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Social Choice, Crypto-Initiatives and Policy Making by Direct Democracy

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by Direct Democracy

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1. Introduction

The initiative process was created originally to enable citizens to enact public policy directly and in so doing to overturn the dominion of interest groups and of state and local party machines.[1] In recent years, initiatives have been thought to serve as a check on legislative authority and to provide the people with a means to pressure the legislature into adopting more public regarding policies.[2] Indeed, the general consensus emerging from the most recent academic research is that, at their worst, initiatives are benign, while at their best, they serve to further the interests of electoral majorities.[3]

A few scholars, however, have found reason to pause in their celebration of the initiative, finding shortcomings in its process, its outcomes, or both.[4] In this paper we argue that initiatives will only infrequently improve the public's welfare. We begin with a survey of the basic social

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[1] For an overview of the history of initiatives and political parties see, Daniel A. Smith. Was Rove Right? The Partisan Wedge and Turnout Effects of Issue 1, Ohio's 2004 Ballot Initiative to Ban Gay Marriage. Presented at Initiative and Referendum Institute Conference. 2005.

[2] Elisabeth Gerber, *Legislative response to the threat of popular initiatives*, 40 AMERICAN JOURNAL OF POLITICAL SCIENCE 99 (1996)

[3] John Matsusaka, *Fiscal effects of the voter initiative: evidence from the last 30 years*, 103 JOURNAL OF POLITICAL ECONOMY 587 (1995); John Matsusaka, *Fiscal effects of the voter initiative in the first half of the 20th century*, 43 JOURNAL OF LAW AND ECONOMICS 619 (2000); JOHN MATSUSAKA, FOR THE MANY OR THE FEW: THE INITIATIVE PROCESS, PUBLIC POLICY AND AMERICAN DEMOCRACY (2004); John Matsusaka & Nolan McCarty, *Political Resource Allocation: benefits and costs of voter initiatives*, 17 JOURNAL OF LAW, ECONOMICS AND ORGANIZATION 413 (2001); Arthur Lupia and John G. Matsusaka. "Direct Democracy: New Approaches to Old Questions." *Annual Review of Political Science*. 7:463-482 (2004); Elisabeth Gerber & Arthur Lupia, *Campaign competition and policy responsiveness in direct legislation elections*, 17 POLITICAL BEHAVIOR 287 (1995); see Gerber (1996) supra note 2; Elisabeth Gerber, *Pressuring legislatures through the use of the initiatives: two forms of indirect influence*, in CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES 191-208, (S. Bowler, T. Donovan, CJ Tolbert, eds., 1998); ELISABETH GERBER, THE POPULIST PARADOX: INTEREST GROUP INFLUENCE AND THE PROMISE OF DIRECT LEGISLATION (1999); D. Roderick Kiewiet & Kristin Szakaly, *Constitutional limitations on borrowing: An analysis of state bonded indebtedness*, v. 12, no. 1 JOURNAL OF LAW, ECONOMICS AND ORGANIZATION 62 (1996).

[4] ELISABETH GERBER, ARTHUR LUPIA, MATHEW D. MCCUBBINS & D. RODERICK KIEWIET, STEALING THE INITIATIVE: HOW STATE GOVERNMENT RESPONDS TO DIRECT DEMOCRACY (2001); Elisabeth Gerber, Arthur Lupia & Mathew D. McCubbins, *When does government limit the impact of voter initiatives? The politics of implementation and enforcement*, 66 JOURNAL OF POLITICS 43 (2004); DAVID BRODER, DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY (2000); Mathew D. McCubbins, *Putting the State Back into State Government: The Constitution and the Budget*, in CONSTITUTIONAL REFORM IN CALIFORNIA: MAKING STATE GOVERNMENT MORE EFFECTIVE AND RESPONSIVE (Bruce Cain and Roger Noll, eds., 1995); Roger Noll & Bruce Cain, *Principles of State Constitutional Design*, in CONSTITUTIONAL REFORM IN CALIFORNIA (Bruce E. Cain and Roger G. Noll, eds., 1995). Elizabeth Garrett. *Perspective on Direct Democracy: Who Directs Direct Democracy?* 4 UNIVERSITY OF CHICAGO LAW SCHOOL ROUNDTABLE 17 (1997).

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choice and public choice critiques of the initiative process. We argue that, despite recent rigorous scholarly attention as to the effects of initiatives[5], we find little reason yet to reject the social and public choice criticisms of policy making via direct democracy. We then offer a series of anecdotes about the rise of crypto-initiatives, which are initiatives that use direct democracy as an instrument to achieve non-policy related goals. Finally, we conclude that the problems inherent in the initiative process are being magnified by the increase in crypto-initiatives and the rise of the crypto-political machines, the new 527 PACs, that sponsor them. Increasingly, the public welfare may be only an incidental consideration in the sponsorship, passage and implementation of initiatives.[6] This in turns implies that we consider anew limiting or amending the initiative process.

2. Policies, Initiatives and the Legislature

We begin with a discussion of the likely types of policies that will be pursued through initiative. We will argue, in this section, that the initiatives that appear on the ballot are likely to be extreme, relative to the legislative median. In the sections that follow, we will argue that voters face significant informational and agenda manipulation problems, which can lead to the adoption of policies that are worse than the status quo for most of the public.

Although we will later discuss the rise of crypto-initiatives, for which policy is not the primary goal, let us begin by considering initiatives for which policy change is the primary goal. We assume that there is someone who wants to change policy and as a starting point, we assume a simple spatial model of policy choice, as is common in the literature.[7] We assume that each

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[5] For a survey see Lupia and Matsuska (2004) supra note 3.

[6] There are many forms of initiatives: constitutional, statutory, bonds and annexation to name a few. In this paper we are primarily concerned with state level initiatives that are either constitutional or statutory in nature.

[7] ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957); DUNCAN BLACK, THE THEORY OF COMMITTEE AND ELECTIONS (1958); Kenneth A. Shepsle, *Institutional Arrangements and Equilibrium in Multidimensional Voting Models*, 23 AMERICAN JOURNAL OF POLITICAL SCIENCE 27 (1979). In particular, as in Shepsle (1979) we use the following six assumptions to model agenda setting in the legislature: First, there are *K* policy dimensions or

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policy dimension is separable and that legislators, initiative sponsors and voters have preferences

that are separable by dimension. Let SQ_k be the status quo policy on dimension k. Policy can

change in one of two ways, either the legislature enacts a new policy, Z_k, which in a one-

dimensional model, by Black's Theorem[8], would move policy to F_k, the floor median, or the

people can pass an initiative, i_k. If policy remains unchanged then SQ_k is the final policy

outcome.

We further assume that actions are costly. That is, it is costly to lobby the legislature to

get them to take up issue $\kappa \in [1, \dots K]$ and change policy on that issue to F_k.[9] The legislature can

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issues that can be adjusted by the legislature. Both status quo policies and policy proposals (bills) are represented as points in K-dimensional Euclidean space. Second, there are M members in the legislature, whose preferences over the policy dimensions are additively separable and who vote strategically. Specifically, on any given dimension k, legislator j has a unique ideal point on that dimension, x_k^j, which is common knowledge. The utility that legislator j derives from a given policy vector, $z = (z_1, \dots, z_n)$, declines with the sum of the distances between x_k^j and z_k: $u_k(z) = -\sum_j | x_k^j - z_k |$. We assume that members seek to maximize the utility that they derive from the final policy choice of the legislature (i.e., to minimize the summed distances between their ideal points and the final choices on each dimension). A consequence of this assumption is that the model of policy choice is, in essence, reduced to a series of independent unidimensional choices. Third, any legislator may introduce a bill dealing with any single issue dimension. Such bills may or may not be allowed onto the floor, depending on the actions taken at the agenda-setting stage. Fourth, there exist agenda-setting agents who have the right to block bills from reaching the floor within their (fixed) jurisdictions. Fifth, the legislative sequence consists of only four stages: (1) members introduce bills; (2) some agent selects (or some agents select) the bills that the floor will consider (more specifically, the agents veto the bills they wish to veto and the remainder are thereby selected for floor consideration); (3) the floor then considers the bills presented to it, one by one, amending them as it sees fit; (4) the floor then votes on final passage of each bill (as amended if amended). Sixth, we focus on the special case in which all bills are considered under open rules, subject only to a germaneness restriction, as this is the simplest case to exposit.

Shepsle (1979, p. 350) suggests that there are three possible agenda-setting agents in the Legislature: the Committee of the Whole, legislative parties, and committees. The third possibility, wherein autonomous and independent committees set the floor agenda, is the topic of Shepsle and Weingast's (1981, 1987) classic analyses. Cox and McCubbins (2002, 2005) focus is on the agenda-setting powers of the first two agents listed: the floor as a whole and the parties--in particular, the majority party. For our analysis here it doesn't matter who we think is the legislative agenda setter.

[8] BLACK , *supra* note 7

[9] F may differ on each issue, but for simplicity and without loss of generality, we drop the issue subscripts here. In addition to those mentioned above, our model makes the following assumptions: 1. There is no more than one group actively lobbying on one issue κ in each year, 2. Voters view the K dimensions as independent, separable issues, 3. The utility that a group gets from a change in a policy is equal to the absolute value of the distance between the status quo and a new policy such as i, given by |SQ – i|, 4. The costs of lobbying the legislature to take up an issue, C_L, are equal for all groups lobbying in all issue dimensions, as are the costs of financing an initiative C_I, and 5. Paying the costs of running an initiative campaign will result in the initiative passing with probability p, while paying the costs of lobbying the legislature will lead to the legislature adopting F with certainty.

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handle far fewer than K many issues per term, and thus, in simplest terms, lobbyists must pay

those who control the legislative agenda to induce them to incur the opportunity costs of acting

on issue κ. We will ignore the game that this creates among lobbyists, as that is the topic of

another paper.[10] If a policy advocate with an ideal point $x_k = i_k$ seeks to change policy on issue

κ, as illustrated in Figure 1 (where we have dropped the subscripts k), and if they are able to pay

the cost to have the legislature put it on the agenda (denoted C_L), then the legislature will adopt

F_k, on issue k, even though the sponsor would prefer i_k.

Figure 1: Placement of policy if legislature acts
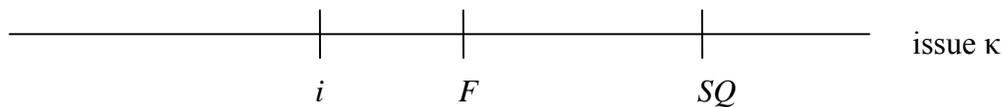
Notice, the legislature will not be able to guarantee the adoption of a policy other than the

floor median, F_k. Once the legislature brings a proposal to the floor on issue κ, majoritarian

influences will move policy to the floor median, F_k. Coherent, concerted majorities may be able

to pass a policy different than F_k, using closed rules or disciplined voting, but they won't be able

to always guarantee this outcome.

Therefore, a policy advocate has to judge whether F_k is sufficient, given the lobbying

costs, or whether an initiative should be sought in an attempt to force the enactment of i_k, given

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[10] A more traditional model of lobbying might posit that the interest group pays a fee in order to shift the legislative floor's ideal point from a position that perfectly represents constituents to a corrupted ideal point that is closer to the interest group's goal. Indeed, this sort of corruption of legislatures by lobbyists is precisely what motivated many Progressives to push for direct democracy in the first place. However, whether the policy passed by the floor (F) reflects the floor's true ideal point or instead a revealed preference influenced by the lobbyist's efforts does not change the subsequent finding of our model, which is that groups will only pursue costly initiatives when they move policy much further away from the status quo than the legislature would have.

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the costs of qualifying and passing an initiative (denoted C_I) and the probability (denoted p) of

passing an initiative located at i_k. [11] Dropping the subscripts for ease of exposition, notice that if i

is to the right of *SQ*, as in Figure 2, the policy advocate will never lobby the legislature for

access as the policy will end up at *F*, making the policy advocate worse off than leaving policy

where it was at *SQ*.

Figure 2: Initiative sponsor will not lobby legislature

If it is indeed more costly to qualify and pass an initiative than it is to lobby the

legislature for consideration of a new policy on issue κ, then we will see only two types of

initiatives.[12] First, as in Figure 1, if i is close to *F*, then it won't be worth the extra cost (relative

to the cost of lobbying) of qualifying and passing an initiative, and the initiative sponsor will

choose a lobbying strategy or will sit out the policy making process and take whatever the

legislature produces. Thus, only initiatives that are extreme *relative to F*, the legislative median,

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[11] An interest group will pursue one of the three actions when the expected utility from that action (calculated by subtracting the cost of the action from the product of the group's utility from a successful policy change and the probability of success) exceeds the expected utilities from each of the other actions. Thus, the group will lobby the legislature when it yields a higher expected utility than the status quo (when $|SQ-F| - C_L > 0$) and a higher utility than attempting an initiative (when $|SQ-F| - C_L > p(|SQ-i|) - C_I$), otherwise lobbying would not be worthwhile. The group would attempt to quality and pass an initiative, whose policy is located at i, if and only if $p(|SQ-i|) - C_I > |SQ-F| - C_L$ and when $p(|SQ-i|) - C_L > 0$. For simplicity, to elucidate the decision problem for individuals, groups and parties in picking their strategies we have ignored the gaming aspects between competing groups that will greatly affect, in non-obvious ways, lobbying and initiative strategies. We leave that exercise for a different venue.

[12] If we relaxed our assumption that utility smoothly declined with distance from the status quo, it would be possible that an interest group with an extremely steep utility function centered at a point in between the status quo and the floor median would find it worthwhile to sponsor an initiative located between SQ and F. However, because we cannot think of any such initiative, we do not alter our model in order to make this possible.

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will be brought to the public as proposed policy changes.[13] If the probability, p, of passing an

initiative declines the further i is from SQ, then there will exist a tradeoff between the costs of

passing an initiative, C_I, and the probability of getting it passed, which will impart a pressure on

the policy advocate to move the proposed policy away from her ideal point and closer to SQ.

This tradeoff creates a limit on how extreme policy advocates will make their initiatives.

Second, if i is on the other side of the SQ from F, as in Figure 2, then policy advocates

will never pursue a lobbying strategy and will instead "go public" with an initiative to change

policy. Such an action, however, would seem to be discouraged by strategic calculations, since

the legislature could then respond by placing a referendum on the ballot to move policy back to

F or to the voting median, V, if the median voter prefers i to F and SQ (and if V is closer to F

than is i).[14] The condition for an initiative of this sort to be placed on the ballot is that V must be

on the same side of SQ as is i and on the opposite side of F. Presumably, by Black's Theorem, V

wins if it is offered to the people as a referendum, so the question for the policy advocate is

whether it is worth the costs of proposing an initiative on this issue in order to get V. If V is

close to SQ, then the answer is almost surely that it is not worth it. So, again, only extreme

initiatives will be proposed.[15]

Extreme policies seem unlikely to enhance the public weal, but they need not necessarily

be bad. However, if the transactions costs associated with enforcement grow with the distance of

the policy change from SQ, then we may begin to think otherwise. Numerous transaction costs

arise from the process of enforcing a new rule: the cost of investigating violations of the rule, the

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[13] The extremity of i, relative to F, will depend on the relative costs of lobbying versus the initiative process. As the initiative process increases in cost, both in terms of qualification and passage, then we expect initiatives to be more extreme.

[14] Presumably, V is at or near F, at least in a district by district vote, ignoring problems of bicameralism and divided government. If V is indeed at or near F, then the threat of legislative referendum would be enough to deter any initiatives such as diagrammed in Figure 2.

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costs of bringing suits alleging violations of the rule, the administrative costs of the agency enforcing the rule, the public's cost of monitoring the government agency that enforces the rule, the costs of the losses that occur due to undeterred violations of the law, the costs of policing opportunistic behavior, and the costs associated with new behaviors that arise as people seek to get out from under the rule's effects. The larger the policy change, the higher the dead weight losses associated with it (because the more you are taking, the harder people will try to avoid it and the easier it will be to avoid, the more expensive will be the enforcement and so on). It seems reasonable to assume that transactions costs increase monotonically (if not faster) with the distance of the policy change from SQ.[16] There is a point, then, at some distance from SQ, where the transactions costs exceed the sum of utility gains for the society (if any) from a policy change, even if the policy change is otherwise favored by the voting median, V.[17]

The problem is exacerbated for initiatives, as the electoral environment in which voters make their decisions lack informational cues about these transactions costs.[18] In the legislative process, by comparison, lobbyists, agencies, and constituents can inform legislators about dead weight losses more effectively, and political parties have positions about both acceptable dead weight losses and who should bear them. The implication of this reasoning is that policy

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[15] We will ignore the costs of getting the legislature to implement initiative policies that are far from F. For a review of that thorny issue see GERBER ET AL, *supra* note 4.

[16] Essentially, we are assuming that, in developed states, we are past the point of increasing returns to scale in coercion and are on the decreasing returns to scale in coercion. Wallis and North (1986) show that transactions costs grew as a percent of GDP in the United States over the 20th Century. This appears to be true for other developed countries in Europe and for Japan as well.

[17] If the SQ imposes significant costs, then bigger policy changes might mean imposing less costs, and therefore may result in lower transaction costs as more people choose to cooperate with the new policy. The increase in compliance will be at least partially offset by the likely decrease in compliance from groups that bear the costs of the new policy change. The net change in compliance and enforcement will affect the overall change in transaction costs.

[18] As evidence for this proposition consider that many initiatives start out with high voter approval that declines as the opposition campaign gets started and that heavy spending can defeat almost any initiative. Often ad campaigns sell initiatives as good for everyone or bad for everyone, obscuring their true costs. Occasionally, campaigns highlight that the policy is good only for a few beneficiaries. Rarely do initiative campaigns highlight the direct

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proposals that end up on the ballot as initiatives are likely to lead to lower social welfare than policies enacted through the legislative process.[19]

We turn next to argue that policies enacted through the initiative process are unlikely to be welfare enhancing and more likely to be merely wealth transfers or some other form of particularistic policy.

3. Who Benefits From Initiatives?

Initiative campaigns are costly. In 2002 over $173 million was spent on campaigns for 117 initiatives. The most expensive initiative campaign in 2002 was the Yes on Arizona 202, a campaign on behalf of Indian gaming that spent over $21 million. This comes nowhere close to the record $92 million spent on the 1998 initiative campaign for California Proposition 5, which was also about Indian gaming.[20] This money has to come from somewhere. What types of policies are most likely to generate sufficient returns so that the benefits exceed the costs of taking an initiative to the public? It is fairly standard to categorize public policy according to how diffuse or concentrated are its benefits and costs.[21] Some policies have diffuse benefits, i.e. benefits that spread widely, in small amounts, over the population, while others have concentrated benefits that are more narrowly targeted to an easily identifiable set of benefactors. National defense, clean air and clean water are often used examples of policies with diffuse benefits, while farm price supports or the bail out of Chrysler or Lockheed are seen as examples of concentrated benefits. Costs can be similarly concentrated or diffuse. The most commonly

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transfer of resources from one group to another. When the costs are highlighted, the opposition message may get out in enough ways to make the losses seem large.

[19] We may assume that the further is the initiative, *i*, from *F* (and likely the further it is from *V*), the less likely it is to pass, but, the probability is not zero, and the potential benefits may lead advocates for such a policy change to pursue a large gamble through the context of an initiative.

[20] The willingness to expend such sums of money on the campaigns suggests there are significant gains for the sponsors of Indian gaming initiatives.

[21] *See, e.g.,* Ripley, Randall B. and Grace A. Franklin. Congress, The Bureaucracy and Public Policy. (1974); JAMES Q. WILSON, THE POLITICS OF REGULATION (1980).

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used examples of concentrated costs are luxury taxes or zoning laws, while Value Added Taxes are considered diffuse. It is also well known that when benefits or costs are diffuse, collective action is difficult.[22] If benefits or costs are concentrated then there exists a private entrepreneur (a privileged person, group or party) who will bear the cost of collective action. Thus, all else constant, as has long been discussed in the lobbying literature, lobbying will take place only on policies where there are concentrated benefits or costs. The same logic holds for initiatives, only those with concentrated benefits will be considered.

It is also clear from the literature on initiatives that a vigorous opposition will almost always sink an initiative at the ballot.[23] Policies and initiatives with concentrated costs will be more likely to draw organized opposition, all else constant. Thus from our typology of initiatives policies with concentrated benefits will be most likely make it to the ballot, and those with diffuse costs (and thus lacking organized opposition) will be most likely to pass, all else constant.[24]

4. The Initiative Information Environment

The conclusion about the types of initiatives that will make it on the ballot has important implications for our understanding of how voters make decisions on these issues. One of the common findings in models of voter decision-making is that in complete information settings the majority (represented by the median voter) is made better off having an initiative process. The problem is that voters typically do not have complete information or ready substitutes. Lupia shows that voters can use cues and information shortcuts to substitute for complete

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[22] Mancur Olson. THE LOGIC OF COLLECTIVE ACTION. 1965.
[23] GERBER, *supra* note 3
[24] We recognize that there are exceptions to this rule. In California, policy entrepreneurs such as Howard Jarvis (1978's Proposition 13) have brought initiatives with diffuse benefits to the ballot. However, such initiatives will only qualify in the rare circumstance that a "privileged group" (Olson, 1965) solves the inherent collective action problem. This state has also provided instances of initiatives with concentrated benefits and costs, such as the

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information.[25] However, Gerber and Lupia show that this conclusion does not hold in an

incomplete information environment in which voters 1) do not know the policy implications of

an initiative and 2) cannot or chose not to seek opinions of credible endorsers.[26] Furthermore,

Lupia and McCubbins find that the credibility of an endorsement requires that one of four

conditions for trust exist, the principal one being that there are two endorsers, each believed to be

knowledgeable and each competing on opposition sides.[27] Moreover, these competing endorsers

must be believed to be strictly adversarial, analogous to opposing attorneys in a legal setting. If

this is not the case, then the statements made by the initiative competitors may not be

trustworthy, and then may not be credible to voters. If none of these information conditions are

met, scholars have recognized that policy outcomes from the initiative process may not improve

outcomes relative to the status quo.[28] Given that the ability of voters to make informed decisions

depends crucially on the type of information environment in which voters make choices, the

relevant question becomes how likely is it that an initiative campaign will produce the conditions

for trust that allow voters to use cues from endorsers as substitutes for full information?

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battles between Indian tribes with gaming operations and Las Vegas casinos (Propositions 68 and 70 on the November, 2004 ballot). But note that both initiatives faces well-funded opposition campaigns and lost badly.

[25] Arthur Lupia, *Shortcuts versus encyclopedias: Information and voting behavior in California insurance reform elections*, 88 AMERICAN POLITICAL SCIENCE REVIEW 63 (1994). On some issues, such as taxation and social issues, voters may not acquire any information during the campaign process because they already have well-formed preferences. However, other issues that appear on the ballot: nuclear power, lottery; Indian gaming, school reform, health insurance, sale of state land, etc, voters may need the campaign process to serve informational purposes. It is to these types of issues that this section is addressed.

[26] Gerber & Lupia, *supra* note 3.

[27] ARTHUR LUPIA & MATHEW D. MCCUBBINS, THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW? (1998). Lupia and McCubbins derive and, experimentally test, several conditions required for learning. The first of these conditions is the knowledge condition (which will only be met if the person receiving information believes that an endorser has knowledge or expertise about what he says). The second general condition is the trust condition (which will only be met if a person believes that the endorser is trustworthy). In order for this person to believe that an endorser is trustworthy, however, one of four additional conditions must also be met: 1) the person 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.

[28]Lupia and Matsusaka supra note 3. "The conclusion that the majority is always better off having the initiative and referendum available is a fairly general property of complete information models but does not necessarily hold with incomplete information." (p.277)

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Although we do not, at present, have the empirical evidence to determine how often the conditions for trust are met, we can provide theoretical reasons to suspect that incomplete information is a more likely outcome. First, as just discussed initiatives are unlikely to pass if there is significant opposition. Because of this, initiative sponsors will attempt to find issues that do not generate opposition. Initiatives are most likely, then, if the proposal has diffuse costs, and those who will pay the costs are unlikely to overcome the collective action problems of organizing an opposition to the proposal. Without organized opposition, the conditions for adversarial verification fail. One ironic consequence of this result is that the proponents may then lack credibility, unless the endorsers they use to deliver their message to the public otherwise meet one of the four conditions for trust.

Second, it is unlikely that advertising campaigns will present voters with information about the tradeoffs between initiatives (either across time or across items on the same ballot), which means that they are unlikely to satisfy the condition regarding knowledge of policy implications. With numerous initiatives on the ballot, even if voters can gain knowledge about each choice individually, they may not be able to predict the consequences of their actions when the interactive effects of all initiatives are taken together. Providing information about the tradeoffs among initiatives, or providing information about policy interactions, would seem unlikely to help one's campaign, while running the very real risk of creating opponents out of otherwise indifferent campaigns.

The argument just presented provides good reason to believe that initiative campaigns will rarely approximate conditions whereby voters can gain knowledge about their initiative choices. Indeed, Lupia's study of five 1988 California insurance initiatives, which pitted trial

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lawyers against insurance companies, seems more like an exception than the rule.[29] In that year

there were multiple ballot measures all addressing the same general concerns and both opponents

and proponents of the initiatives had a strong incentive to campaign for their side. The generation

of vigorous opposition and support campaigns suggests the stakes in this election were massive,

because it made sense to run an initiative even in the face of guaranteed opposition.[30] This

provided an environment that was likely to create the conditions for voters to make informed

decisions, as Lupia found, but it's not clear that this empirical example translates to the typical

election year and to the typical initiative environment, given the conclusions derived from the

typology of initiatives above. [31] Furthermore, voters must also solve the information problem

presented by having many initiatives at many different levels of government (city, county and

state).[32]

Lupia and McCubbins, as previously discussed, derive and test the conditions necessary

for trust and learning from an information source.[33] Recent empirical work on the informational

aspects of initiatives[34] have not explored whether or not these conditions are present in initiative

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[29] Lupia, *supra* note 24.
[30] The expectation of opposition changes the probability of qualifying and passing an initiative, but if the stakes are high enough the sponsor may still continue with the initiative process.
[31] Most of the literature, including this argument, is directed primarily at statewide campaigns. The full information conditions seem less likely to occur in the many city, county or regional initiatives that change local government charters. For instance, imagine a proposal to change from a weak to strong mayor form of government. Is it likely that both sides will be organized and run campaigns? On the other hand, local initiatives that deal with land use issues probably will tap issues with concentrated costs and benefits, and thus spur serious campaigns on both sides, but because of this are more likely to lose.
[32] Between 60 and 70% of the U.S. population lives in a city with an initiative, and between 70 and 75% of the U.S. population lives in either a city or a state with an initiative process (Matsusaka I&R in American Cities, Basic Patterns)
[33] Lupia and McCubbins supra note 26.
[34] Caroline Tolbert, The Ballot Measure /Citizen Interest Link: Information, Engagement and Participation. Paper presented for Impact of Direct Democracy Conference. (2005). Caroline J. Tolbert, Ramona S. McNeal & Daniel A. Smith. Enhancing Civic Engagement: The Effect of Direct Democracy on Political Participation and Knowledge. State Politics and Policy Quarterly. Vol. 3, No. 1 (Spring 2003): pp.23-41. Shaun Bowler & Todd Donovan. Demanding Choices: Opinion, Voting and Direct Democracy. Ann Arbor. University of Michigan Press. (1998). This empirical work typically measures a dependent variable of interest, say voter turnout or survey responses, across a variety of states and then compares non-initiative states to initiative states. A positive relationship between being an initiative state and turnout is interpreted as an effect of the initiative. However, states with initiatives may

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campaigns and thus whether voters are able to make welfare-enhancing choices. The implication of this experimental research on trust is that simply identifying the presence of information in the form of advertisements or endorsements does not allow one to draw the conclusion that voters have learned from the information. Although the empirical work in this field is of great interest and has made strides in beginning to identify some effects of the initiative process, the studies have not yet incorporated the conditions for trust and learning into their models of the effects of campaigns. Furthermore, showing that exposure to an initiative campaign increases the proportion of people who vote, give campaign contributions or correctly answer information questions is not equivalent to showing that they can make choices that improve welfare.

The combination of the slim likelihood for the conditions for verification to be met and the sheer number of initiatives facing voters in states such as California further compounds the information problem facing voters. In the end, it seems unlikely voters will have access to the cues needed to make informed decisions for most initiatives.

5. Who is setting the agenda?

We have just argued that initiatives are likely to be extreme particularistic policies, with concentrated benefits and diffuse costs, and that there is a significant chance that voters will lack the information necessary to make informed decisions. So, the odds that initiatives will improve social welfare seem small. In this section we further question the beneficial effects of initiatives by considering a variety of social choice critiques that seem particularly pernicious with respect

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not be a random sample of all states, in which case we need an observation of our dependent variable before the initiative was implemented to definitely conclude that the initiative caused the change in the variable of interest. Studies like one showing that increased usage of the initiative process within initiative states leads to higher levels of turnout – Caroline Tolbert, John Grummel & Daniel A. Smith, *The Effect of Ballot Initiatives on Voter Turnout in the American States*, AMERICAN POLITICS RESEARCH 625 (2001) – go part of the way toward solving this challenge to inference.

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to the initiative process, critiques that have largely escaped comment in the literature on initiatives.

5.1 The unidimensional initiative

One of the key problems with initiatives, and one that leads to a host of subsequent problems, is that they are likely to be one-dimensional policy moves with multi-dimensional repercussions.[35] First, in 12 of the 23 states that allow initiative petitions there are single-subject rules with regards to proposed initiatives. These rules almost guarantee that initiatives will only address a single issue, such as increasing school funding, without presenting voters with the other (obvious) dimensions of the policy change – increased taxes or decreased spending in another area. Second, even in the absence of a single subject rule or where it is loosely enforced, initiative sponsors will prefer to propose one-dimensional policies. The addition of a second, third or fourth dimension is political suicide because it increases the possibility of generating opposition. Because opponents of initiatives are more likely to be successful in their campaign than proponents, there is a strong reason not to incite opponents. Because of this tactical concern, voters are likely to see one dimensional policy moves and be asked to make yes or no decisions about a multitude of single dimension ballot measures, which has important consequences for the results of the initiative process.

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[35] It is important to note that in legislative bodies where voting is largely one-dimensional (Poole and Rosenthal 1997) there is reason to believe the existence of a single dimension is the result of the legislative process collapsing many dimensions into a single dimension. Given that the initiative process lacks the institutions that generate this outcome it is unreasonable to expect a similar outcome from initiatives.

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5.2 Inability to make tradeoffs

One of the key features of the legislative process, particularly during the appropriations stage, is that legislators make trade-offs between priorities both within a given year's budget and across time.[36] However, in the models of voter decision making during initiative campaigns voters are presumed to be choosing between a "yes" and "no" vote on a single initiative, along a single dimension.[37] In such a situation these models typically find that initiatives either make the legislature more responsive to the median voter or that only those policies favored by the median voter will be approved.[38] One limit to these models is that they do not address how voters make tradeoffs between different initiatives. Consider that in many elections there are multiple issues to be voted upon, and voters must not only be able to consider the tradeoffs for a particular initiative, but they must also weigh initiatives against each other. For voters to calculate these tradeoffs (what do they think they'll have to give up in order to get the policy proposed by the initiative?) they must:

1) have a good idea about how each policy proposal will be financed (what do they give up to get it) or how it will otherwise affect the status quo;

2) know the externalities associated with each proposition (doing one thing may preclude doing other things or may enable or disable the successful implementation of other policies);

3) have knowledge about all of the ballot proposals;

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[36] Mathew D. McCubbins & Daniel B. Rodriguez, *Canonical Construction and Statutory Revisionism: The Strange Case of the Appropriations Canon*, JOURNAL OF CONTEMPORARY LEGAL ISSUES (2004).

[37] Lupia, *supra* note 24; Gerber and Lupia, *supra* note 3; Gerber (1996), *supra* note 4; Matsusaka & McCarty, *supra* note 3

[38] It is worth considering the assumptions contained within these models, because it suggests how rarely all the conditions will be met. For example, Gerber (1996) assumes 1) simple binary agenda; 2) no substitute initiatives; 3) both "yes" and "no" campaigns for verification purposes or voter knowledge of the policy implications of the initiative; 4) single stage game that ends; 5)one dimension of policy; and 6) 100% voter turnout.

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4) be able to determine the probability that each of the other proposals will pass, (so they can calculate an expected combined effect for their actions on each ballot initiative) and these probabilities must be common knowledge so that all voters act on similar expectations.

Only with all of these conditions satisfied can a voter make decisions that aid in moving policy towards her most preferred position. At the same time, the fact that the conditions for successful policy choice are so stringent (if any one of these conditions fails the voter will be unable to form an expectation about the consequences of her actions) does not, however, imply that they will never be able to do so. Of course, the greater the number of initiatives and the worse the knowledge environment is for each, the worse off voters will be.

For voters to actually weigh prisons versus schools, for example, they must know not only the costs of each policy, but also how the two policies affect each other. We know that in the absence of a tradeoff between services or tax levels voters will prefer more of almost all government services or the same level and lower taxes.[39] So, the relevant question about the information environment is will voters be provided, and use, the information, or substitute cues, to choose between initiatives focused on schools, jails, lottery, insurance and nuclear power? Will cues be sufficient to help voters weigh these perhaps conflicting policies against each other and to account for the costs of each proposed policy change? It is difficult to imagine that initiative supporters will provide this type of universal tradeoff information. The proponents of a hypothetical measure A are unlikely to argue against measure B (if they are about different issues), because doing so will likely lead to a response from the proponents of measure B. Because the opposition has the upper hand in initiative campaigns it would appear to be a poor strategy to take action that increases the likelihood of generating opponents.

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Moreover, when there is no opposition to an initiative, as is the case for a great many initiatives, and is to be expected for the concentrated benefits, diffuse cost proposals we expect to see on the ballot. Furthermore, our observation living in California is that information about how the goals of one initiative interact with the goals of another is unlikely to be widely available. If voters lack information about how the passage of two initiatives will affect each other or the general policy environment, it is easy to have outcomes that lead to non-Pareto improving, and therefore non-welfare enhancing, results.

5.3 Initiatives are Sequential Elimination Agendas

Yet another problem with initiatives relates to what social choice theorists dub "sequential elimination agendas".[40] Sequential elimination agendas occur when votes are held one after another, defeated options are removed from consideration, and the winning issue moves onto the next round of voting. The core problem with sequential elimination agendas, then, 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. It is this inability to make tradeoffs that often leads to suboptimal outcomes, and as Ordeshook and Schwartz emphasize, "as soon as the feasible agendas are allowed to include…sequential elimination agendas…sincere voting can lead practically anywhere [in the policy space]."[41]

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[39] Earl Brubaker, *How Big a Budget do the People Prefer?*, v.III, n.2 THE INDEPENDENT REVIEW 211 (1998).
[40] Peter C. Ordeshook & Thomas Schwartz, *Agenda and the Control of Political Outcomes*, 81 AMERICAN POLITICAL SCIENCE REVIEW 179 (1987).
[41] *Id.* at 192.

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For example, consider the following preference rankings for three individuals, 1, 2 and 3, over four different policies, A, B, C and Q:

	1	**2**	**3**
First	Q	A	B
Second	C	Q	A
Third	B	C	Q
Fourth	A	B	C

The game proceeds as follows.[42] First, there is a vote between policy A and the status quo, Q. Next the new status quo (either A or Q) is pitted against B. Then, the new SQ (either A, B or Q) goes against C. If this voting game were to be actually played out the winner is C, *despite the fact that Q is unanimously preferred to C* (thus C is Pareto inferior to Q). The movement to C is clearly non welfare-enhancing as no possible majority would choose Q over C, and no one would have wanted to end up with C, having started at Q.

Although scholars have considered sequential elimination agendas when analyzing various voting procedures[43] (Fishburn 1974; Ordeshook and Schwartz 1987), they have not yet applied this concept to the initiative process—a process that we argue is particularly plagued by the pathologies of sequential elimination agendas. Not only does the initiative process satisfy the conditions just listed above (i.e. multiple initiatives are voted on over time and initiatives are not pitted against all other initiatives), but this process also makes it particularly difficult for citizens to make tradeoffs over time. As the example illustrates, when proposals are pitted against each

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[42] *Adapted from* PETER C. ORDESHOOK, GAME THEORY AND POLITICAL THEORY: AN INTRODUCTION 68 (1986).
[43] Peter C. Fishburn, *Paradoxes of Voting*, v.68 no.2 THE AMERICAN POLITICAL SCIENCE REVIEW 537 (1974); Ordeshook & Schwartz, *supra* note 39.

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other in a sequential (or serial) process and the losing proposal is removed from consideration, it can generate outcomes that no one would prefer.

To see how sequential elimination agendas and the inability to make inter-temporal tradeoffs play out in real world initiative processes, consider the following examples from Oregon and Massachusetts: In 1990, the citizens of Oregon passed an initiative that sought to reduce property taxes, and then, in 1996, they passed another measure that limited the revenue available for schools and other services that had been funded by property taxes. Just four years later in 2000, citizens passed an initiative that established a "sufficiency standard" for funding based on the Oregon Quality Education Model that required a significant increase in state spending on education. It's easy to see that following multiple ballot measures to reduce taxes with one that instructs the legislature to increase education spending may be mutually inconsistent.

Similar contradictory initiatives occurred in Massachusetts. For example, in 1982, citizens voted to restrict radioactive waste disposal, but then in 1988, they failed to ban the electric power plants that produced such nuclear waste. Needless to say, citizens in these two time periods passed measures that were largely at odds with each other—with the 1988 result perpetuating the problem that the 1982 initiative sought to solve.

The above anecdotes suggest that the theoretical problems of sequential elimination agendas have an empirical basis in the initiative process. Indeed, these anecdotes demonstrate that when citizens must choose alternatives over time without being able to compare them directly, they are unlikely to consider tradeoffs and are, therefore, almost certain to pass contradictory measures that have deleterious economic, social, and/or political consequences.[44]

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[44] As an example of a deleterious political consequence, consider a legislature charged with implementing contradictory initiatives. When faced with such contradictions, the legislature will be unable to satisfy the

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5.4 Who is Setting the Agenda?

Another problem with the initiative process is that it does not allow for careful selection of those who set the agenda. Social choice theorists and game theorists have long noted that agenda setters can be, for all intents and purposes, "dictators" when it comes to determining political outcomes[45], and they have also emphasized that under certain conditions, there is a risk that agenda setters, through strategically setting the agenda, can induce outcomes that diverge from the preferences of the median voter[46] and, in fact, are Pareto inferior.[47] This possibility seems particularly acute in the initiative setting, given that we previously established that initiatives will generally be extreme relative to the floor median of the legislature. Given the existence of such a risk, scholars have analyzed real world instances of agenda setting and have discussed the ways that agenda setters can be constrained to be faithful agents of those they represent.[48] Although there are, of course, many ways to constrain agenda setters, most relevant to this paper are screening and selection mechanisms.

Screening and selection mechanisms are important because they help to ensure that faithful agenda setters are chosen in the first place. As many scholars note, ex ante screening and selection are particularly important, for it can be very costly to sort good agenda setters from

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conflicting demands of citizens, and will therefore partially implement the initiatives, perhaps generating frustration with government and spawning more initiatives that also cannot be implemented.

[45] Richard D. McKelvey, *General Conditions for Global Intransitivities in Formal Voting Models*, 47 ECONOMETRICA 1085 (1979); THOMAS SCHWARTZ, THE LOGIC OF COLLECTIVE CHOICE (1986); Thomas Romer & Howard Rosenthal, *Political Resource Allocation, Controlled Agendas, and the Status Quo*, 33 PUBLIC CHOICE 27 (1978); Thomas Romer & Howard Rosenthal, *Bureaucrats vs. Voters: On Political Economy of Resource Allocation by Direct Democracy*, 93 QUARTERLY JOURNAL OF ECONOMICS 563 (1979).

[46] Romer & Rosenthal (1978), *supra* note 44;Romer & Rosenthal (1979), *supra* note 44

[47] McKelvey, *supra* note 44

[48] *See* DAVID W. ROHDE, PARTIES AND LEADERS IN THE POSTREFORM HOUSE (1991); D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS (1991); GARY W. COX & MATHEW D. MCCUBBINS, LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE. (1993); Gary W. Cox & Mathew D. McCubbins. *Setting the Agenda*. Cambridge University Press (2005); WOLFGANG C. MULLER & KAARE STROM, EDS., POLICY, OFFICE, OR VOTES: HOW POLITICAL PARTIES IN WESTERN EUROPE MAKE HARD DECISIONS (1999).

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bad ones and remove the bad ones after they have been selected.[49] For this very reason,

legislators worldwide consider the past performance of potential agenda setters when selecting

them and promote only those who have demonstrated their competence and responsiveness.[50]

With the initiative process, however, it is impossible to screen and select faithful agenda

setters because any individual or group with sufficient resources can place an initiative on the

ballot. This aspect of the initiative process allows virtually anyone to become an agenda setter,

and it is this "direct democracy" aspect of the initiative process that is frequently lauded as one

of its greatest strengths.[51] The one mechanism designed to screen out initiative agenda setters –

the requirement that they collect a specified number of signatures in order to qualify for the

ballot – does not in any way guarantee that sponsors have the public interest in mind. The

industry of paid signature gathering, nearly as old as direct democracy itself, now guarantees that

whoever has the requisite amount of money (now more than a million dollars in California) can

qualify virtually any initiative for the ballot. As the above discussion of screening and selection

makes clear, however, allowing anyone with sufficient resources to become an agenda setter is

problematic, for there is then no mechanism to select agenda setters who will pursue policies that

benefit a majority of citizens. Furthermore, with the rise of crypto-initiatives there will be an

increasing number of agenda setters that use the initiative process to manipulate outcomes to

serve their ends.

5.5 Consequences

As a result of these flaws in the initiative process we believe that initiatives are likely to

lead to deleterious outcomes. One such outcome is that they bust a state's budget, or require

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[49] A. MICHAEL SPENCE, MARKET SIGNALLING: INFORMATION TRANSFER IN HIRING AND RELATED SCREENING PROCESSES (1974); KIEWIET & MCCUBBINS, *supra* note 47

[50] COX & MCCUBBINS, *supra* note 47; MULLER & STROM, *supra* note 47

[51] GERBER, *supra* note 3; MATSUSAKA, *supra* note 3.

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lawmakers to balance the budget by cutting services or raising fees or moving programs and their costs off-budget or moving them as unfunded mandates to lower levels of government or to the private sector, which, if included explicitly in the initiative, probably would have made it fail at the polls.[52] This outcome is easy to predict given the previous pathologies: low information, inability to make tradeoffs, sequential elimination of agenda items, and no selection process for agenda setters. The budget busting effect may be limited by the legislature's ability to avoid implementation.[53] However, this may provoke further initiatives by policy advocates who want their policy implemented. One can see this degenerating into a spiral of initiative, poor implementation, initiative, poor implementation, and so on. Given that initiatives are going to hand the legislature extreme and conflicting policies to implement, the legislature will do its best to ignore its instructions. For example, even though in 1986 California voters passed Proposition 63, the English Only Initiative, the legislature never actually implemented it. In fact, Attorney General John Van de Kamp argued that by his reading the initiative only required that official publications were available in English, not that they were to be limited to English.[54] When voters pass laws that ties the legislature's hands it further complicates policy making. It seems unlikely that further disguising the effects of policy is likely to improve its quality.

Even if legislatures are able to get around initiatives, each time they do so they lose degrees of freedom. California responded to the legislative staffing cuts mandated by Proposition

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[52] Matsusaka, Matsusaka and McCarty, and Gerber argue that states with the initiative process have different outcomes on a variety of policy variables than states without initiatives, and that this difference is due to the presence of the initiative process. Matsusaka (1995), *supra* note 3; MATSUSAKA, *supra* note 3; Matsusaka & McCarty, *supra* note 1; Gerber (1996), *supra* note 1; GERBER, *supra* note 1. Matsusaka's (2004) supra note 3, comprehensive analysis finds that initiative states spend less, controlling for other factors. We agree that this important question deserves further empirical study. In addition to spending less, initiative states also have much less flexibility in their spending. California's Proposition 98 and Colorado's Taxpayers' Bill of Right, for example, severely restrict the abilities of state governments to react to fiscal shocks by locking in spending on education (Prop. 98) and restricting total spending (T.A.B.O.R.).

[53] GERBER ET AL., *supra* note 4.

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140 but cutting their expert staff in half (but leaving political staff largely intact)[55] and by moving the state library out of the legislature and to the Department of Education. These one-time moves had serious consequences for the operation and staffing of the legislature and the library which limit future policy tradeoffs. This may have been of small import previously, but with the increasing use of initiatives to change policy and reform constitutions we may see an accelerated use of initiatives and thus further constraints placed on legislative activity. Indeed, as direct democracy ties up the legislature we may begin to lose our representative form of government and run afoul of Article 4, Section 4 of the Constitution, which guarantees every state a republican form of government.[56] Central to this question will be what we believe are the conditions for republican government. Is it just elections? Or, must the elected representatives have the ability to also change policy? This is not a question for us to answer, but it is one that will be important as state legislatures increasingly have their hands tied by initiatives.

6. The Rise of Crypto-Initiatives

During the 2004 general elections, there were 162 ballot measures in 34 states. California led the pack with 16 total ballot measures, 12 of which qualified by the initiative process. Although final figures are not yet in, estimates are that nationally more than $600 million was spent on initiative campaigns and more than $192 million was spent in California.[57] Many scholars, somewhat naively, tend to see these initiatives as attempts by citizens to change public policy.[58] But, as the following anecdotes from 2004 illustrate, a large and increasing number of

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[54] *Id.*

[55] Bruce E. Cain, and Thad Kousser, "Adapting to Term Limits: Recent Experiences and New Directions." Report from the Public Policy Institute of California. San Francisco, CA: PPIC, November 2004.

[56] For a discussion of court cases related to this issue see Robert Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution's Guarantee Clause*, 80 TEXAS LAW REVIEW 807 (2002).

[57] The California figure represents all expenditures by initiative PACs between January 1, 2004 and October 26, 2004 for which spending data was available on the Secretary of State's webpage.

[58] Other scholars have long recognized that initiatives often have purposes beyond their policy applications. For a survey of the literature on this point, see Smith (2005) supra note 1. In recent years, the Republican Party has

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initiatives are designed by agenda setters, often from outside the state or locality in which the

initiative is being run, who have other goals in mind; for them, affecting policy is often at most a

secondary concern. We term these crypto-initiatives. The hidden aspects of crypto-initiatives are

the motives of their sponsors and their connections to political parties.

In many cases the initiatives of 2004 had their roots in prior elections. In 2000, George

W. Bush beat Al Gore in Ohio by a slim margin – less than 170,000 votes out of more than 4.5

million votes cast. As the 2004 election between President Bush and John Kerry crystallized, it

was clear that Ohio would again be a very close race and it would be one of the few states to

decide the presidential victor. Democrats had been campaigning extensively in Ohio to improve

their odds of wining the state.[59] State Republican leaders coordinated with the White House on

one of the so-called Defense of Marriage initiatives, which they hoped would increase

Republican turnout and help Bush carry Ohio.[60] Leading up to the election it seemed that this

strategy had a reasonable chance of securing Bush the win, because although Kerry was likely

beat Bush in urban areas, the marriage initiative was projected to have a significant effect in the

electorate, amounting to a 2 to 3 percent increase in turnout with the largest number coming from

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directed much financial support to Grover Norquist's "Americans for Tax Reform" in order to back tax limitation, right to work, and "paycheck protection" initiatives aimed at spurring conservative mobilization in California, Colorado, and Oregon, according to Daniel A. Smith, *Special Interests and Democracy: An Historical Glance*, in THE BATTLE OVER CITIZEN LAWMAKING, (M. Dane Waters, ed., 2001). Even an examination of Colorado's 1912 direct democracy campaigns revealed that "the mechanisms of the initiative and popular referendum were easily manipulated during the Progressive Era," quoted on page 369 of Daniel A. Smith and Joseph Lublinski, *Direct Democracy During the Progressive Era: A Crack in the Populist Veneer?* 14 JOURNAL OF POLICY HISTORY 349 (2002). While such works have examined the behavioral *effects* of crypto-initiatives, they have not yet probed the social choice consequences of the *intentions* of their backers.

[59] David D. Kirkpatrick, *Gay Marriage Becomes a Swing Issue With Pull*, NEW YORK TIMES, 14 August 2004. The group America Coming Together had spent $1.1 million and deployed 700 employees in Ohio by the end of April 2004 to oppose President Bush's reelection. Derek Willis, *Voter Turnout Group Focuses on Ohio*, Center for Public Integrity, 1 July 2004. The group America Coming Together had spent $1.1 million and deployed 700 employees in Ohio by the end of April 2004 to oppose President Bush's reelection. Derek Willis, *Voter Turnout Group Focuses on Ohio*, Center for Public Integrity, 1 July 2004.

[60] Kirkpatrick *supra* note 59.

conservative Christians.[61] As it turned out, Bush indeed won Ohio and the presidency. While the evidence is not conclusive as to the effect of the Ohio's defense of marriage initiative[62], after the election Ohio "political analysts credit[ed] the ballot measure with increasing turnout in Republican bastions in the south and west, while also pushing swing voters in the Appalachian region of the southeast toward Mr. Bush. The president's extra-strong showing in those areas compensated for an extraordinarily large Democratic turnout in Cleveland and in Columbus, propelling him to a 136,000-vote victory."[63] While Karl Rove[64] may be the only one who knows if this account is accurate, Ohio's Defense of Marriage Initiative was a key factor in Bush's re-election.

A Defense of Marriage Initiative also appears to have affected political outcomes in Kentucky. This time the likely beneficiary of the initiative was Republican Senator Jim Bunning who barely retained his Senate seat. Bunning had been in the midst of running what may be one of the worst political campaigns of all time.[65] His 20 point lead in the polls evaporated during the campaign, and some of his behaviors and statements led Democrats to directly question his sanity.[66] "Supporters of the measure [Defense of Marriage Initiative] used extensive church

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[61] John C. Green, *Ohio: The Heart of it All*, v. 2 issue 3 THE FORUM (Berkeley Electronic Press) (2004).

[62] See Smith (2005) supra note 1, in which he finds that the voter support for Ohio's gay marriage initiative has an insignificant effect on county-level turnout but does significantly affect a county's vote for Bush. This last result (Model III) is the best test of the effect of the initiative on Bush's vote.

[63] James Dao. "Same-Sex Marriage Issue Key to Some G.O.P. Races." *New York Times* Late Edition (East Coast)). New York, N.Y.:Nov 4, 2004. p. 4. However, Smith (2004) in his analysis of county-level data did not find that Ohio's gay marriage amendment had significant effects on voter turnout in Ohio. At the same time, all that may be necessary for the spread of such crypto-initiatives is the perception among relevant political actors that they can affect turnout or election outcomes.

[64] In 2004 Rove was Senior Advisor and chief strategist to President Bush.

[65] As recounted in Stolberg (10/28/2004, NYT), "Mr. Bunning's difficulties began earlier this year when he suggested that Dr. Mongiardo looked like Saddam Hussein's sons. Later he debated Dr. Mongiardo from a television studio in Washington, and admitted afterward having used a teleprompter to read his opening and closing statements. Then he told reporters he had not heard about the Army reservists in Iraq who had refused a mission because they felt it unsafe. 'I don't watch the national news, and I don't read the paper,' Mr. Bunning explained. 'I haven't done that for the last six weeks. I watch Fox News to get my information.'"

[66] Ryan Alessi, Delano Massey & Karla Ward, *Race was contentious, personal*, KENTUCKY HERALD-LEADER, 3 November 2004

networks to persuade people to vote" and the support of conservative voters may have helped Bunning secure victory.[67] To help Bunning, Republicans tried to tie opposition to the initiative around the neck of Democratic candidate Daniel Mongiardo.[68] Bunning eventually overcame his own campaign to win reelection. Although again there is not yet definitive empirical evidence about the effects of the different Defense of Marriage Initiatives, the proponents appear to have intended effects beyond mere policy change.[69] In the November 2004 election, eleven states (Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah) considered Defense of Marriage Initiatives, and they all passed. Bush and other Republican candidates either won, or did better than previously expected, in these states.

On the other side of the political spectrum, Democrats have also been using initiatives to try to bolster registration and turnout. In 2004, the Association of Community Organization for Reform Now (ACORN)[70], through a Political Action Committee called Florida Families for All, spent millions of dollars to support an initiative to raise the state's minimum wage. The group chose the minimum wage as its instrument because, according to an internal document acquired

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[67] James Dao. "Same-Sex Marriage Issue Key to Some G.O.P. Races." *New York Times* Late Edition (East Coast)). New York, N.Y.:Nov 4, 2004. p.4

[68] *Id.*

[69] Karol and Miguel argue that the Defense of Marriage Initiatives had no effect on the vote for Bush, but they do not take account of the strategic use of initiatives or the possibility that they have different effects in different states. First, turnout may only be an important aspect of the initiative in certain states (Ohio), whereas in other states (Mississippi) the initiative may have other goals. Second, the goal may not be to increase turnout for the national election but instead for state or local elections. David Karol & Edward Miguel, *Iraq War Casualties and the 2004 Presidential Election*, 30 Nov. 2004 (no publication). Smith (2005) supra note 1; finds little support for the contention that the Ohio defense of marriage initiative increased Republican turnout, although he does find that the initiative affects a county's vote for Bush.

[70] In a clear, but perhaps overly humble, statement of their activity, ACORN declares "When most community organizations still believed in sitting on the sidelines on election day, ACORN was leading the way in voter registration, education, and mobilization. In the most recent election cycle, ACORN registered over 200,000 new voters, and made over 1 million non-partisan contacts to infrequent voters encouraging them to vote." One might question the "non-partisan" nature of their contacts given the information above. According to their website, www.acorn.org, in recent years, ACORN has led ballot initiative campaigns in San Francisco, Phoenix, Pine Bluff City and Kansas City. They work closely with their "sister" organization, Project Vote, to build "voter registration, education and mobilization networks" to turnout "new and infrequent voters around issues that are important to their families and communities, thus giving previous non-voters a reason to vote" (p. 24) ACORN Annual Report, 2003.

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by the *Washington Times*, their "plan concluded that initiatives increase voter turnout and that 'minimum wage initiatives can significantly increase the turnout of supporters without increasing turnout from the opposition'."[71] ACORN declared its three major goals as "driving heightened Democratic turnout, passing the initiative, and building permanent political capacity for future gains."[72] In addition to targeting a proposed initiative at its ideal audience, Florida Families for All registered 200,000 initiative signers as voters, which boosted their signature count and the number of registered voters who supported their petition, possibly having a significant effect on statewide elections this year and into the future. These efforts have drawn scrutiny from the Florida Department of Law Enforcement, which is investigating to determine whether or not ACORN engaged in illegal registration activity.[73]

In Colorado during the 2004 election cycle, donors and the Democratic Party also utilized the initiative process to affect the state and national elections. Most national attention focused on the wealthy president of a Brazilian university who spent millions in a vain attempt to pass an initiative to allocate Colorado's electoral votes on a proportional basis. However, other less noticed initiatives may have been far more important in the 2004 election in Colorado. The Democratic Party, after its losses in 2002, started to plan a series of initiatives to drive turnout and change voting patterns. Using extensive databases to tie together political, demographic, consumer and other information, these political operatives sought to identify areas in the state, and the individuals living within, who "under-performed" in the 2002 election. That is, they wanted to find likely Democratic voters, who either did not turnout or who turned out but voted

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[71] Jerry Seper, *Liberals target Bush with Florida wage initiative*, THE WASHINGTON TIMES, 25 October 2004. It is richly ironic that in 1995 ACORN sued the state of California because having to pay their own workers a minimum wage would reduce the number of employees they could hire. Associated Press, *Critics point to effort by ACORN to dodge minimum wage in '96*, 11 August 2004.

[72] Seper, *supra* note 70.

[73] This begs the question, of course, abut the actual effect of the initiative on voter turnout.

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Republican. Through waves of phone surveys, personal interviews and shopping-mall focus groups the political strategists discovered that this age group and demographic were unhappy and highly motivated about transportation (they complain bitterly about their daily commutes to and from downtown Denver). In response, these Democratic Party activists helped sponsor an initiative in 2004: FasTracks, which increased mass transit funding. One of the critical aspects of this strategy was getting Republicans, such as Governor Bill Owens, to oppose the measures, which would provide a cue to the targeted voters that their interests were more similar to Democrats than Republicans. As expected, Governor Owens publicly opposed the transit initiative. When the $3.5 million campaign for the transit initiative was done and the election results were counted, it appeared the Democratic strategy had worked on multiple fronts. First, although the initiative was designed to be instrumental in generating turnout, the policy proposal also passed. Second, while the rest of the country was electing Republicans, Coloradans elected Democrats to the U.S. Senate, U.S. House, and the Colorado Assembly. Indeed, Democrats have control of the Colorado legislature for the first time in over 40 years.

The anecdotes just offered suggest that thinking about initiatives only in terms of their policy outcomes ignores other possibly significant effects on registration, turnout, and election outcomes. As a matter of fact, if initiatives determine who wins the presidency, the Senate and state houses, we are ignoring their most important effects.

In what follows we show that initiatives are indeed known to affect voter turnout and we provide a model of how wedge and jack issues influence voter turnout. These forms of crypto-initiatives are particularly problematic because they are a form of political pork and the combination of 527s and party involvement is likely to increase their use. Finally, we argue that

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the implicit analogy between the initiative market and economic markets is not applicable and does not eliminate the problems we raised throughout this paper.

6.1 Initiatives are known to affect turnout

We have been using the term crypto-initiatives to refer to cases where the proponent's primary goal is to affect political outcomes rather than policy. Such initiatives – also discussed in Garrett[74] and Garrett and Smith[75] – often achieve their goals by reshaping the electorate. For an initiative to influence elections by shifting the composition of the electorate in a way that favors a party's candidates, it must boost turnout and also bring out a different type voter. This would not be the case if initiatives like FasTracks or Defense of Marriage turned out new voters who represented a random draw from those who do not typically participate in American elections. Smart political actors do not spend millions to turn out a random selection of nonvoters. Their efforts are targeted in two ways: they want to get voters who support their candidates to the polls, and they aim their message at those who are likely to be most receptive. The first tactical consideration is part of the explanation of why, even though nonvoters have demographic characteristics that might link them to the Democratic Party, elections with higher turnout do not consistently benefit Democratic candidates. A long scholarly literature[76] rebuts the conventional wisdom that higher turnout will shift the electorate leftwards. If Republican groups run a strong mobilization effort, then a boost in turnout could bring more of their party's

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[74] Elizabeth Garrett, *McConnell v. FEC and Disclosure*, 3 ELECTION LAW JOURNAL 237 (2004).
[75] Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors: The Real Threat to Campaign Disclosure Statutes*, USC-Caltech Center for the Study of Law and Politics Working Paper No. 13 (2003)
[76] See Benjamin Highton & Raymond Wolfinger, *The Political Implications of Higher Turnout*, 31 BRITISH JOURNAL OF POLITICAL SCIENCE 179 (2001); Jack Citrin, Eric Schickler, & John Sides, *What if Everyone Voted? Simulating the Impact of Increased Turnout in Senate Elections*, 47 AMERICAN JOURNAL OF POLITICAL SCIENCE 75 (2003) for the most recent contributions)

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adherents to the polls. Studies of election outcomes[77] show that there is no consistent partisan bias when turnout ticks upward.

The second tactical consideration for mobilizing turnout is to choose issues that are likely to resonate with nonvoters, which may lead to turnout different than a simple random sample of nonvoters. As a whole, nonvoters are less politically interested and less partisan than voters. However, the nonvoters who are most receptive to a campaign's get out the vote drive – especially one based on an initiative's policy effects – are likely to be the most politically engaged, educated, and partisan members of that group. Campaigns conducting "strategic mobilization"[78] target these voters, whose sense of the stakes of politics and psychological attachment to one of the "teams" allow them to see the benefits of turning out. Turnout initiatives that seek to tempt voters to the polls by offering a policy that they strongly favor could attract a subset of nonvoters that is unrepresentative of the mass of nonvoters.

Recent works on initiatives and turnout suggest that this is, in fact, often the case. First, Tolbert, Grummel, and Smith[79] show that the number of initiatives on the ballot boosts turnout in both presidential and mid-term elections, controlling for a host of other factors. But what types of voters are brought to the polls by propositions? Donovan and Smith[80] examine the results of exit polls in three states to see how the voters who said that initiatives motivated them to turn out differed from other voters. The differences vary across states, but are generally consistent with the notion that these mobilized voters look very different from the overall set of those who do not regularly vote. "Partisan identifiers (Democrats in Arizona and Colorado; strong partisans of

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[77] J. DeNardo, *Turnout and the Vote: The Joke's on the Democrats*, 74 AMERICAN POLITICAL SCIENCE REVIEW 406 (1980); Jack H. Nagel & John H. McNulty, *Partisan Effects of Voter Turnout in Senatorial and Gubernatorial Elections*, 94(4) AMERICAN POLITICAL SCIENCE REVIEW 780 (1996).
[78] STEVEN J. ROSENSTONE & JOHN MARK HANSEN, MOBILIZATION. PARTICIPATION. AND DEMOCRACY IN AMERICA (1993).
[79] See Tolbert, Grummel & Smith supra note 33.

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both parties in Colorado), those with self-identified ideological predispositions (in Colorado), older (in Oregon and Colorado), and better educated (in Colorado) respondents were most likely to say that initiatives figured heavily in their decisions to participate in an election," conclude Donovan and Smith[81].

The anecdotes presented at the beginning of this section suggest that political operatives have discovered the immense partisan possibilities of initiatives and are increasing their usage of the process. Setting of the initiative agenda by party operatives would not seem to be a happy occurrence, because strategic political actors will pick strategies, which we call either wedges or jacks, to serve their partisan goals even if they lead to the passage of bad policies. Increasing usage of these types of initiatives will exacerbate their negative consequences of initiatives.
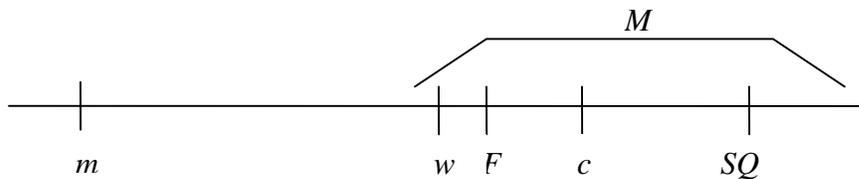
6.2 Wedge Initiatives

We use the term wedge initiatives to describe those that are designed to split the opposition party and help one's party by drawing support from the opposition. The following two conditions are necessary for a wedge issue. First, the status quo must be favored by the other party, and particularly the status quo must help extreme members of the other party. Second, a change in status quo must benefit the party looking to use the initiative. Figure 3 presents this situation spatially. *M* represents the dispersion of ideal points within the majority party, which is protecting the *SQ* even though it is far from the floor median, *F*. The minority party, *m*, can use a wedge, *w*, to induce a portion of the majority party to support a change in policy on this dimension (everyone to the left of *c* will prefer *w* to *SQ*, and thus *w* drives a wedge, at *c*, into the majority party). To insure the support of *F*, the minority will offer a new policy that is at or near

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[80] Todd Donovan & Daniel Smith, *Turning On and Turning Out: Assesing the Individual-Level Effects of Ballot Measures* (paper presented at the 4th Annual State Politics and Policy Conference, Kent State University 2004).
[81] *Id.* at 18.

F's ideal point. The possible shifts in alliances generated by this dynamic create a situation akin to Riker's (1962) coalition model of politics.

Figure 3: Model of wedge issues

One such example of a wedge issue is Proposition 187, which California Republicans actively supported in 1994. This initiative helped convince some Democrats, whose party opposed the initiative, to abandon their party in the gubernatorial race and support the Republican candidate Pete Wilson, who sponsored the initiative.

While these wedge issues, when effective, will divide the electorate and change party allegiance, at least for one election, their long-term effects may not be salutary. If wedge initiatives succeed, we can see that, over time, as each party slams a wedge between the other party and its leaders, that the electorate may become increasingly distrustful of parties and government. Consequently, the parties may be unable to set the agenda in such a way that maintains their coalitions (by keeping wedge issues off the agenda), as all of their compromises will be exploited by the opposition in initiatives. Parties may either fractionalize or they may coalesce around issues that clearly divide them from the opposition, thus increasing partisan polarization.

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One effect of wedge issues is that representatives are elected based on their stance on a single-issue initiative. In such a case, voters truly become single-issue electors, picking candidates for office they may not ordinarily choose were a full range of issues considered. This is a standard problem in political campaigns, but it is magnified when initiatives focus the electorate on a single policy dimension. The Defense of Marriage Initiatives in 2004 represent a rather clear example of this phenomenon, as the anecdotes from Kentucky and Ohio suggest.

In addition, wedge issues present a particularly difficult aspect for voter information models. Because the initiative is not about policy, but about turnout, the sponsor of the wedge would actually like opposition, as doing so makes it easier to tie it around the other party's neck. The wedge serves as bait, and if the other party takes it, then it will become clear that the party is protecting some of its extreme members. Therefore, if the opposition understands it is a wedge issue they should vacillate on the issue and try to keep it off the agenda. The mere fact that there are extreme policies that have not moved to the floor median suggests that the majority party has already been quite effective in keeping it off the agenda until the initiative was raised. If the opposition follows its political incentives and stays silent on the initiative, then we are left with an environment that does not meet the conditions for voters to make informed decisions.

6.3 Jack Initiatives

A jack initiative is designed to help a party's candidates by jacking up turnout in one targeted portion of the electorate.[82] The growth of jack initiatives, which are about increasing turnout among a targeted sample of the population, is particularly troubling. These policies are likely to have highly concentrated benefits and diffuse costs, which helps increase turnout only among beneficiaries. Geographically targeted projects, such as new roads, rail lines, schools, etc,

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seem to be ideal policies to have this effect at the local level. The passage of FasTracks and

minimum wage initiatives are prototypical examples of this type of statewide policy. The

ACORN document that discussed the Florida minimum wage strategy makes the targeted

benefits clear, "Giving our constituency an opportunity to vote themselves a raise is probably the

most compelling reason to go to the ballot box."[83] It is hard to think of a more direct, targeted

benefit than the ability to vote yourself a raise, paid for by a highly diffuse set of consumers and

businesses. The minimum wage issue was also important because it had a differential effect on

turnout. It did not generate unified business opposition (many businesses already pay wages well

above the minimum wage and so had little incentive to oppose it) and therefore the opposition

campaign did not motivate its likely supporters. Considered in this light, jack initiatives look a

lot like a new form of distributive politics, which has been well and thoroughly discussed in the

congressional and policy literature.[84] Initiatives that fall into this category not only have effects

on the larger political process, but they also act to increase the amount of pork in the political

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[82] Jacks and wedges may not be mutually exclusive categories for any given policy. That is, a Defense of Marriage Initiative may be a wedge in one state and a jack in another. It will depend on the configuration of political interests in each environment.

[83] Seper, *supra* note 70.

[84] Carol F. Goss, *Military Committee Membership and Defense-Related Benefits in the House of Representatives*, 25 WESTERN POLITICAL QUARTERLY 215 (1972); Clyde I. Browning, *The Geography of Federal Outlays*, Studies in Geography No. 4, University of North Carolina, Dept. of Geography (1973); MORRIS P. FIORINA, REPRESENTATIVES, ROLL CALLS, AND CONSTITUENCIES (1974); James T. Murphy, *Political Parties and the Porkbarrel: Party Conflict and Cooperation in House Public Works Committee Decision-Making*, 68 AMERICAN POLITICAL SCIENCE REVIEW 169 (1974); Joseph P. Kalt & Mark A. Zupan, *The Apparent Ideological Behavior of Legislators: Testing for Principal-Agent Slack in Political Institutions*, 33 JOURNAL OF LAW AND ECONOMICS 103 (1990); Steven D.Levitt & James M. Snyder, *Political Parties and the Distribution of Federal Outlays*, 39 AMERICAN JOURNAL OF POLITICAL SCIENCE 958 (1995); Barry Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 JOURNAL OF LAW, ECONOMICS, & ORGANIZATION 1 (1995); Brian E. Roberts, *A Dead Senator Tells No Lies: Seniority and the Distribution of Federal Benefits*, 34(1) AMERICAN JOURNAL OF POLITICAL SCIENCE 31 (1990); R. Michael Alvarez & Jason L. Saving, *Deficits, Democrats, and Distributive Benefits: Congressional Elections and the Pork Barrel in the 1980s*, 50 POLITICAL RESEARCH QUARTERLY 809 (1997); Eric Helland, *The Waiver Pork Barrel: Committee Membership and the Approval Time of Medicaid Waivers*, 17 CONTEMPORARY ECONOMIC POLICY 401 (1999).

environment.[85] Therefore, the effects of jack initiatives must include the additional pork that they introduce into politics and the effect that pork has on the quality of policy.

A good jack issue will only cause a targeted group of potential supporters to turn out to the polls, likely because a proposal has concentrated benefits and diffuse costs. In this environment there is unlikely to be organized opposition to the initiative. Without an opposition the campaign environment does not meet the conditions for full information[86] or trust[87] so there is no reason to believe outcomes will improve upon the status quo. These jack issues are not designed to be public regarding. Indeed, extensive polling was done (in Colorado) to find issues that had concentrated benefits and diffuse costs, and that drive turnout up for one party but not the other. Policy is not the point. Good public policy would only be a fortunate, if unlikely, accident.

Certainly pork barrel policy has been extensively used by legislatures to serve political purposes, and we should believe that pork barrel initiatives will also become increasingly popular as the results in Colorado have demonstrated. No one believes that such distributive pork barrel politics make for good public policy.

While the use of crypto-initiatives is not new[88] we seem to be witnessing a new trend as political parties, individuals and interest groups are all scouring the policy space to find niche

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[85] Bowler and Donovan (1998) discuss distributive logrolls as a new twist on initiatives, but in their formulation these initiatives are still about passing policy not some non-policy goals such as increasing voter turnout. Because of this difference the critical issue for jack initiatives may not be how people vote on the actual proposal, but whether or not its presence has differential effects on turnout.

[86] Elisabeth Gerber & Arthur Lupia. "Term Limits, Responsiveness and the Failures of Increased Competition" In *Legislative Term Limits: Public Choice Perspective*s, B. Grofman, ed. Boston: Kluwer Academic Publishers, (1996) 87-99.

[87] LUPIA & MATHEW D. MCCUBBINS, *supra* note 39.

[88] Daniel A. Smith and Caroline J. Tolbert. *The Initiative To Party: Partisanship and Ballot Initiatives in California*. PARTY POLITICS. 2001 discuss the role of political parties in the California initiative process, and find that parties appear to be more prominent in the process than intended by initiative supporters. We do not contest their findings but we do emphasize the increase in these crypto-initiatives and the role that newly-formed 527s will have on crypto-initiatives.

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issues for the purpose of affecting elections or rewarding or punishing candidates and parties.

This trend, coupled with the rise of 527s[89] –so called "silent partners" – who can spend tens, if

not hundreds, of millions of dollars in relative obscurity[90] for campaign activities (527s spent a

combined $544 million in the 2003-04 election cycle) may turn an already impaired method of

policy making and institutional reform into the corrupt tool of twenty-first century party

machines and their unprincipled operatives, where the social good is at most a remote thought.

7. The Efficient Initiative Market?

Although scholars are ambiguous about why positive outcomes will occur via the

initiative process, they appear to have something in mind like an "efficient initiative hypothesis"

(EIH), which they consider to be an analogy to the efficient market hypothesis (EMH). Although

there is no well-developed analogy between markets and initiatives, Matsusaka most clearly

compares the initiative process to the market by briefly considering how two hallmarks of

markets – dispersed information and competitive forces – can be applied to the initiative

process.[91] As he makes clear, neither of these approaches have been sufficiently elaborated upon

to be very useful in understanding the initiative process. Nonetheless, it seems from the literature

on initiatives that scholars have in mind an implicit version of the EIH, in which outcomes are

positive as long as voters support them (notice all of the results in the literature referring to

surveys that find that the median voter favors enacted initiatives). Because the comparison is not

well developed, we present what we think is the most likely way scholars are thinking of the

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[89] Garrett & Smith, *supra note 69.*Elizabeth
[90] Each state has different reporting requirements and 527s tend to share money so that resources can end up where the party needs it, but in such a way that it is difficult to determine, at least prior to the election, who is funding which initiatives and how much they are spending.
[91] Matsusaka (2004) *supra note* 3.

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initiative process, and then we consider why such the analogy between initiatives and markets is inappropriate.

It seems to us that the most likely model implicit in the literature is one in which "policy entrepreneurs" propose different products, and then voters acting as policy consumers choose which ones to purchase by casting their scarce votes. In the EMH, price conveys all publicly available information about an asset, given the decisions of well-informed and rational market traders.[92] Consumers purchase only the products that serve their goals, and guided by the invisible hand, the aggregate outcome is welfare enhancing (i.e., it is efficient). If this is the analogy being used, then we presume the collective decisions of market participants are represented by the median voter, and policy entrepreneurs are equivalent to marketers who introduce new products. If this is the appropriate analogy, then we conclude that policies supported by the median voter must improve welfare.

The basic analogy, however, between efficient markets and initiatives is not reasonable. First, what in the EIH plays the role of price in the EMH? One can't simply gloss over the absence of something equivalent to price, because prices, and the information they convey, are the heart of the EMH.[93] So, unless there's a suitable analogy in the initiative process then the analogy between the EMH and the EIH simply makes no sense. Second, there is no clear theory about how selecting the median voter's ideal point on a series of one-dimensional issues is likely

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[92] *See, e.g.,* John H. Cochrane, *Volatility Tests and Efficient Markets: A Review Essay*, 27 MONETARY ECONOMICS 463 (1991); Eugene F. Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 JOURNAL OF FINANCE 383 (1971); Fama 1991 (not in works cited); Michael C. Jensen, *Some Anomolous Evidence Regarding Market Efficiency*, 6 JOURNAL OF FINANCIAL ECONOMICS 95 (1979); J. S. Jordan, *On the Efficient Markets Hypothesis*, 51 ECONOMETRICA 1325 (1983); A. Craig. MacKinlay, *Event Studies in Economics and Finance* 35 JOURNAL OF ECONOMIC LITERATURE 13 (1997).

[93] Alternatively, while we are not sure of all the conditions required for competitive markets to arise and to function well (to be efficient or nearly so), we know that one of the basic requirements is accurate and timely information, uniformly available to all market participants. Information generation and learning are costly. Consequently, the value of information or knowledge may exceed its costs for all but a few participants. This situation in itself is a

to improve net welfare. Is there something equivalent to the invisible hand of the median voter?

Third, for reasons already discussed, voters will often lack the information necessary to make

decisions equivalent to the decisions of consumers in a market (who base their choices on price,

which is absent in the EIH). In situations that do not qualify as complete information, such as

when there aren't credible endorsers on both sides of a policy or there are multiple initiatives

with multiple endorsers, then we don't know whether voters will act to become informed or not

and we suspect they will not. We are betting our democracy and perhaps our very lives on a

hunch, an undeveloped analogy, that politicians won't lie to us. Fourth, when making

consumption decisions people are able to make decisions simultaneously on multiple dimensions

and can thus make tradeoffs among their various choices. But such decisions are difficult, if not

impossible, in choosing among initiatives.[94] Fifth, we have spent many pages demonstrating

how, in the end, policy can be Pareto-inefficient, even when the median favors each policy

choice dimension by dimension. Sixth, the initiative process can be manipulated by agenda

setting, which determines what options voters see and the order in which they are considered.

Neither of these last two problems with the initiative process have an analog in markets. Seventh,

there seems to be a common theme among initiative proponents that simply having more options

makes voters better off. There is not a clear theory of how aggregating voters' decisions across a

variety of political dimensions improves policy outcomes. Such an assumption is based on

something akin to the invisible hand of economic markets, but there is not an analog to price,

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form of market failure, and asymmetry of information may be a source of market power, and is often thought to be a source of political power.

[94] Think of each initiative battle as a market share competition in which consumers chose between the status quo and a new product, much as they do between Coke and Pepsi or Ford and Toyota. The alternative preferred by most consumers gets the highest market share and thus wins. The trouble with this analogy is that voters are left with no way to consider trade-offs across different types of goods. A consumer with a finite budget constraint recognizes that her choice of a higher priced product for one type of good constrains her choices in another area. Legislators dealing with multiple issues as once also face such a budget constraint. For consumers who spend only their votes,

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which would have to exist for us to believe there is an invisible hand for the "initiative market." Furthermore, the problems with the initiative information environment that we discussed earlier also make it unlikely that simply offering a multitude of options will improve social welfare. For these reasons it seems unreasonable to use the EMH to understand initiatives.

This discussion leads us to believe that there is not an "efficient market" for initiatives. The previously discussed pathologies of initiatives are not overcome simply by comparing voters to consumers and initiatives to products. Given the problems with the initiative process it is unclear why aggregating policy preferences via a series of uncoordinated, low-information elections will lead to improved outcomes.

8. Conclusion

Lupia and Matsusaka faithfully report that "recent breakthroughs in theory and empirical analysis paint a comparatively positive picture of the initiative and referendum."[95] We have attempted to provide more troubling empirical examples along with theoretical reasons to be less sanguine. Throughout this paper we have presented a variety of reasons why the initiative process in general and crypto-initiatives in particular, are unlikely to improve policy outcomes. In fact, all of the institutional solutions to social choice problems that scholars have studied[96] are lacking in the initiative context. This should be a strong indication that outcomes are unlikely to be positive, as we demonstrated in our discussion of social choice problems for initiatives. Furthermore, it is clear that information problems will plague the initiative process, particularly

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though, no such disciplining constraint is in place, allowing them to always pick the more costly option without forcing them to consider the costs of their choices.

[95] Lupia and Matsusaka (2004) supra note 5.

[96] Shepsle, *supra* note 4; Shepsle & Weingast, *supra* note 22; Gordon Tullock, *Why So Much Stability?*, 37 no. 2 PUBLIC CHOICE 189 (1981); George Tsebelis, *Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartism*, 25 BRITISH JOURNAL OF POLITICAL SCIENCE 289 (1995).

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when initiatives are chosen so as not to arouse opposition. Despite the possibility of negative social effects, political activists have picked up on the success of crypto-initiatives in 2004 and are encouraging political activists to use initiatives to set their own agenda in 2005 and beyond. The deleterious consequences of partisan manipulation of the initiative agenda is further affected by the rise of 527 crypto-PACs. Crypto-initiatives will tend to be particularistic and will typically not foster the creation of a voter-friendly information environment or a social-welfare enhancing choice environment. The combined effect of crypto-initiatives and crypto-PACs seems very unlikely to improve social welfare.

Our conclusion about the negative consequences of the initiative process leads us to suggest that legislatures are generally a better way to make law. Legislative lawmaking includes the ability to make tradeoffs through the budget process, greater resources to study and determine possible effects of policy change, and compared to constitutional amendments legislative changes are less permanent. Despite our generally greater support for the legislative process, we do acknowledge that there are times when the legislature may be corrupt or captured by special interests. In those circumstances, the initiative may be a useful way to change policy, but it should be made more difficult to change policy via initiatives so that they are only used when the legislature is particularly ineffective.

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We also recognize that the legislature may suffer from many of the same social choice problems that plague initiatives, but there are two important differences. First, the legislature has to make policy tradeoffs within its budget process every year or two. So, even if adopted policies are rushed, one-dimensional, or the result of pandering, eventually the state has to face tradeoffs in passing its budget. This process helps to mitigate problems from the initial adoption. Second, the legislature typically doesn't amend the constitution so changes are not permanent and can be amended or repealed by statute as opposed to initiatives that often permanently amend the state constitution. The greater flexibility of legislative policy avoids solidifying bad policy choices. Also, changes in public opinion that affect the election of legislators can affect public policy through the legislature rather than requiring someone to bring an initiative and pass it if the public wants to amend or repeal a previously passed constitutional amendment. For these two reasons, the legislature seems to be a better arena for law making than the initiative process.

Since initiatives, campaign finance reform, and the other imperfect reforms of the Twentieth Century seem here to stay, we offer three proposals that we believe would improve the outcomes from the initiative process. First, require initiatives to meet the "pay as you go" standard, in which new policy proposals must either contain a funding source or explain what is to be cut in the budget to fund the new program. The adoption of this proposal makes the tradeoffs more explicit and also increases the probability of generating opposition, which is more likely to meet the conditions necessary for voters to become informed. Second, initiatives should be subject to amendment by the legislature. Every other type of policy making in the U.S. is subject to checks and balances. In California and in many localities, no such checks and balances exist for initiatives. This condition will force initiative sponsors to recognize the implementation difficulties faced by the legislature and may also constrain extreme initiatives because they can

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be more easily moderated. Third, initiatives should contain Sunset Provisions that require either voters or the legislature to reconsider the policy and determine if they wish to keep it after a specified time period. This would reduce the permanence of the constitutional changes and make it easer to rollback ineffective or negative policies. These three additions to the initiative process will force their sponsors to anticipate the reactions of voters and legislatures to the trade-offs inherent in their proposals. This would make it more likely that initiatives would be welfare enhancing, even if it makes them less common.