outcome of the senatorial race in Kentucky; Republican incumbent Jim Bunning won a narrow victory thanks to rural voters energized by the ballot measure (Garrett 2006, p. 230).

Similarly, in 1994, Governor Pete Wilson of California used initiatives – in this case the country's harshest three-strikes law and an initiative that would have denied public services to undocumented workers – to convince dubious conservatives in the Republican Party that he was

not too moderate for their support. Interestingly, Proposition 187, the measure relating to undocumented workers, primed voters to consider this issue in relationship to many candidate races in that election, even when the policy was not one that the candidate could have influenced (Nicholson 2005, pp. 107-12). To the extent that Wilson and others cared more about how these initiatives shaped the results of candidate elections than how they changed public policy, these measures would be considered crypto-initiatives. Perhaps that explains why the three-strikes law is so harsh or why Proposition 187 was later overturned as unconstitutional – their proponents did not spend enough time on them to ensure they worked well or survived judicial challenge. On the other hand, proponents of the two measures would likely have disputed that they were insufficiently attentive to the policy consequences of their initiatives, arguing that they supported them on the merits. They may well have seen the initiatives as serving two objectives: enacting policies favored by a majority of Californians but opposed by a Democratic state legislature, and only secondarily as assisting Wilson in his quest for reelection or aiding other Republican candidates. The initial supporters of Proposition 187 were likely primarily motivated by their support for the policy, but the measure qualified for the ballot thanks to funding by the California Republican Party that allowed advocates to hire paid signature gatherers. Party officials saw the measure as a way to shape the campaign agenda and as an engine for fundraising in candidate elections (Nicholson 2005, p. 96).<sup>9</sup> This example demonstrates that strategic political actors may not be the initial impetus for a ballot measure, but they can opportunistically use them to frame candidate campaigns.

On the other hand, decrying the use of initiatives by candidates and parties as largely the cynical manipulation of the electoral process by sophisticated candidates and party operatives overlooks the beneficial spillover effects that ballot measures can produce. Coordinating a candidate campaign with an initiative can allow politicians to make more credible policy commitments to voters (Garrett 2005b). Usually, promises made during a campaign are ‘cheap talk’ because politicians know that they are unlikely to be punished in the future for a broken promise or, at the least, they discount that possibility because they are more concerned with the current election campaign. Public choice scholars have noted that there are very few ways for a candidate to credibly commit during a campaign to a particular course of action once she is in office (see, for example, Levmore 1996). Although incumbents have a record that voters can use to assess the trustworthiness of any position taken during a campaign, challengers, particularly those without prior public service, may find it difficult to convince voters of their credibility. However, if a candidate spends time or money on an initiative, she sends a costly, and therefore more trustworthy, signal of her views on the issue.<sup>10</sup>

Matsusaka (2005b) notes that this example is not isolated; voters can use initiatives generally to constrain politicians with respect to certain policies, thereby allowing them to better monitor officials when they act in the unconstrained realms. This suggests a different spillover

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<sup>9</sup> Initiatives can be used in various ways to affect fundraising in candidate elections. Not only can the issue campaign be linked to candidate fundraising, as it was in the 1994 election in California, but political operatives can use ballot measures to divert funds from candidates to opposition campaigns in the initiative process. In 1996, conservative activist Grover Norquist worked to qualify measures in California, Oregon and Colorado that were opposed by labor unions so that their money and attention would be focused on these races and not used to help Democratic candidates (Smith and Tolbert 2004, pp. 107-08).

<sup>10</sup> For example, Jerry Brown’s campaign for California governor as a political reformer was enhanced because he championed the Political Reform Act of 1974 that appeared on the same ballot (Schrag 2004, p. 226). By approving the reform act at the same time they elected Brown as governor, voters could be more confident that he could not easily back away from his campaign promises. Of course, the structure of decision making – simultaneous votes for the governorship and on the initiative – meant that voters could not be confident that both outcomes would occur.

effect, one that affects the voters' ability to enforce campaign promises that are unrelated to a particular ballot measure supported or sponsored by the candidate. Using his model of the effects of initiatives on executive behavior, Matsusaka concludes that 'by taking some issues out of the hands of elected officials and deciding them directly, the initiative seems to enable voters to more effectively sanction their representatives for poor performance on issues that remain under their control' (pp. 24-25). In this way, initiatives solve problems of principal-agent slack that are inherent in our representative institutions.

Another positive effect of an explicit relationship between candidates and ballot measures relates to the previous discussion of voting cues in Part II.A. If voters are aware that an initiative is supported by a candidate or a political party, this information provides a helpful shortcut to enable them to vote competently on the initiative. Indeed, this relationship imports the familiar and helpful cue of party affiliation and ideology into direct democracy. Political party leaders are very aware of the strength of this voting shortcut, and they work to provide this information in salient ways, knowing that the party cue will not be present on the ballot itself for initiatives in the way that it is for candidates. Governor Arnold Schwarzenegger, whose political career has been tied to his use of direct democracy, clearly understands the strength of his endorsement for some voters. In 2004, the California Republican Party spent approximately \$2 million to send out five million slate mailers informing voters of the Governor's position on ten of sixteen measures on the general election ballot (Garrett 2005b, p. 989). Party officials no doubt hoped that recipients would bring the slate mailer to the polls with them or would use it at home when filling out absentee ballots. This would compensate for the absence of ballot notations, just as the endorsement of an initiative by party officials or elected officials in a voter pamphlet provides information in format likely to be used at the time a vote is cast.

In addition, because parties are increasingly active in initiative campaigns (Hasen 2000), they may help to solve the problems caused by the structure of decision making and sequential elimination agendas. Budge (2001) argues that parties, with their comprehensive platforms, can 'improve the overall policy coherence of single-issue balloting by tying it in with the overall governmental program supported at the previous election' (p. 86). Parties can provide structure across single-issue campaigns in direct democracy just as they provide consistency and coherence in the legislative branch. More work is required to determine the ability of parties to enable voters to overcome the problems of sequential elimination agendas in direct democracy, particularly in the United States where political parties play different roles than they do in the parliamentary systems that Budge also considered, and to determine when additional structures like commissions and citizens' assemblies might be warranted. Nonetheless, it is important to keep in mind that direct democracy, like representative democracy, has institutions that are capable of alleviating some of the pathologies described by social choice theorists, and reforms could be crafted to enhance the influence of such institutions.

In short, the interaction between candidates and initiatives is not necessarily as negative as Kousser and McCubbins argue in their indictment of crypto-initiatives. Certainly, public choice counsels that political actors will use ballot measures strategically to further their election campaigns, but this relationship can also aid voters by reducing principal-agent slack in representative institutions and by improving voter competence. It is also inaccurate to assume that all initiatives used by politicians are poorly drafted and ill considered; indeed, many are first promoted by policy activists and opportunistically used by candidates involved in the hybrid elections or by political parties seeking to raise money or promote their candidates. However, the realization that some ballot measures are primarily seen by proponents as ways to achieve goals other than the actual policy that would be enacted should raise questions with regard to their effect on social welfare. The threat of crypto-initiatives combined with the presence of decision making pathologies caused by sequential elimination agendas and other flaws discussed above at

least raise the question of whether outcomes of direct democracy are likely to systematically undermine welfare.

Even if these fears are well-founded, the solution of discarding direct democracy altogether, however, seems extreme. Rather, the better response would be to adopt reforms targeting the problem of crypto-initiatives. For example, if the concern is that some measures linked to candidate elections are likely to enact welfare-reducing policies, then rules designed to minimize the effects of such measures could be adopted. Some extreme initiatives, like Proposition 187, are struck down by courts as unconstitutional, protecting against measures that infringe on individual rights and other federal constitutional guarantees. But not all welfare-reducing policy is unconstitutional, so additional reforms may be necessary. Accordingly, Garrett and McCubbins (2007) argue that all statutory initiatives should be subject to revision or repeal by the legislator, albeit with some protection such as supermajority vote requirements,<sup>11</sup> and constitutional initiatives should include sunset provisions so that they would expire after ten years unless reenacted (pp. 329-32). A sunset requirement would ensure that policies are reconsidered after some experience with them, with the option of readopting them without change, making modifications to respond to new information, or allowing them to expire. Such a provision might have allowed a softening of California's three strikes law, which was at least partly used to further candidate campaigns when it was enacted, although voters were not willing to revise this law when given the opportunity in 2004. The advantage of a sunset provision is that it allows voters the opportunity at a later time to sort between crypto-initiatives that they regret having enacted and policies that conform to their preferences.<sup>12</sup>

## **B. Hybrid democracy and the design of democratic institutions**

Just as political actors use mechanisms of direct democracy to achieve their electoral goals, they also seek to manipulate other democratic institutions to achieve their objectives. Thus, for example, they will generally resist reforms that would increase the competition they face on Election Day, that would hinder their ability to raise funds for their campaigns, or that would limit their ability to retain their elected position for many years. Although relatively durable constitutional provisions set up some of the institutions that shape the electoral and representative processes, gaps in the requirements for institutional design remain even in state constitutions, which provide considerably more detail than the federal constitution. Over time, as political actors find ways within the established framework to achieve goals that serve their self-interest more than the public interest, public sentiment may support reforms such as campaign finance regulations, lobbying disclosure, term limits, blanket or nonpartisan primaries or redistricting commissions. Lawmakers themselves are unlikely to embrace such reforms because they would be constrained by them and because that are uncertain how the changes would affect the dynamics of their reelection campaigns. Given this inherent conflict of interest – made clear by

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<sup>11</sup> All states except California allow legislatures the ability to modify statutory initiatives; in California, statutory initiatives are insulated from subsequent legislative involvement unless the initiative specifically allows it. Some other states prohibit outright repeal, at least for some period of time, by requiring supermajority votes to repeal or amend laws enacted by initiative, or require that any amendment further the purposes of the initiative (Garrett and McCubbins 2007, pp. 328-29).

<sup>12</sup> One suggested reform – to require votes on ballot measures and on candidates occur in separate elections – would have negative consequences on voter turnout for initiatives. When ballot questions are the only matters on the ballot, then only voters who have intense preferences about the issues are likely to come to the polls, reducing the chance that the outcome will reflect the preference of the median voter. Concerns about turnout have led some states to require that ballot measures only appear on general election ballots (Waters 2003, p 24), presumably to ensure a higher and more representative group of voters decide the fate of initiatives

scholars using public choice theory to analyze legislative behavior (see, for example, Issacharoff and Pildes 1998) – direct democracy seems a particularly attractive route through which to consider and adopt changes to democratic institutions. Even scholars who are generally skeptical about the initiative process are more willing to envision a role for direct action by the people in determining questions of institutional design (see, for example, Thompson 2005, pp. 158-60).

Again, insights from public choice about the conflict of interest faced by legislators in this arena echo the arguments made by progressives who originally supported the initiative process. Early supporters identified the problem of a ‘lawmaking monopoly’ (Sullivan 1892, p. 100) and saw direct democracy as a way to circumvent self-interested legislators and political bosses who would block governance reforms such as the direct primary and anti-corruption laws. Although one target of initiative advocates at the turn of the last century was corporate interests who exercised disproportionate power in state legislatures, progressives also took aim at political party elites and legislators who were seen as growing rich and powerful at the expense of the citizens they were supposed to serve (Smith and Tolbert 2004, p. 113). In a similar vein, it appears that the modern initiative process is being used to combat growing polarization in the political realm, to attack anticompetitive electoral structures, and to realign institutions so that they produce outcomes more consistent with the preference of the ordinary voters. Issacharoff (2004) has called the use of initiatives to change democratic institutions in the last decade or so as the ‘rebellion of the median voter’ (p. 416). Just as public choice literature identifies the indirect effect of direct democracy on policy outcomes in the legislature – making them more consistent with the median voter’s preferences – it also suggests that there will be similar direct and indirect effects on changes affecting the design of democratic institutions.

Scholars influenced by public choice have begun to test empirically whether there are systematic differences between electoral and representative structures in states with robust direct democracy and states without the initiative process. Just as with the work on policy outcomes, the focus of study must not only be on the reforms adopted by the initiative process, but also on laws adopted by the legislature in the shadow of the initiative process. Findings so far have demonstrated that the differences in electoral design are less substantial than one might expect. Tolbert (1998) finds that states characterized by frequent use of the initiative are more likely to adopt legislative term limits, state tax and expenditure limits, and supermajority voting rules for tax increases. Persily and Cully Anderson (2005) do not discover empirical support for ‘strong claims that are made often about legislative capture inhibiting reform,’ (p. 1034) but they find that legislative term limits would not have been adopted without the initiative process. Moreover, they determine that the initiative plays a role – albeit often an indirect one – in the adoption of public financing for legislative campaigns and independent redistricting commissions. Pippin, Bowler and Donovan (2002) find that initiative states were more likely to have laws restricting campaign contributions and more heavily regulating contributions to candidates from political parties and PACs. Matsusaka’s (2006) study of fourteen different kinds of laws related to electoral reform concludes that the initiative process was essential only for legislative term limits. Controlling for region, demography and ideology, he determines that, with respect to redistricting commissions, the differences between initiative and non-initiative states cannot be attributed to the availability of direct democracy.

Substantially more study is required to determine whether differences in the design of democratic institutions between initiative states and non-initiative states are really as limited as the initial work suggests. If these findings are reinforced by further analysis, one could conclude that the public does not actually want different institutional designs for democratic institutions, but largely prefers current arrangements that tend to suppress competition (Matsusaka 2006, p. 168). However, further consideration must be given to different explanations provided by public choice theory for the failure of the initiative process in practice to live up to the hopes of

reformers. Reform proposals are often advocated by grassroots ‘good government’ groups like Common Cause and Public Interest Research Group (PIRG) that may have access to sufficient numbers of motivated volunteers to succeed in the petition drive, but that do not have overflowing coffers to mount expensive advertising campaigns. In contrast, they may be opposed by incumbent politicians and political parties who can raise money to fund opposition campaigns.<sup>13</sup> As discussed in Part I.C., well-funded opposition campaigns often are successful in convincing people to vote ‘no’ perhaps only as a defensive reaction to the amount of noise in the campaign. One study of initiatives to establish independent redistricting commissions has concluded that the initiatives succeed only when unusual events make it difficult for the majority party to run a successful opposition drive, or when strong media support counterbalances a well-funded opposition campaign (Stephanopoulos 2007, p. 382). In contrast, the more successful term limit proposals have tended to find support from individuals who provide substantial funding (Young 1993), and their effect on incumbents may be more easily understood by busy voters who find it difficult to see the link, if any exists, between greater electoral competition and changes in policy outcomes.

A second hurdle facing initiatives proposing comprehensive reform of the electoral process may be the single subject rule. Often proposals to redesign electoral institutions encompass a variety of reforms. Perhaps this packaging results from logrolling to attract sufficient votes to win at the polls, but comprehensive reform may also be required to better ensure that the changes in institutional design have their desired effect. Reformers are aware that self-interested legislators will attempt to circumvent new rules to continue to achieve their objectives; thus, effective reform may require changes to many features of institutional design. The more comprehensive the proposal, the greater the risk that the initiative will run afoul of the constitutional single subject rule. For example, in 1999, the California Supreme Court ruled that a proposal explicitly targeting legislator self-interest violated the single subject requirement because it dealt with redistricting as well as changing the rules regarding legislators’ salaries and expense reimbursements (*Senate v. Jones*, 998 P.2d 1089 (Cal. 1999)). This case presented particularly persuasive evidence that the provision relating to salaries and reimbursements was added to attract voters, with redistricting reform as the real objective (Lowenstein 2002, pp. 39, 41). Nonetheless, a credible argument could be made that all parts of the proposal were designed to address the problem of legislative self-dealing and thus could be considered as serving a single subject. In an even more questionable decision, the Florida Supreme Court found a redistricting initiative violated the single subject rule because it dealt with both state and federal legislative seats and because it both set up a redistricting commission and set out new standards to guide the commission in drawing district lines (*Advisory Opinion to the Attorney General re: Independent*

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<sup>13</sup> For example, in 2005 California Proposition 77, a redistricting proposal, had support from ‘good government’ groups such as Common Cause but faced better-financed opposition, led by several incumbent politicians who helped defeat the measure by nearly 20 points. See Campaign Finance: Proposition 77 – Reapportionment. Initiative Constitutional Amendment, *available at* <http://cal-access.ss.ca.gov/Campaign/Measures/Detail.aspx?id=1276356&session=2005> (last visited Aug. 1, 2008). In contrast, Proposition 11 is a 2008 California redistricting proposal that is favored by some incumbent politicians, led by Governor Arnold Schwarzenegger. Unlike Proposition 77, spending for Proposition 11 has been relatively equal between proponents and opponents. See Campaign Finance: Proposition 011 – Redistricting. Constitutional Amendment and Statute, *available at* <http://cal-access.ss.ca.gov/Campaign/Measures/Detail.aspx?id=1303165&session=2007> (last visited Aug. 1, 2008). It is not clear at this time (August 2008) whether Proposition 77 will fare better at the polls; in addition, more empirical work is required to determine what factors are responsible for the loss of redistricting proposals offered at various times in the last few decades in California.

*Nonpartisan Commission to Apportion Legislative and Congressional Districts which Replaces Apportionment by Legislature*, 926 So.2d 1218 (Fla. 2006)).

Of course, not all sweeping electoral reforms adopted by initiative are found to violate the single subject requirement. For example, the influential and broad Political Reform Act of 1974 with rules regulating campaign finance and lobbying in California survived such a challenge (*Fair Political Practices Commission v. Superior Court*, 599 P.2d 46 (Cal. 1979)). However, in general, the judiciary's combined mistrust of the initiative process and of innovative political structures more generally (Garrett 2001) may lead courts to look favorably on challenges to reform initiatives, whether brought under the single subject rubric or some other legal theory. Knowing that they are likely to prevail either in a well-financed opposition campaign or in a subsequent court challenge, legislative incumbents and political party leaders are unlikely to feel much pressure from the indirect influence of direct democracy. Why should they consider reforms that would constrain their ability to self-deal when they see no credible threat of such proposals emanating from direct democracy?

Again, a creative use of the possibilities of hybrid democracy might allow reform of political institutions that is not unduly influenced by self-interested lawmakers and that can be drafted in suitably comprehensive form without raising concerns about voter confusion or unseemly logrolling. The commission used in New Zealand and the Citizens' Assembly established in British Columbia provide models for mechanisms to consider and draft far-reaching reform, with the final proposal submitted to the people for a vote. Although some have recommended this path for reform in the U.S. (see, for example, Thompson 2002, pp. 168-70; Ferejohn 2008), the same obstacles that inhibit changing redistricting practices, campaign finance and lobbying rules and other features of democratic institutions will stand in the way of creating a new institution, insulated from political control, to consider and propose comprehensive reform. Creating such bodies would require either legislative involvement or would have to succeed as an initiative proposal (if not considered so far-reaching as to be a constitutional revision, not amenable to the initiative process (Garrett and McCubbins 2007, p. 312 n.35)), over the likely vociferous opposition of entrenched political players.

### **C. The challenge of effectively implementing initiatives**

Just as the foregoing discussion raised the problem of resistance by lawmakers and party elites to proposals changing the design of electoral and representative institutions, entrenched political players often stand in the way of implementing the provisions of any policy adopted by initiative. A primary reason that advocates of new policies resort to direct democracy is to circumvent lawmakers or other officials who use the vetogates in the traditional representative process to block change, perhaps because it conflicts with their self-interest or because it is opposed by influential special interests with intense preferences. These officials are not likely to eagerly or aggressively work to follow a public mandate when they opposed the change in the first place. One irony of direct democracy is that the policy changes most likely to succeed in the initiative process are precisely those that are least likely to be implemented and enforced (Gerber, Lupia and McCubbins 2004). Implementation agents know that they face little threat of sanction for failure to faithfully execute the initiative's mandate. The people, having succeeded in passing a new policy, assume that government officials will follow their directions. They do not have the ability, or often the interest, to monitor implementation by the executive branch and, in some cases, the legislative branch.

Failure of public officials to implement initiatives is different from a judicial decision striking down an initiative, although both deny the people their will as expressed at the ballot box. As discussed in Part I.A.'s description of protections afforded to minority groups, courts act to negate initiatives when they are convinced that a popular law is unconstitutional or otherwise

legally flawed. The people cannot get what they want because their desires conflict with larger principles and values, such as individual rights guaranteed by the federal constitution. The problem of the failure of public officials to implement an initiative is another manifestation of the principal-agent slack problem that motivated the decision to resort to the initiative process in the first place. Passage of an initiative does not magically transform the preferences of officials who had resisted the change initially, and public choice teaches that they will continue to try to achieve their objectives to the greatest extent possible under the new institutional arrangements. Realizing that the story is not over the day after the election, public choice scholars have thus begun to focus their attention on the implementation phase of direct democracy.

Consider, for example, a clean elections initiative that enacts public financing of state legislative campaigns. Although the ballot measure may establish the new system, it may still depend on the legislature to appropriate funding before the proposal can go into effect. In Massachusetts, for example, state legislators refused to appropriate money to a clean elections fund established by a 1996 initiative, hoping to undermine the law without making their opposition salient to voters who might punish them when they came up for reelection. However, a candidate who qualified for financing brought a lawsuit to obtain funding, and the Supreme Court ruled that the legislature either had to repeal the statutory initiative or provide the money necessary to make the law operative, even though state law excludes specific appropriations laws from the initiative process (*Bates v. Director of Campaign and Political Finance*, 763 N.E. 2d 6 (Mass. 2002)). Only after the court began to order state assets be sold to satisfy the public funding mandate – and the Speaker of the House had to go to court to keep his office furniture from being auctioned off to satisfy the state’s obligation to qualifying candidates – did the legislature actually repeal the popularly-enacted law. Although the people did not get the policy they had preferred, they were able to hold legislators accountable for thwarting their will.

The Massachusetts lawmakers were forced by this unusual court decision to frustrate implementation of an initiative in a relatively visible way designed to inform voters of their action and ensure political accountability. It is noteworthy, however, that lawmakers continued to try to avoid responsibility, burying the repeal in a larger budget bill, which mainly dealt with Medicaid reform and a prescription drug benefit. Typically, public officials are able to surreptitiously undermine initiatives so that they continue to achieve their own objectives, rather than the preferences of the voters, because no one is willing to bear the costs of monitoring and enforcing compliance when the benefits of those actions will be shared broadly by all citizens. The Massachusetts case was unusual because the plaintiff had sufficient personal reason to bring the lawsuit; he was granted a judgment of \$811,050 that he was owed under the clean elections law.

In their analysis of the experience with 11 initiatives in California, Gerber, Lupia, McCubbins and Kiewiet (2002) find that certain conditions in the political environment allow government officials to undermine or ignore initiatives more easily. First, substantial technical or political costs will lead to lower levels of compliance because the net value of implementation is reduced. Second, if implementers face significant sanctions for noncompliance, they are more likely to work to effectively implement the initiative. Third, when it is easier for the public or others who support the initiative to observe compliance, it is more likely that officials will comply. Fourth, the more the number of people required for successful implementation, the more the likelihood of full compliance falls to zero.

This framework helps predict which initiatives will face serious implementation problems and which will go into effect relatively fully and easily. For example, a measure mandating term limits for all legislators is likely to be fully enforced. Challengers and other intermediaries have every reason to monitor behavior and bring attention to any violations. Moreover, determining whether a term limit proposal has been ignored is straightforward and unambiguous. A

comprehensive education reform that is enacted at the ballot box, however, is unlikely to be fully or effectively implemented. It will rely on the efforts of many people – bureaucrats in the Department of Education, principals and (often unionized) teachers, and sometimes lawmakers to ensure funding or pass additional implementing legislation – most of whom likely resisted change in the first instance. It will be difficult for the public to monitor compliance throughout the state, and even if a few reformers with intense preferences do pay attention, remain organized and have resources after the campaign is over, it may not be clear how to hold those who undermine the initiative accountable. The purpose of the initiative was to circumvent these officials and educators and put into place a policy they did not support – and yet success of the initiative relies heavily on their willingness to implement the policy that they opposed.

Bali (2003) expands the analysis of the implementation problem beyond the preferences of the implementation agents and the conditions that allow them to undermine a particular ballot measure to include other factors such as voter preferences, local demographics and institutional capacity. She studies the reaction of local school districts to California's initiative aimed to reduce or eliminate bilingual classes. Although an important factor in compliance was the preferences of leaders, that is, schools with a superintendent of Hispanic origin had higher levels of bilingual enrollments, other factors were also relevant to the degree of implementation. Voter support or opposition to the initiative in the particular district affected the extent of compliance. This factor suggests that public officials who resist implementation may actually be responding to voter preferences, but they are focusing only on their constituents, not the overall statewide vote. A related study of the decisions of state legislators to overturn the results of term limits ballot initiatives also revealed that a legislator's vote to repeal a popularly-enacted law was related to the support for or opposition to the measure in the legislator's own district (Smith 2001). In addition, Bali finds that institutional factors played a significant role in compliance, with lower levels of compliance in large school districts, districts with larger bureaucracies and urban school districts.

Public choice scholarship on the implementation problem counsels advocates of an initiative to draft straightforward policies that rely on as few implementation agents as possible. It also indicates that compliance may differ across the state depending on the level of support for the measure by voters in particular districts or areas and on the level of opposition of local bureaucrats. Some ballot measures are inevitably complicated or will be effective only with the assistance of many public officials. To ensure better compliance in these cases, Garrett and McCubbins (2007, pp. 333-39) have proposed establishing a statewide Citizens Initiative Implementation Oversight Commission (CIIOC), comprised of members appointed through the initiative process. They note that some successfully-implemented initiatives have been overseen by oversight commissions specifically vested with the power to ensure compliance with the initiative. For example, the Political Reform Act of 1974 in California established the Fair Political Practices Commission (FPPC) with five members to oversee and administer the Act. Various provisions of the law ensure that the FPPC remains independent and has sufficient funding to carry out its work; it has played a significant role in ensuring compliance with popularly-enacted campaign finance and lobbying reforms that work to constrain elected officials and candidates for office.<sup>14</sup> The 2004 stem cell initiative in California, Proposition 71, established an Independent Citizens Oversight Committee to award grants to researchers and institutions engaged in cutting-edge stem cell research. Arguably, a citizens oversight board was less necessary in this case; most California lawmakers also support stem cell research, but the initiative was required by the state constitution in order to issue bonds, which were authorized up

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<sup>14</sup> Similarly, many laws mandating public financing of state campaigns enacted by direct democracy are administered by independent entities, such as the Citizens Clean Elections Commission in Arizona.

to \$3 billion. Nonetheless, it seems likely that the decisions made by the citizens oversight board, which includes patient advocates, leaders of educational institutions, representatives from business and the person who was the main force behind the initiative, have been different from those that would have been made by a more traditional administrative agency. Furthermore, it is doubtful that lawmakers would have delegated these decisions to a commission with the characteristics of the current citizens oversight board.

Drawing on this experience with initiative-specific commissions, Garrett and McCubbins propose a single citizens commission to oversee implementation of all statewide initiatives. Under their proposal, each statewide initiative would be required to name one representative to serve on the CIIOC if the initiative is enacted; each representative would serve for a ten-year term. The CIIOC would have a professional staff and would be assured a level of certain level of funding so that lawmakers could not undermine it by starving it of funds. The CIIOC would have the ability to hold hearings, issue reports and otherwise publicize the level of implementation of initiatives, as well as to bring other enforcement actions. The advantage of one entity to oversee compliance with all successful initiatives is that the commission will include a wide range of viewpoints among its members; they will have in common only their use of the initiative process and will not necessarily share policy or other ideological goals. Thus, any decision to pursue enforcement will be the result of compromise among CIIOC commissioners; the requirement of collective action by people of diverse perspectives will serve as an internal constraint.

The commission will alter the conditions surrounding enforcement of ballot measures to make it more likely that compliance will occur. It reduces monitoring costs, increases the chance that recalcitrant officials will be sanctioned, and tilts the political and technical costs in favor of implementation. It is informed by the insights of public choice, in particular, by the awareness that institutional design can change the behavior of public officials by adjusting the costs and benefits of particular actions and can work to address agency problems inherent in a system of representative democracy.

### **Conclusion**

Over the last two decades, public choice scholarship has contributed substantially to a more sophisticated understanding of the effects of direct democracy in our hybrid system. However, more work remains to be done on issues like the role of money in the initiative process, the effect of direct democracy on interest groups and vice versa, and the reasons that initiative states and non-initiative states do not diverge more substantially with respect to the design of democratic institutions. Future empirical work testing the theories developed by public choice scholars will provide information on these issues, as well as demonstrate the relationship between the initiative process and the output of the traditional legislative system. More attention should be paid to direct democracy on the local level, where popular votes play a vital role in shaping infrastructure, schools, land use decisions and other policies that affect the daily lives of citizens. Moreover, the focus of scholars should not end with the outcome on Election Day but should extend to an analysis of initiative implementation. All of these avenues for study must take into account the reality of hybrid democracy, which provides opportunities for political actors to take advantage of institutional features to strategically respond to initiatives, but which also creates possibilities for reforms to ensure that both direct democracy and representative democracy work to improve public accountability to voters and yield welfare-enhancing policies.

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