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Marriage on the Ballot: An Analysis of Same-Sex Marriage Referendums in North Carolina, Minnesota, and Washington During the 2012 Elections

*Craig M. Burnett & Mathew D. McCubbins**

INTRODUCTION

Using direct democracy, voters in a majority of states have considered, in recent years, whether the definition of marriage should include or exclude same-sex couples. This Article explores how individuals assessed three ballot measures that defined marriage in three states: two constitutional referendums that proposed to outlaw same-sex marriage in North Carolina and Minnesota, and a veto referendum that asked voters to affirm a legislative action that legalized same-sex marriage in Washington state. We explore what individuals knew about the referendums and whether elite endorsements helped them make what Lupia and McCubbins termed “reasoned choices” on these ballot measures.¹ We find that, despite the simplicity of the measures, knowledge about them was generally poor. We also show that individuals sometimes, but by no means universally, use elite endorsements to inform their decisions. When individuals use elite endorsements, the individual must perceive the cue-giver to be knowledgeable and trustworthy. We also discover knowing a gay or lesbian person is sometimes related to voters’ decisions about whether to support or oppose same-sex marriage. Our results have broad implications for how individuals form their evaluations of social policy in the United States and how these evaluations translate into votes. We conclude by considering what our findings mean for direct democracy from both a legal and policy perspective.

Since 1998, voters in thirty-six states have considered the question of whether to outlaw or allow same-sex couples to marry

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¹ See *generally* ARTHUR LUPIA & MATHEW D. MCCUBBINS, *THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW?* (James E. Alt & Douglass C. North eds., 1998) [hereinafter LUPIA & MCCUBBINS, *DEMOCRATIC DILEMMA*].

a total of forty times.² Until the 2012 elections in Maine, Maryland, and Washington, citizens had not yet voted to legalize same-sex marriage at the ballot box. In June 2015, the United States Supreme Court decided in *Obergefell v. Hodges* that bans on same-sex marriage are unconstitutional.³ While the basic right of same-sex marriage is now decided, issues related to same-sex marriage as a social policy—for example, whether public figures can opt out of performing marriages based on their religious beliefs or whether businesses must cater to same-sex couples—will continue to be matters considered both in the courts and on the ballot. Despite the often-contentious nature of the issue—and the sometimes astronomical spending for or against these measures—research using individual-level data to analyze how individuals make decisions concerning same-sex marriage is limited.

In what represents some of the only individual-level data that explores how voters decided these social policy questions, our previous research on same-sex marriage⁴ examines an exit survey of California voters regarding Proposition 8—the highly contentious and notably expensive constitutional amendment banning same-sex marriage in California that was later overturned by the United States Supreme Court.⁵ Our results reveal that most voters knew very little about the measure. Those who knew and trusted one of the political parties' endorsements, however, were likely to use that cue to arrive at a decision. This finding supports the theory of persuasion, learning, and choice that Lupia and McCubbins proposed.⁶ By contrast, voters' knowledge of specific facts about the measure had a negligible effect on their decisions.

Our previous results, while novel and interesting, suffer from a relatively small sample size.⁷ Moreover, due to the exit

² Two states—Arizona and California—considered outlawing marriage twice; Maine rejected a law via referendum to allow same-sex marriage, but then passed an initiative to legalize same-sex marriage. H.R. 1860, 125th Leg., 2d Reg. Sess. (Me. 2012). Nevada's constitution dictates that voters must consider (and pass) any constitutional change in two subsequent elections. NEV. CONST. art. 19, § 2.

³ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

⁴ For our analysis on voting behavior on California's Proposition 8 in 2008, see generally Craig M. Burnett & Mathew D. McCubbins, *Sex and the Ballot Box: Perception of Ballot Measures Regarding Same-Sex Marriage and Abortion in California*, 34 J. PUB. POL'Y 3 (2014) [hereinafter Burnett & McCubbins, *Sex and the Ballot Box*].

⁵ *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

⁶ For a formal explanation of their model and expectations, see LUPIA & MCCUBBINS, *DEMOCRATIC DILEMMA*, *supra* note 1, at 17–39.

⁷ See Craig M. Burnett, Elizabeth Garrett, & Mathew D. McCubbins, *The Dilemma of Direct Democracy*, 9 ELECTION L.J.: RULES, POL., & POL'Y 305, 305–14 (2010) [hereinafter Burnett et al., *Dilemma of Direct Democracy*] (analyzing voting behavior on California's Proposition 7, showing that usage of cues is quite limited); see also Burnett

survey format of these studies, we were unable to ask more than a few questions about the ballot measures we surveyed. Indeed, our research on Proposition 8 likely raises more questions than answers,⁸ including:

1. How often do voters use endorsements to arrive at an informed decision on ballot measures?
2. Is our finding that knowledge of facts has a limited impact on decisions idiosyncratic to Proposition 8, or is this a general finding?
3. Given the relatively low levels of knowledge about policy specifics and endorsements, how do the majority of voters arrive at decisions?

While we cannot definitively approach an answer to the third question, we endeavor to provide some analysis on the other two questions with additional data. Using survey data from three states that considered outlawing or adopting same-sex marriage during the 2012 election cycle, we again examine the degree to which individuals' knowledge of prominent endorsements and pertinent policy facts influence their decisions. Taking our lead from Lupia,⁹ and his work with McCubbins,¹⁰ we explore the hypothesis that individuals use information to arrive at a reasoned decision. Unlike our previous research, we have gathered significantly more in-depth data to provide greater insight into how voters make decisions about whether to legalize or outlaw same-sex marriage in their state. As in our previous research, we find that individuals do not use cues from prominent third-party endorsers at a high rate. We also show that factual knowledge has a limited effect on decisions.

We argue that the results we present here represent a unique and instructive test case of the Lupia and McCubbins hypothesis, as same-sex marriage is the prototypical "easy issue" for which most individuals can arrive at a decision armed with little more than their gut instinct.¹¹ In other words, we expect

& McCubbins, *Sex and the Ballot Box*, *supra* note 4, at 11 (finding wide recognition of Governor Schwarzenegger's endorsement in a study of several Indian gaming compacts); Craig M. Burnett & Mathew D. McCubbins, *When Common Wisdom Is Neither Common nor Wisdom: Exploring Voters' Limited Use of Endorsements on Three Ballot Measures*, 97 MINN. L. REV. 1557, 1561–69 (2013) [hereinafter Burnett & McCubbins, *Voters' Limited Use of Endorsements*].

⁸ Burnett & McCubbins, *Sex and the Ballot Box*, *supra* note 4, at 10–12.

⁹ See generally Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63 (1994) [hereinafter Lupia, *Shortcuts*] (showing that voters make reasonably informed decisions on insurance reform initiatives).

¹⁰ LUPIA & MCCUBBINS, *DEMOCRATIC DILEMMA*, *supra* note 1, at 35–38.

¹¹ For what constitutes an "easy issue," see Edward G. Carmines & James A.

that same-sex marriage is the least likely place to find support for the Lupia and McCubbins hypothesis.¹² In addition to estimating the effect of endorsements and facts, we also provide some traction on the third question by gauging the effect that personal relationships have on decisions. In particular, we find that knowing a gay or lesbian person can have a large effect on the individuals' decision calculus.

Not only do these findings have both important normative and legal implications, we suspect that our results will be informative regarding how voters will behave on related issues in future elections. That is, while the basic policy of marriage is decided, it is likely that same-sex marriage will follow a similar policy path that abortion did post *Roe v. Wade*.¹³ The battle of same-sex marriage will likely shift to the policy margins, as citizens, interest groups, and legislatures will attempt to shape and reshape the boundaries of same-sex marriage as a policy.

I. VOTERS AND DECISION MAKING ON BALLOT MEASURES

Whether voters are equipped with the ability to make political decisions in both representative and direct democracy has been a subject of considerable debate among scholars and political observers. For representative democracy, Converse's study of belief systems highlights the fact that most individuals do not organize the world in terms of a liberal or conservative ideology, and most individuals lack a meaningful understanding of the ideological spectrum.¹⁴ The impact of Converse's study cannot be understated, as it became common wisdom that the average voter's inability to recall specific facts implies voters are unprepared to make democratic decisions. Subsequent studies on what voters know about politics have served to reinforce this belief.¹⁵

In response to Converse's findings, scholars interested in voter decision making approached the question of competence from a more practical vantage point. Notably, Brady and Sniderman constructed a framework for understanding voters'

Stimson, *The Two Faces of Issue Voting*, 74 AM. POL. SCI. REV. 78, 80 (1980).

¹² LUPIA & MCCUBBINS, DEMOCRATIC DILEMMA, *supra* note 1, at 205–08.

¹³ See *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁴ Philip E. Converse, *The Ideological Character of Mass Participation in American Politics*, in POLITICAL ISSUES AND BUSINESS IN 1964, at 11, 15 (Govert W. van den Bosch ed., 1964) (finding that voters lack a strong understanding of the political world in a deep analysis of American National Election Study data).

¹⁵ For a summary of what voters know about politics, see MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS 62–104 (1996).

decisions that differed substantially from Converse.¹⁶ They argue that most individuals will rely on basic feelings of groups to help them arrive at a decision, which they termed “likability heuristics.” Their argument is that storing and recalling vast amounts of knowledge to make a decision is often too difficult for most individuals. Instead, basic feelings of like or dislike for a group or person often lead to similar decisions as if the individual were more informed.

Similar to Downs,¹⁷ Popkin’s classic work on heuristics argues that simple cues—and especially party identification—help voters arrive at a relatively informed decision without investing much time or effort.¹⁸ Popkin argues that voters choose to minimize the time required to arrive at a decision, but still make decisions that are not all that different from a fully-informed vote.¹⁹ Empirically, it is Lupia’s seminal research on voters in Los Angeles during the 1988 general election that examines this theory with survey data.²⁰ Lupia’s survey shows that voters who were aware of simple endorsements were able to arrive at decisions that were indistinguishable from those who were the most informed.

While the public’s use of party identification was largely a foregone conclusion, Lupia’s results demonstrate that voters’ use of cues beyond party identification is possible. Expanding on this finding, Lupia and McCubbins identify the conditions under which the significant result seen in Lupia can appear.²¹ Lupia and McCubbins define two necessary conditions for a third-party endorsement to be persuasive and demonstrate the conditionality of persuasion in a novel set of laboratory experiments.²² First, an

¹⁶ See generally Henry E. Brady & Paul M. Sniderman, *Attitude Attribution: A Group Basis for Political Reasoning*, 79 AM. POL. SCI. REV. 1061 (1985) (theorizing that most individuals think about politics simplistically).

¹⁷ ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 211 (1957) (arguing that ignorance of specific facts is rational).

¹⁸ SAMUEL L. POPKIN, *THE REASONING VOTER: COMMUNICATION AND PERSUASION IN PRESIDENTIAL CAMPAIGNS* (2d ed. 1994) (expanding on the logic that ignorance is rational and party identification helps voters cast reasoned votes despite their ignorance of politics).

¹⁹ *Id.* at 7–15.

²⁰ Lupia, *Shortcuts*, *supra* note 9, at 63, 72.

²¹ *Id.*; LUPIA & MCCUBBINS, *DEMOCRATIC DILEMMA*, *supra* note 1, at 98.

²² LUPIA & MCCUBBINS, *DEMOCRATIC DILEMMA*, *supra* note 1, at 98. For additional experimental research on this topic which confirms the Lupia and McCubbins finding, see Cheryl Boudreau, *Closing the Gap: When Do Cues Eliminate Differences Between Sophisticated and Unsophisticated Citizens?*, 71 J. POL. 964 (2009); Cheryl Boudreau, Mathew D. McCubbins & Seana Coulson, *Knowing When to Trust Others: An ERP Study of Decision Making After Receiving Information from Unknown People*, 4 SOC. COGNITIVE & AFFECTIVE NEUROSCIENCE 23 (2009) [hereinafter Boudreau et al., *ERP Study*]; Mathew D. McCubbins & Daniel B. Rodriguez, *When Does Deliberating Improve Decisionmaking?*, 15 J. CONTEMP. LEGAL ISSUES 9 (2006). For experimental results that match the Lupia

individual must trust the cue-giver in order for an endorsement to be persuasive. There are four requirements, which are individually or jointly sufficient, for an individual who receives an endorsement to trust the endorser.²³ One means by which someone trusts the statements made by someone else (who is a stranger to them), is the Aristotelian maxim that the two are perceived by each other to share a common interest in the outcome of the individual's choice. In terms of a vote on a ballot measure, the endorser and the voter must desire the same outcome. In the absence of a shared common interest, the endorser can establish trust by taking an observable and costly action to convey the information. Similarly, a penalty for lying or the threat of outside verification of the endorser's statement can serve as external forces that substitute for the trust gained from common interest.

The second condition is that the individual must perceive the endorser as being knowledgeable about the decision at hand. Put another way, if the endorser has no experience or knowledge that is pertinent to the choice available—e.g., the hardware salesman who is not particularly knowledgeable about cars offers his advice about which car to purchase—the individual receiving the endorsement will disregard the information as not useful.

By establishing these two conditions for persuasion, Lupia and McCubbins make clear that a good number of endorsements will not be persuasive.²⁴ Indeed, Garrett and McCubbins find that many third party endorsements fail to meet the two conditions for persuasion,²⁵ and Garrett and Smith uncover the

and McCubbins propositions, but do not test it directly, see generally GERD GIGERENZER, *ADAPTIVE THINKING: RATIONALITY IN THE REAL WORLD* (Stephen Stich ed., 2000); GERD GIGERENZER, *GUT FEELINGS: THE INTELLIGENCE OF THE UNCONSCIOUS* (2007); GERD GIGERENZER, *RATIONALITY FOR MORTALS: HOW PEOPLE COPE WITH UNCERTAINTY* (Stephen Stich ed., 2008); GERD GIGERENZER ET AL., *SIMPLE HEURISTICS THAT MAKE US SMART* (Stephen Stich ed., 1999); GERD GIGERENZER & REINHARD SELTEN, *BOUNDED RATIONALITY: THE ADAPTIVE TOOLBOX* (2001).

²³ Lupia and McCubbins state a prior necessary condition: individual decision makers must believe that they will learn something that enables them to improve the outcome resulting from their decision, or else they will not pay attention to the endorsement to begin with. Attention, and the belief that the decision maker can learn from the statement of another, is assumed away in all other analyses of persuasion and learning. LUPIA & MCCUBBINS, *DEMOCRATIC DILEMMA*, *supra* note 1, at 2. If, for example, the individual is already confident in her choice, she will not seek or incorporate an endorsement into her decision (more information is not always better, a new statement could be erroneous, or confusing, thus making the decision maker worse off). *Id.* For an experimental study of attention and persuasion, see Boudreau et al., *ERP Study*, *supra* note 22.

²⁴ LUPIA & MCCUBBINS, *DEMOCRATIC DILEMMA*, *supra* note 1, at 7.

²⁵ For an analysis of several cue-givers in direct democracy elections, see Elizabeth Garrett & Mathew D. McCubbins, *When Voters Make Laws: How Direct Democracy Is*

common practice of hiding the identity of the true endorsement with an ambiguous front group name.²⁶ In our own research, we also call into question the degree to which voters use endorsements to make decisions on ballot measures.²⁷ Our empirical findings are quite mixed, but consistent: endorsements are influential on some people for some endorsements, and knowledge of facts only matters some of the time.

While our surveys have raised important questions about the degree to which voters actually use endorsements or knowledge of facts, the results we have presented to date are still limited. Our goal here is to expand on the empirical record concerning both cues and factual information and how voters process knowledge into decisions. The policy area we study is whether an individual chooses to adopt or ban same-sex marriage—a policy we have examined before.²⁸ In addition to providing new data, we ask more in-depth questions about what kinds of policy facts and prominent endorsements individuals learn about, allowing us to gauge what individuals know about these referendums that will appear on their ballots just days later. We also include a measure of whether or not they know a gay or lesbian person.

Unlike our previous research that examines other policy areas, same-sex marriage is a relatively inhospitable environment to look for the Lupia and McCubbins hypothesis to have predictive power. Same-sex marriage is an archetypal “easy issue” under the Carmines and Stimson framework.²⁹ Same-sex marriage has been on the political agenda for over fifteen years and focuses on the ends, rather than the means. Thus, voters who must consider these types of issues often have well-formed opinions about the matter and can rely on a “gut reaction” to the policy. Because easy issues, such as same-sex marriage measures, typically do not require much in the way of policy specifics, providing a reasoned answer often means the voter needs “no conceptual sophistication.”³⁰ For the Lupia and McCubbins framework, we would predict that endorsements are likely less persuasive. Many individuals will already have made

Shaping American Cities, 13 PUB. WORKS MGMT. & POL’Y 39 (2008).

²⁶ See Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 ELECTION L.J. 295 (2005) (revealing, in an examination of several groups listed in official support or opposition of ballot measures, that most groups were constructed for just the one election and the names chosen were largely uninformative, if not misleading).

²⁷ See Burnett et al., *Dilemma of Direct Democracy*, *supra* note 7; Burnett & McCubbins, *Sex and the Ballot Box*, *supra* note 4; Burnett & McCubbins, *Voters’ Limited Use of Endorsements*, *supra* note 7, at 1561.

²⁸ Burnett & McCubbins, *Sex and the Ballot Box*, *supra* note 4, at 3, 10–12.

²⁹ Carmines & Stimson, *supra* note 11, at 78.

³⁰ *Id.*

up their minds about the issue and, therefore, are not seeking knowledge from an endorsement. Under these conditions, endorsements will only be persuasive for a fraction of the population.

In this research, we test two hypotheses that we derive from the Lupia and McCubbins framework that sets parameters for when third-party endorsements will be persuasive.³¹ Similar to our previous research, we operationalize common interest—which establishes trust—between an endorser and an individual as being satisfied when the individual has a positive perception of the endorser.³² We establish the knowledgeability condition by only examining endorsers who have considerable expertise on the question at hand.³³ Consistent with the Lupia and McCubbins framework, we explore the following hypothesis:

Hypothesis 1: Individuals who share a common interest with a cue-giver will be more likely to accept the cue-giver's endorsement and vote in accordance with that recommendation.

We also use the Lupia and McCubbins framework to derive a second hypothesis about how third-party endorsements can influence voters. In particular, we agree with Lupia and McCubbins that an individual does not need to have a positive perception of the endorser to extract information from an endorsement. Indeed, Lupia and McCubbins argue that sometimes the most informative endorsement comes from endorsers with whom an individual *disagrees*.³⁴ In other words, an individual can use the recommendation from an endorser they disagree with to learn to do the opposite, as they do not share a common interest. Accordingly, our second hypothesis is:

Hypothesis 2: Individuals who are aware that they do not share a common interest with a cue-giver will be more likely to use the cue-giver's endorsement and vote in opposition to that recommendation.

We also examine two other relationships with our data. First, similar to Lupia and others, we investigate whether greater knowledge has an impact on an individual's decision.³⁵ In

³¹ See LUPIA & MCCUBBINS, DEMOCRATIC DILEMMA, *supra* note 1, at 9.

³² Burnett & McCubbins, *Sex and the Ballot Box*, *supra* note 4, at 10–11.

³³ We discuss this in further detail for each endorsement in the next section. See *infra* Part II.

³⁴ See generally LUPIA & MCCUBBINS, DEMOCRATIC DILEMMA, *supra* note 1.

³⁵ See Lupia, *Shortcuts*, *supra* note 9, at 72. For an example of how increased information can alter voting choices, see Larry M. Bartels, *Uninformed Votes: Information*

our research, we focus on whether factual knowledge of policy specifics influences an individual's decision. Second, we explore the degree to which personal relationships affect an individual's belief that same-sex marriage should be legal or not. Here, the personal relationship we focus on is whether an individual knows a gay or lesbian person. We do not define these two explorations as formal hypotheses to test because, as we outline next, we perceive these two variables to be covariates in our model, not treatments.

II. RESEARCH DESIGN AND DATA

We examine our hypotheses using data we collected during the 2012 election cycle. During the 2012 primary season, we polled eligible voters in North Carolina about Amendment 1—a legislatively-referred constitutional amendment that proposed to outlaw same-sex marriage in the state.³⁶ In the general election, we asked registered voters in Minnesota and Washington about a referendum in their respective state concerning same-sex marriage. Minnesota's Amendment 1 was a legislatively-referred constitutional amendment that proposed to outlaw same-sex marriage in the state.³⁷ Washington's Referendum 74 was a veto referendum³⁸ of a legislative statute that legalized same-sex marriages.³⁹ Thus, for North Carolina and Minnesota, voters in these states were considering an amendment to the constitution that would outlaw same-sex marriage; all constitutional amendments in these states require voter approval.⁴⁰ As a veto referendum, Washington's measure was citizen-initiated, in that individuals gathered enough signatures to require the duly passed legislation (a regular statute) authorizing same-sex marriages to appear on the ballot for voter approval before being enacted.⁴¹

We use a post-test-only non-equivalent group design to explore our two hypotheses based on the Lupia and McCubbins

Effects in Presidential Elections, 40 AM. J. POL. SCI. 194 (1996).

³⁶ *North Carolina Same-Sex Marriage, Amendment 1 (May 2012)*, BALLOTPEDIA, [https://ballotpedia.org/North_Carolina_Same-Sex_Marriage,_Amendment_1_\(May_2012\)](https://ballotpedia.org/North_Carolina_Same-Sex_Marriage,_Amendment_1_(May_2012)) [http://perma.cc/FH4J-V3EN].

³⁷ *Minnesota Same-Sex Marriage Amendment, Amendment 1 (2012)*, BALLOTPEDIA, [https://ballotpedia.org/Minnesota_Same-Sex_Marriage_Amendment,_Amendment_1_\(2012\)](https://ballotpedia.org/Minnesota_Same-Sex_Marriage_Amendment,_Amendment_1_(2012)) [https://perma.cc/WYR4-6VRF].

³⁸ This may also be called a popular referendum.

³⁹ *Washington Same-Sex Marriage Veto Referendum, Referendum 74 (2012)*, BALLOTPEDIA, [https://ballotpedia.org/Washington_Same-Sex_Marriage_Veto_Referendum,_Referendum_74_\(2012\)](https://ballotpedia.org/Washington_Same-Sex_Marriage_Veto_Referendum,_Referendum_74_(2012)) [perma.cc/J5X9-WRYG].

⁴⁰ MINN. CONST. art. XI; N.C. CONST. art. XIII; WASH. CONST. art. XXIII.

⁴¹ See *Washington Same-Sex Marriage Veto Referendum, Referendum 74 (2012)*, *supra* note 39.

model of when third-party endorsements will influence outcomes.⁴² In a basic sense, our treatment is knowledge of an endorsement. Knowledge of an endorsement, as we discussed previously, is not sufficient for persuasion by itself. For the endorsement to be persuasive, the individual must trust the endorser by sharing a common interest or knowing that they do not share a common interest (allowing for the individual to do the opposite of the recommendation). Here, similar to Karp and our own research, we establish trust between the individual and the endorser by accounting for the interaction between knowledge of an endorsement and the individual's perception of the cue-giver (positive or negative).⁴³ Our first hypothesis states that individuals who have knowledge of an endorsement and have a positive perception of the endorser will be more likely to follow the endorser's suggestion in their vote choice. Likewise, our second hypothesis states that individuals who have knowledge of an endorsement but have a negative perception of the cue-giver will be less likely to follow the cue-giver's recommendation. To model this relationship, we split our sample of respondents into two groups: individuals who have a positive view of the endorser and individuals who have a negative view of the endorser. Separating the two types of individuals allows us the most precise test of our hypotheses and minimizes the difference in propensity to receive the treatment between the two groups. In other words, if there is a difference in propensity to learn of an endorsement based on an individual's perception of the cue-giver, we account for that variance by separating our respondents into separate groups.

While we can account for the variance in the propensity to receive the endorsement between groups by creating subgroups, we still must account for the variance in propensity *within groups*. Since we have a non-equivalent group design, we must account for the discrepancies between the treatment group—i.e., learned of an endorsement—and the control group—i.e., did not learn of an endorsement. We use the empirical strategy we outlined in our previous research to construct equivalent groups.⁴⁴ Specifically, we use the GenMatch package for R as implemented by MatchIt to construct equivalent treatment and

⁴² See generally LUPA & MCCUBBINS, DEMOCRATIC DILEMMA, *supra* note 1.

⁴³ See Burnett & McCubbins, *Voters' Limited Use of Endorsements*, *supra* note 7, at 1575; Jeffrey A. Karp, *The Influence of Elite Endorsements in Initiative Campaigns*, in CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES 149 (Shaun Bowler et al. eds., 1998) (showing that impact of an endorsement depends on an individual's evaluation of the endorser).

⁴⁴ See Burnett & McCubbins, *Voters' Limited Use of Endorsements*, *supra* note 7.

control groups.⁴⁵ Matching is a useful tool to reduce the covariate imbalance between treatment and control groups. Unlike experimental work in which the researcher can use random assignment to achieve balance between the treatment and control groups, researchers conducting observational or quasi-experimental work have no control over the distribution of the treatment among groups. Indeed, there are sound reasons to expect that the treatment is not distributed evenly among the treatment and control group. In our research, we know that knowledge of endorsements is not randomly assigned to individuals: people who are more interested in politics, better educated, wealthier, and older are more likely to follow politics and, as a result, learn from endorsements. Matching, then, finds the best matches of individuals in the treatment group to the control group. In a more practical sense, the genetic matching algorithm produces a two-group sample of respondents who are as similar as possible along important covariates. Matching, combined with separating respondents into the two groups described in the previous paragraph, creates a balance in the propensity to receive the treatment for all relevant subgroups. In each of our matching algorithms, we use the following covariates: age, income, education, gender, party identification, ideology, and political knowledge.⁴⁶

After constructing equivalent groups, we use a logit regression to estimate the effect of knowing an endorsement on vote choice. A formal representation of this regression appears in Equation 1.

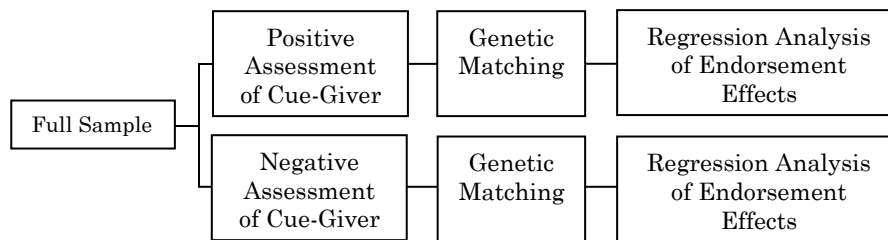
⁴⁵ For detailed descriptions on how GenMatch works, see Alexis Diamond & Jasjeet Sekhon, *Genetic Matching for Estimating Causal Effects: A General Multivariate Matching Method for Achieving Balance in Observational Studies*, 95 REV. ECON. & STAT. 932 (2013); Jasjeet Sekhon, *Opiates for the Matches: Matching Methods for Causal Inference*, 12 ANN. REV. POL. SCI. 487 (2009). MatchIt is a package in R that implements several matching algorithms. For a technical description of how to use the MatchIt package, see Daniel E. Ho et al., *Matching as Nonparametric Preprocessing for Reducing Model Dependence in Parametric Causal Inference*, 15 POL. ANALYSIS 199 (2007).

⁴⁶ Political knowledge for North Carolina's Amendment 1 is an index of the percentage of correct answers of the following six questions: (1) Whose responsibility is it to determine if a law is constitutional or not; (2) Do you happen to know what job or office Harry Reid currently holds; (3) How much of a majority of both the House of Representatives and the Senate are required to override a presidential veto; (4) Do you happen to know which party has the most members in the House of Representatives in Washington, D.C.; (5) Who is the current Speaker of the U.S. House of Representatives; and (6) Who is the current Chief Justice of the United States Supreme Court? For Minnesota's Amendment 1 and Washington's Referendum 74 there is an additional question in the index: Do you happen to know which party has the most members in the Senate in Washington, D.C.?

Equation 1

$$\Pr(y_{iz} = 1) = \frac{1}{1 + e^{-(\beta_0 + \beta_1 Q_{iz} + \beta_2 X_{iz})}}$$

In our logit regression, $\Pr(y_{iz} = 1)$ represents the estimated probability an individual voting in favor of supporting a ballot measure; i denotes an individual in our survey; z represents the ballot measure being analyzed. A binary choice, “1” represents a “yes” vote and “0” is a “no” vote on ballot measure z . Next, Q is a matrix of dichotomous variables that signifies whether an individual had knowledge of an endorsement for ballot measure z . The model’s final term is X , which is a matrix of covariates that includes dichotomous variables identifying whether respondent i had knowledge of facts pertaining to ballot measure z and whether respondent i knows a gay or lesbian person. For a summary of our research design, see Figure 1.

Figure 1: Research Design Summary

We fielded three surveys during the 2012 election cycle to examine our hypotheses. The first survey asked voting-eligible residents of North Carolina about Amendment 1, which appeared on the May 8 presidential primary ballot. To collect our sample of respondents, we hired Marketing Systems Group (MSG) to recruit voting eligible North Carolina residents and forward those individuals to our survey site.⁴⁷ We received responses from 1066 individuals during the time we were in the field, and our cooperation rate was 6%.⁴⁸

On this survey, we asked our respondents to report what they knew about Amendment 1, a legislatively-referred constitutional amendment that would codify the already existing statutory ban on same-sex marriage in the state’s constitution.⁴⁹

⁴⁷ Marketing Systems Group recruits respondents from their online opt-in panel. Online opt-in panels are discussed at length in the literature concerning survey sampling; we argue that most samples will be biased in some way. Additionally, since we are using a quasi-experimental design, we minimize the problem of selection bias. However, Appendix A contains the demographics for each sample compared to relevant U.S. census statistics.

⁴⁸ Time in the field was from April 27 to May 3, 2012.

⁴⁹ See *North Carolina Same-Sex Marriage, Amendment 1 (May 2012)*, *supra* note 36.

Many individuals voiced their support or opposition to the measure. Of note, both President Barack Obama and then-Governor Beverly Perdue expressed opposition to the amendment. In addition to these two identification questions, we also asked respondents to indicate whether they approved or disapproved of President Obama's and Governor Perdue's job performance (two separate questions). Finally, we asked respondents to identify a piece of factual information regarding Amendment 1: whether our respondents understood that same-sex marriage was already prohibited in North Carolina.⁵⁰ This question serves as a covariate in our regression model.

Our second survey asked registered voters in Minnesota about Amendment 1, a legislatively-referred constitutional ban on same-sex marriage that appeared on the 2012 general election ballot.⁵¹ As before, we used MSG to provide a sample of registered voters in Minnesota. We collected survey responses from October 31 to November 5, receiving a total of 1250 responses. The cooperation rate was 7%.

On this survey, we asked respondents to report whether they knew the positions of some of the most prominent third-party endorsements relating to Minnesota's Amendment 1. In particular, we asked our respondents to identify the positions of President Barack Obama (opposed), Governor Mark Dayton (opposed), and Congresswoman Michele Bachmann (supported). We also asked respondents to indicate whether respondents had a positive or negative view of these cue-givers. For this measure, we assessed respondents' knowledge about three facts relating to Amendment 1: (1) Amendment 1 left open the possibility for civil unions; (2) same-sex marriages were already prohibited by the state; and (3) the Minnesota Legislature had considered proposing a similar measure previously. A full list of these questions is available in Appendix B.

The third survey asked registered voters in Washington state about Referendum 74, a veto referendum that proposed to legalize same-sex marriage in the state on the November 6, 2012 general election ballot, where a yes vote constituted a vote to approve same-sex marriage.⁵² For this sample, we again used MSG and collected responses from registered voters in the state from October 31 to November 5. We received responses from 1285 registered voters in Washington with a response rate of 7%.

⁵⁰ See Appendix B.

⁵¹ The date of the general election ballot was November 6, 2012. See *Minnesota Same-Sex Marriage Amendment, Amendment 1 (2012)*, *supra* note 37.

⁵² See *Washington Same-Sex Marriage Veto Referendum, Referendum 74 (2012)*, *supra* note 39.

Similar to questions regarding the Minnesota measure, we asked respondents to identify the positions of three third-party endorsements: Washington State Democrats (supported); Jeff Bezos, CEO of Amazon.com, a major employer in the state (supported); and the National Organization for Marriage (opposed). As was the case with the other measures, we asked respondents to indicate whether they had a positive or negative assessment of each cue-giver. In addition, we asked respondents to report their knowledge of three facts pertaining to Referendum 74: (1) same-sex couples were not allowed to marry in Washington state; (2) if passed, the majority of domestic partnerships would convert to marriages; and (3) there was no exemption for religious organizations who accepted state money from being required to provide various services to same-sex couples, such as adoption (but excluding marriages). Again, a full description of each question is available in Appendix B.

For each of the three ballot measures, we also asked respondents to indicate whether they knew a gay or lesbian person. Specifically, we asked: "Do you have any friends or relatives or coworkers who have told you, personally, that they are gay or lesbian?" This variable is similar to our measures of knowledge about the ballot measure, since it acts as a covariate in our model. Additionally, including this measure allows us to examine whether contact with a gay or lesbian person continues to have an impact on vote choice. We turn now to present our results.

III. RESULTS

The first step in our results is to present the percentage of correct answers to each of the knowledge questions and the distribution of responses for knowing a gay or lesbian person for each of the three samples. As Table 1 shows, knowledge of cues and facts varied across the three surveys. For North Carolina's Amendment 1, only 36.5% of respondents were aware of President Obama's opposition, and only 42.6% were aware of then-Governor Perdue's opposition to the measure. Notably, 72.2% of respondents knew the status quo, that same-sex marriages were already illegal in the state. Lastly, just over 70% of respondents reported having been informed personally by someone close to them that he or she was a gay person or a lesbian.

2016]

Marriage on the Ballot

15

Table 1: Percentage of Correct Responses to Endorsement and Factual Knowledge Questions and Knowing a Gay or Lesbian Person

Question Description	Ballot Measure	% Correct
<i>North Carolina</i>		
President Obama Opposed (Cue)	Amendment 1 (NC, 2012)	36.5
Governor Beverly Perdue Opposed (Cue)	Amendment 1 (NC, 2012)	42.6
NC Prohibits Same-Sex Marriage Already (Fact)	Amendment 1 (NC, 2012)	72.2
Knows a Gay or Lesbian Person (Covariate)	Amendment 1 (NC, 2012)	70.3
<i>Minnesota</i>		
President Obama Opposed (Cue)	Amendment 1 (MN, 2012)	44.2
Governor Mark Dayton Opposed (Cue)	Amendment 1 (MN, 2012)	48.4
Representative Michele Bachmann Supported (Cue)	Amendment 1 (MN, 2012)	50.2
MN Prohibits Same-Sex Marriage Already (Fact)	Amendment 1 (MN, 2012)	77.6
Leaves Open Possibility of Civil Unions (Fact)	Amendment 1 (MN, 2012)	38.5
Considered Similar Measure Before (Fact)	Amendment 1 (MN, 2012)	29.5
Knows a Gay or Lesbian Person (Covariate)	Amendment 1 (MN, 2012)	70.6
<i>Washington</i>		
Washington State Democrats (Cue)	Referendum 74 (WA, 2012)	62.3
Jeff Bezos Supported (Cue)	Referendum 74 (WA, 2012)	32.1
National Organization for Marriage (Cue)	Referendum 74 (WA, 2012)	40.3
WA Prohibits Same-Sex Marriage Already (Fact)	Referendum 74 (WA, 2012)	77.6
Domestic Partnerships Convert to Marriages (Fact)	Referendum 74 (WA, 2012)	29
No Exemption for Religious Organizations (Fact)	Referendum 74 (WA, 2012)	24.6
Knows a Gay or Lesbian Person (Covariate)	Referendum 74 (WA, 2012)	74.6

Note: We calculate the percentage of correct responses to these questions based on the respondents who are eligible for regression analysis before matching. The sample sizes are as follows: North Carolina N=561, Minnesota N=684, Washington N=700.

Regarding Minnesota's Amendment 1, knowledge of the cues we asked about varied from 44.2% for President Obama's opposition to 50.1% identifying Representative Michele Bachmann's support of the amendment, while 48.4% identified Governor Dayton as an opponent. As was the case with North Carolina, a large majority of respondents knew the status quo

policy—that Minnesota law already prohibited same-sex marriages.⁵³ The two other facts in our survey did not fare as well: only 38.5% understood that the legislation left open the possibility of civil unions and just 29.5% were aware that the Legislature had considered proposing a similar measure recently. Almost identical to North Carolina, we find that 70.6% of respondents have had someone close to them inform them personally that he or she is a gay person or a lesbian.

For Washington, knowledge of cues also varies. A majority⁵⁴ of respondents were aware of the Washington State Democrats' support of Referendum 74,⁵⁵ but only 32.1% were aware of Amazon.com CEO Jeff Bezos's support for the measure. Likewise, 40.3% of the Washington respondents knew that the National Organization for Marriage opposed the measure. As before, the status quo—that Washington did not allow same-sex couples to marry—was widely known.⁵⁶ Knowledge of other facts, however, was quite low, with just 29% and 24.6% of respondents reporting correctly that most domestic partnerships would convert to marriages and that the law did not provide exemptions for religious organizations to not be required to serve same-sex couples (with the exception of marriage ceremonies), respectively. As was the case in both North Carolina and Minnesota, a large majority of respondents report having a close relative or friend who identifies himself or herself as a gay person or lesbian.⁵⁷

Next, we turn to analyze whether knowledge of cues have an impact on individuals' decisions on ballot measures that consider same-sex marriage as a policy outcome. First, we present the results of our matching algorithm. While the full output associated with our matching results is far too large to publish, we present the overall improvement in propensity scores achieved through our genetic matching algorithm in Table 2. The first column of the table reports the difference in means for the propensity to receive the treatment between the treatment and control groups. That is, column one is the pre-matching mean propensity of the treatment minus the pre-matching mean propensity of the control group. The second column is the same comparison in mean propensity scores *post matching*. The third column is a calculation of the percent of propensity score improvement.

⁵³ 77.6% correct. *See supra* Table 1.

⁵⁴ 62.3%. *See id.*

⁵⁵ Referendum 74 legalizes same-sex marriage. *See id.*

⁵⁶ 77.6 % correct. *See id.*

⁵⁷ 74.6%. *See id.*

2016]

Marriage on the Ballot

17

Table 2: Propensity Score Balance Before and After Genetic Matching

Matched Treatment Condition	Mean Propensity Difference Pre	Mean Propensity Difference Post	Percent Improvement
NC Amendment 1, Approve Obama	0.058	0.002	97.2
NC Amendment 1, Disapprove Obama	0.068	0.000	95.7
NC Amendment 1, Approve Perdue	0.171	0.005	97.0
NC Amendment 1, Disapprove Perdue	0.065	0.004	94.2
MN Amendment 1, Negative Opinion Bachmann	0.219	0.003	98.8
MN Amendment 1, Approve Obama	0.139	0.001	99.3
MN Amendment 1, Disapprove Obama	0.133	0.000	99.8
MN Amendment 1, Approve Dayton	0.275	0.012	95.7
MN Amendment 1, Disapprove Dayton	0.290	0.006	97.9
WA Referendum 74, Positive Opinion Bezos	0.134	0.003	98.0
WA Referendum 74, Positive Opinion WA Dems.	0.120	0.005	95.5
WA Referendum 74, Negative Opinion WA Dems.	0.199	0.003	98.6
WA Referendum 74, Negative Opinion N.O.M.	0.358	0.018	95.7

As Table 2 shows, each of the subgroups we matched saw a marked improvement in propensity score balance between the treatment and control groups. As an example, consider the improvement in North Carolina's Amendment 1 for individuals who gave a positive job evaluation to President Obama. Before matching, respondents who received the treatment—i.e., they were aware that President Obama opposed the amendment—were 5.8 percentage points more likely to receive the treatment based on the matching algorithm we used.⁵⁸ After matching, the difference in propensity to receive the treatment between the treatment and control group dropped to 0.2 percentage points. In fact, this subgroup saw a 97.2% increase in propensity score balance between the treatment and control group after matching. While we refrain from discussing each of the propensity score improvements for each subgroup, it is worth noting that each subgroup experienced a substantial increase in propensity

⁵⁸ See *supra* Part II for details on the algorithm.

balance after matching (the lowest improvement was 94%). Overall, Table 2 shows that our genetic matching algorithm produced a treatment group and control group that are directly comparable.

With comparable groups, we calculate a series of regressions based on Equation 1. After each regression, we calculate some predicted probabilities of interest using Long and Freese's SPost program (SPost is a program in Stata that easily calculates quantities of interest based on regression results 2005).⁵⁹ Table 3 presents the regression results for our matched samples of respondents who either approved or disapproved of President Obama's job performance. For respondents who approved of his job performance, knowledge of President Obama's opposition led individuals to vote against the measure at a higher rate—that is, they appeared to follow the advice of his endorsement. For respondents who disapproved of his job performance, knowledge of Obama's opposition to the measure led them to do the opposite of his recommendation. In both cases, then, the treatment had a significant effect in the predicted direction. Notably, respondents in both subgroups who knew a gay or lesbian person were significantly less likely to support the measure.

Table 3: Logit Regression Results of President Obama's Endorsement on North Carolina's Amendment 1

	Approve Obama	Disapprove Obama
Knows Obama Opposed	-0.94* (0.41)	0.62* (0.27)
SSM Prohibited	-0.08 (0.48)	0.07 (0.28)
Knows Gay or Lesbian Person	-1.63*** (0.43)	-1.11*** (0.31)
Constant	0.65 (0.57)	0.83* (0.35)
Pseudo-R ²	.122	.057
N	172	294

Note: Dependent variable is support for North Carolina's same-sex marriage ban (Amendment 1 of 2012). * p<0.05, **p<0.01, *** p<0.001

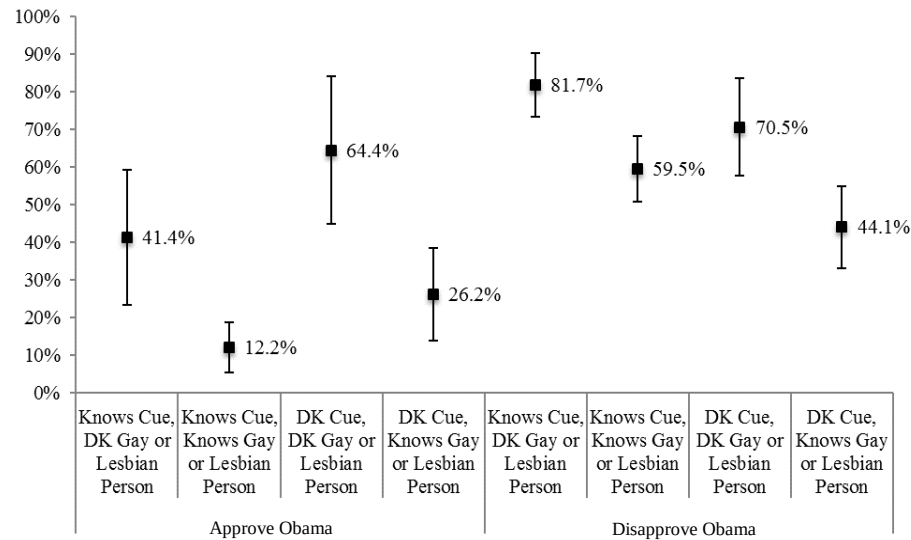
Figure 2 presents the predicted probabilities for the regressions in Table 3. Holding the factual knowledge variable at its mean effect,⁶⁰ we calculate four quantities of interest for North Carolina's Amendment 1. What these probabilities show is

⁵⁹ See generally J. SCOTT LONG & JEREMY FREESE, REGRESSION MODELS FOR CATEGORICAL DEPENDENT VARIABLES USING STATA (3d ed. 2014).

⁶⁰ For all calculations of predicted probabilities, we hold the effects of factual knowledge at their mean values.

that knowledge of Obama's opposition produced a 23 percentage point drop in support for the amendment among individuals who approve of his job performance; knowing both a gay or lesbian person and the cue lead to an additional decline of 29.2 percentage points. Interestingly, just knowing a gay person or lesbian and not knowing the cue produces a voting rate that is statistically indistinguishable from respondents who approve of Obama's job performance. For respondents who disapprove of Obama, patterns are similar: knowledge of the cue leads to an increase in support for the amendment, but knowing a gay or lesbian person leads to a substantial decline in support.

Figure 2: Predicted Probabilities of President Obama's Endorsement on North Carolina's Amendment 1 (2012)



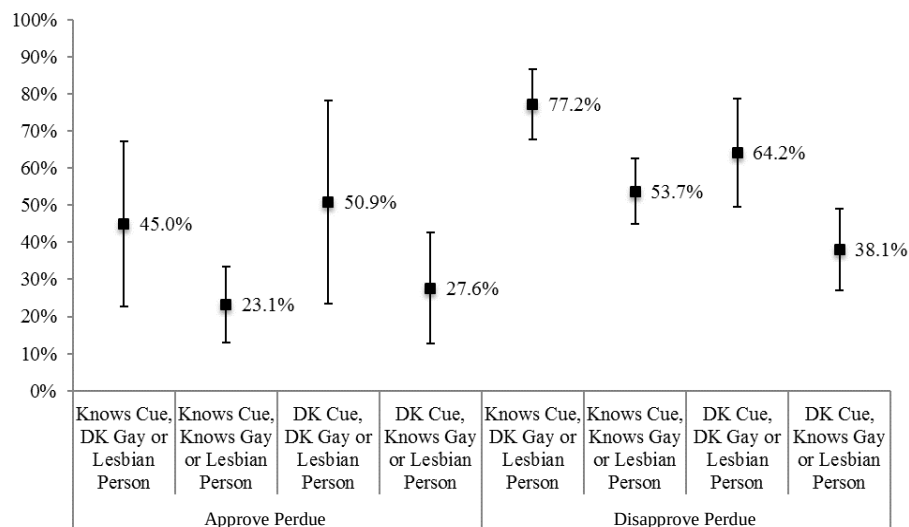
Turning now to examine the effect of Governor Perdue's opposition to the amendment, Table 4 reports that her endorsement only had an effect on individuals who disapproved of her job performance. That is, individuals who disapproved of her job performance as Governor but knew she opposed Amendment 1 were more likely to support the measure as a result. Governor Perdue's endorsement did not have a significant effect on respondents who approved of her job performance, but the effect was in the expected direction. In both regressions, we again see a significant decline in support for the amendment among respondents who know a gay or lesbian friend or relative.

Table 4: Logit Regression Results of Governor Perdue's Endorsement on North Carolina's Amendment 1

	Approve Perdue	Disapprove Perdue
Knows Perdue Opposed	-0.24 (0.46)	0.63* (0.28)
SSM Prohibited	1.00 (0.55)	0.22 (0.29)
Knows Gay or Lesbian Person	-1.00* (0.51)	-1.07*** (0.31)
Constant	-0.69 (0.63)	0.43 (0.34)
Pseudo-R ²	.05	.055
N	128	287

Note: Dependent variable is support for North Carolina's same-sex marriage ban (Amendment 1 of 2012). * p<0.05, **p<0.01, *** p<0.001

The predicted probabilities relevant for Governor Perdue, presented in Figure 3, highlight the effect of both the endorsement and knowing a gay or lesbian person. While knowledge of her endorsement had no discernable effect on respondents who approved of her job performance, knowing a gay person or lesbian leads to a decline in support for the measure by about 22 percentage points. For respondents who disapprove of her job performance, knowledge of her endorsement increases support for the measure by 13 percentage points, but knowing a gay person or lesbian decreases support for the measure by 23.5 percentage points for individuals who know the cue and 26.1 percentage points for those who do not.

Figure 3: Predicted Probabilities of Governor Perdue's Endorsement on North Carolina's Amendment 1 (2012)

We begin our analysis of Minnesota's Amendment 1 by examining the effect of Representative Bachmann's support for the measure. Unfortunately, there were not enough respondents who reported a positive opinion of the Representative to analyze whether her endorsement had an effect on those respondents. Instead, Table 5 reports the regression results for just individuals who have a negative opinion of Representative Bachmann. The regression shows clearly that knowing that Representative Bachmann supported the measure was helpful for this subgroup as they were less likely to support the amendment. Interestingly, knowing that the law left open the possibility of civil unions led to an increase in support for the measure. Unlike North Carolina, however, knowing a gay or lesbian friend or relative did not have a substantial effect on this subgroup. The predicted probabilities associated with this regression, available in Figure 4, show that the effect of knowing her endorsement led to a substantial drop in support for the amendment of at least 16 percentage points.

Table 5: Logit Regression Results of Representative Bachmann's Endorsement on Minnesota's Amendment 1

	Negative Opinion of Bachmann
Bachmann Supported	-1.17*** (0.35)
Civil Unions Possible	1.04** (0.35)
SSM Prohibited	0.36 (0.39)
Considered Ban Previously	-0.81 (0.42)
Knows Gay or Lesbian Person	-0.54 (0.35)
Constant	-0.84 (0.44)
Pseudo-R ²	.107
N	378

Note: Dependent variable is support for Minnesota's same-sex marriage ban (Amendment 1 of 2012). * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

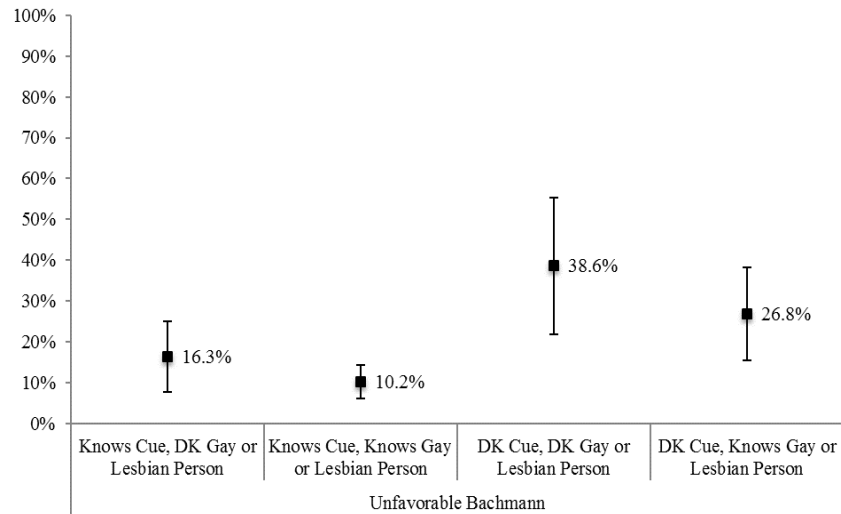
Figure 4: Predicted Probabilities of Representative Bachmann's Endorsement on Minnesota's Amendment 1 (2012)

Table 6 contains the regression results for President Obama's endorsement. Unlike North Carolina, President Obama's opposition to Minnesota's Amendment 1 only had an effect on respondents who disapproved of the President's job performance: respondents aware of this cue were significantly more likely to support the measure, as our second hypothesis predicts. As was the case with Representative Bachmann, knowing a gay or lesbian friend or relative has no discernable

Table 6: Logit Regression Results of President Obama's Endorsement on Minnesota's Amendment 1

	Approve Obama	Disapprove Obama
Obama Opposed	-0.07 (0.36)	1.33*** (0.35)
Civil Unions Possible	0.50 (0.37)	-0.21 (0.34)
SSM Prohibited	-0.02 (0.42)	-0.63 (0.46)
Considered Ban Previously	0.12 (0.38)	0.28 (0.45)
Knows Gay or Lesbian Person	-0.55 (0.40)	-0.25 (0.35)
Constant	-1.80*** (0.51)	1.25* (0.53)
Pseudo-R ²	.017	.077
N	300	310

Note: Dependent variable is support for Minnesota's same-sex marriage ban (Amendment 1 of 2012). * p<0.05, **p<0.01, *** p<0.001

effect on our respondents in either subgroup. Figure 5, which presents the predicted probabilities, shows that there is essentially no difference in voting rates among respondents who approve of the President's job performance. For respondents who disapprove of his job performance, however, knowing his endorsement leads to at least a 21.2 percentage point increase in support for the measure.

Figure 5: Predicted Probabilities of President Obama's Endorsement on Minnesota's Amendment 1 (2012)

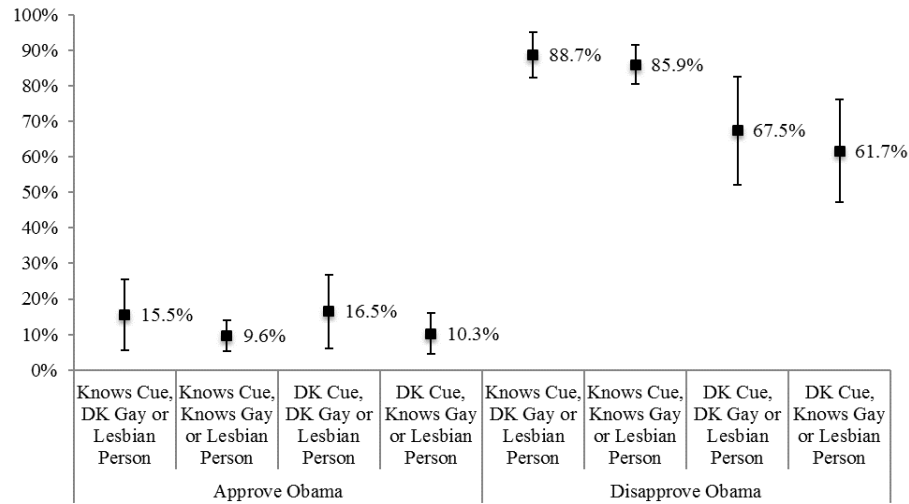
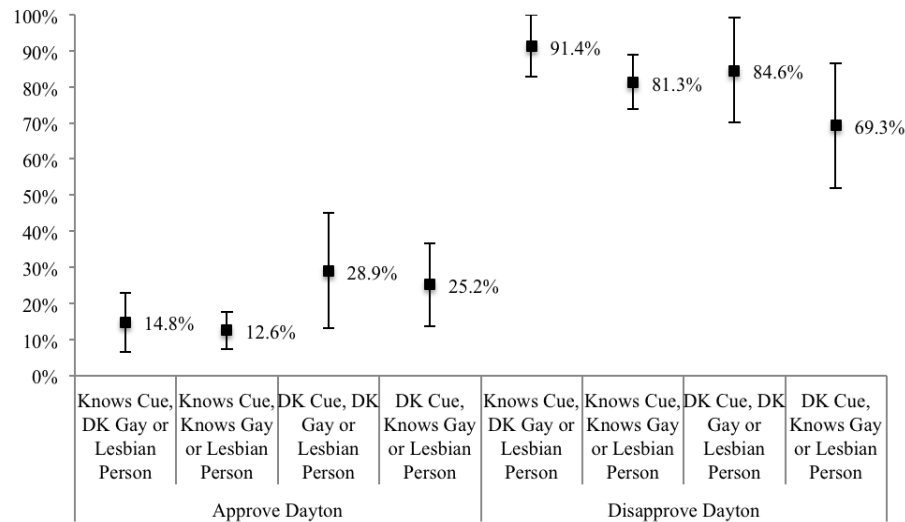


Table 7 presents the regression results related to Governor Dayton's endorsement. The results for Governor Dayton are the exact opposite of President Obama's: individuals who approve of Governor Dayton's job performance and knew of his opposition to the measure were significantly less likely to support Amendment 1. Also, similar to the results for Representative Bachmann, respondents in this subgroup who knew that the measure left open the possibility of civil unions were more likely to support the measure. By contrast, there were no significant results for respondents who disapproved of Governor Dayton's job performance. Identical to the previous two sets of regression results, knowing a gay person or lesbian had no effect on vote intention for Minnesota's Amendment 1. The predicted probabilities we generate from this regression, available in Figure 6, show that knowledge of the cue among respondents who approve of Governor Dayton's job performance lead to at least a 12.6 percentage point drop in support for the measure. There were no meaningful quantities of interest for respondents who disapproved of Governor Dayton's job performance.

Table 7: Logit Regression Results of Governor Dayton's Endorsement on Minnesota's Amendment 1

	Approve Dayton	Disapprove Dayton
Dayton Opposed	-0.85*	0.66
	(0.37)	(0.47)
Civil Unions Possible	0.87*	0.37
	(0.34)	(0.42)
SSM Prohibited	0.42	-0.02
	(0.42)	(0.52)
Considered Ban Previously	0.22	0.30
	(0.35)	(0.44)
Knows Gay or Lesbian Person	-0.19	-0.89
	(0.37)	(0.57)
Constant	-1.56***	1.44*
	(0.47)	(0.62)
Pseudo-R ²	.053	.053
N	303	177

Note: Dependent variable is support for Minnesota's same-sex marriage ban (Amendment 1 of 2012). * p<0.05, **p<0.01, *** p<0.001

Figure 6: Predicted Probabilities of Governor Dayton's Endorsement on Minnesota's Amendment 1 (2012)

The final measure we surveyed about is Washington's Referendum 74. First, we examine the effect of Jeff Bezos' support of the referendum. The regression results for individuals who have a positive opinion of Bezos are available in Table 8.⁶¹

⁶¹ There were not enough respondents who had a negative opinion of Bezos to run a regression.

2016]

Marriage on the Ballot

25

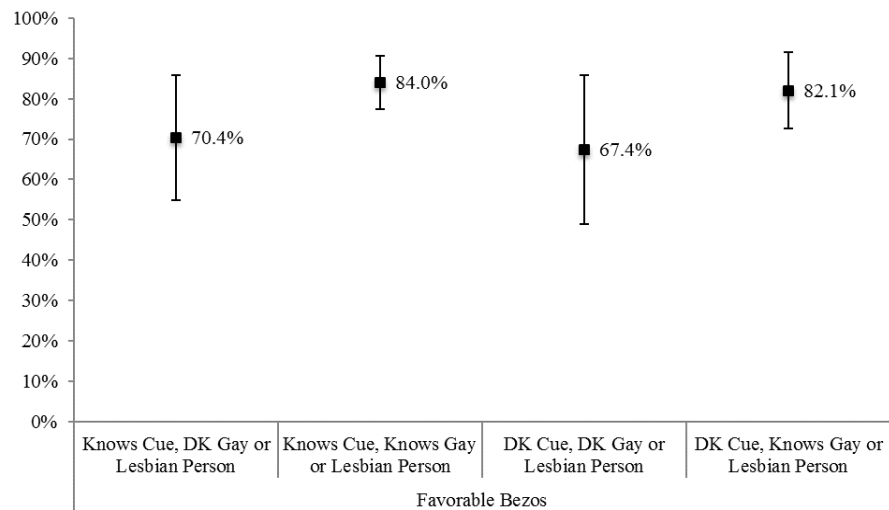
The results show that Jeff Bezos had no effect on vote intention. This is perhaps expected, as Bezos is not a policy expert. The predicted probabilities in Figure 7 reflect the null results seen in Table 8.

Table 8: Logit Regression Results of Jeff Bezos's Endorsement on Washington's Referendum 74

	Positive Opinion of Bezos
Bezos Supported	0.14 (0.38)
SSM Prohibited	0.15 (0.44)
Civil Unions Convert	-0.49 (0.38)
No Religious Exemptions	-0.28 (0.46)
Knows Gay or Lesbian Person	0.80 (0.42)
Constant	0.81 (0.59)
Pseudo-R ²	.03
N	210

Note: Dependent variable is support for Washington's legalization of same-sex marriages (Referendum 74 of 2012). * p<0.05, **p<0.01, *** p<0.001

Figure 7: Predicted Probabilities of Jeff Bezos's Endorsement on Washington's Referendum 74 (2012)



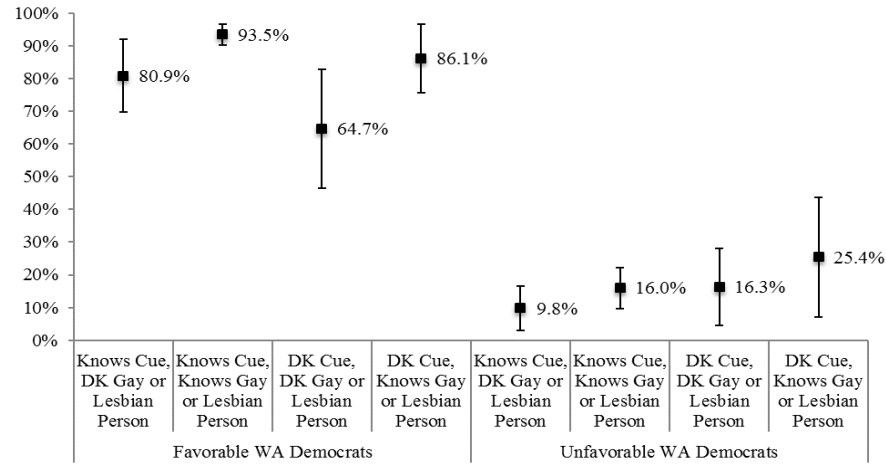
Next, we examine the effect of the Washington State Democrats' endorsement on individuals' vote choice. As Table 9 shows, the effect of their support for the referendum was statistically indistinguishable for both respondents who have a positive or negative opinion of the party. That is, the treatment of an endorsement from the Washington State Democrats has no effect on respondents' intended vote choice. For respondents with a positive view of the Washington State Democrats, knowing a gay or lesbian relative or friend had a significant and positive effect on voting for the referendum (i.e., supporting same-sex marriage). For those who have a negative view, knowing that the referendum did not provide exemptions for religious organizations for activities other than marriage led to a significant and negative effect on support for the measure. For the predicted probabilities in Figure 8, the only interesting calculation is that knowing a gay person or lesbian increases support for the referendum by about 12.6 percentage points for respondents who have a positive opinion of the Washington State Democrats.

Table 9: Logit Regression Results of Washington State Democrats Endorsement on Washington's Referendum 74

	Positive Opinion of WA Democrats	Negative Opinion of WA Democrats
WA Democrats Supported	0.83 (0.45)	-0.58 (0.45)
SSM Prohibited	0.22 (0.44)	-0.01 (0.43)
Civil Unions Convert	-0.44 (0.40)	-0.37 (0.42)
No Religious Exemptions	-0.25 (0.44)	-1.47* (0.72)
Knows Gay or Lesbian Person	1.22** (0.41)	0.56 (0.44)
Constant	0.62 (0.45)	-1.17* (0.50)
Pseudo-R ²	.071	.066
N	324	245

Note: Dependent variable is support for Washington's legalization of same-sex marriages (Referendum 74 of 2012). * p<0.05, **p<0.01, *** p<0.001

Figure 8: Predicted Probabilities of Washington State Democrats' Endorsement on Washington's Referendum 74 (2012)

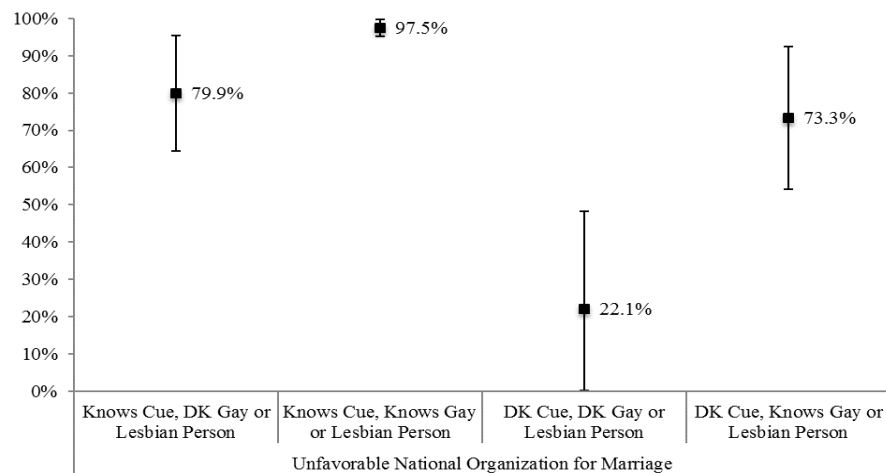


Finally, we present the results related to the National Organization for Marriage's endorsement. While there were not enough respondents who had a positive view of the organization to run a regression, the results for respondents who had a negative opinion of the group are available in Table 10. Unlike the previous two endorsements that had no effect, individuals who were both aware of the National Organization for Marriage's opposition to Referendum 74 and held a negative view of the group were significantly more likely to vote for the referendum. This result supports our second hypothesis. Also of note, individuals who knew a gay person or lesbian were significantly more likely to support the measure. The predicted probabilities, presented in Figure 9, are impressive as well: knowledge of the endorsement leads to a 57.8 percentage point increase in support, and knowing a gay person or lesbian increased that support by an additional 17.6 percentage points. In fact, just knowing a gay or lesbian friend or relative increases the probability of supporting the measure by 51.2 percentage points.

Table 10: Logit Regression Results of National Organization for Marriage's Endorsement on Washington's Referendum 74

	Negative Opinion of the National Organization for Marriage
National Organization for Marriage Opposed	2.64*** (0.73)
SSM Prohibited	-0.96 (0.78)
Civil Unions Convert	1.01 (0.67)
No Religious Exemptions	-0.90 (0.70)
Knows Gay or Lesbian Person	2.27*** (0.63)
Constant	-0.58 (0.77)
Pseudo-R ²	.271
N	204

Note: Dependent variable is support for Washington's legalization of same-sex marriages (Referendum 74 of 2012). * p<0.05, **p<0.01, *** p<0.001

Figure 9: Predicted Probabilities of the National Organization for Marriage's Endorsement on Washington's Referendum 74 (2012)

CONCLUSION

We analyzed whether cues from prominent third-party endorsers have an effect on individuals' decisions on ballot measures related to same-sex marriage. Using the largest database of individual-level data collected on the topic to date, we used genetic matching to examine the hypothesis that knowledge of cues leads to improved decision making. We found that knowledge of a cue only sometimes influences individuals'

decisions: a cue was effective in seven of our thirteen cases. This result reinforces our interpretation that cues are influential some of the time for some voters. Indeed, there are substantial swaths of the electorate—i.e., those who do not have firm opinions of the cue-givers we analyzed—who are absent from our analysis. We also showed that knowing a gay or lesbian person sometimes has a substantial impact on an individual's voting behavior.

Similar to our previous research, we find that knowledge of a policy's specifics has a very limited impact on individuals' decisions. In only a few of our regressions did we find that knowledge of facts had an effect on vote choice. What we can conclude, however, is that knowledge of the status quo policy—that same-sex couples were prohibited from marrying in all three states—never had an effect on an individual's assessment of the ballot measure being considered. While our expectation is that knowledge of facts should influence individuals' decisions, after numerous explorations of this hypothesis in this Article and in our previous research, we can only conclude that, when compared with cues, factual information has an even more limited effect on individuals' decisions.⁶²

Examining an easy issue for voters to understand and make decisions leaves open the possibility that individuals simply do not need a cue to make a choice and, as a result, we should read our results as signs of encouragement that voters are making competent choices. We argue, however, that this is not what our results suggest. Overall, our results imply that scholars and the legal community should not assume that individuals use elite endorsements to inform their decisions at a high rate. Furthermore, we also find that knowledge of cues and facts is often quite low. Even though we examine an easy issue in same-sex marriage, our results here mimic the results in previous research, where we examine both easy and hard issues.⁶³ In other words, we argue that our results are beginning to provide convergent validity to our conclusion that individuals simply do not use information from the campaign environment at a high rate.

Our findings have several notable implications relevant to both legal scholars and practitioners. First, interpreting the will of the electorate may be more difficult than some might commonly assume. We show that knowledge of most ballot

⁶² Burnett et al., *Dilemma of Direct Democracy*, *supra* note 7, at 305–16; Burnett & McCubbins, *Sex and the Ballot Box*, *supra* note 4, at 3, 5.

⁶³ Burnett & McCubbins, *Voters' Limited Use of Endorsements*, *supra* note 7, at 1587–94.

measures is often quite low, demonstrating that most individuals are unaware of a measure's specific attributes. If voters do not know a policy's specifics, the courts are left with the unenviable task of guessing what the average voter knew when casting her choice. Additionally, we found that voters often knew little about the relevant endorsements. These endorsers are often the individuals who must explicate the logic behind supporting or opposing a specific policy. Thus, when voters are unaware of these endorsements, it raises concerns about turning to the actual supporting and opposing campaigns for guidance on interpreting what the voters' intent was—which is a natural place for the courts to look, as these groups often compose at least one of the belligerents in a legal contest.

Second, our results imply that the legal community and policymakers should be concerned about the kinds of questions that appear on the ballot. Moreover, in states similar to Washington that pose multiple ballot questions per cycle (e.g., California and Oregon), there should be some additional concern about the length of the ballot. In addition to the decades of research showing that voters lack basic foundational knowledge about politics, our findings show that knowledge of ballot measures is also quite low. As Downs argues, we suspect that most voters are simply too busy to spend the time and resources to acquire a deep understanding of the political world, let alone facts about ballot measures that will appear during the next election.⁶⁴ Whereas Downs was less concerned about voter knowledge because cues, such as party labels, could convey immense amounts of information and substitute for knowledge, we show that knowledge of these cues is low—a problem that only compounds because cues are not available on the ballot directly in direct democracy contests, unlike many candidate contests. While some policies are largely symbolic and ends- rather than means-focused, and likely not difficult for most voters to cast a competent vote, many issues are complex and legally complicated propositions that require more than a “gut response” to make a reasoned decision.⁶⁵ When ballots ask voters to consider these complicated policies, democracy is likely asking too much from the average voter. In some states, the number of complicated policies the voter must consider is astoundingly large. Policymakers and the legal community should begin thinking about how to institute controls and regulations that address these larger democratic concerns.

⁶⁴ DOWNS, *supra* note 17, at 44–46.

⁶⁵ Carmines & Stimson, *supra* note 11, at 78, 80 (referencing the prototypical “easy issues”).

Third, our findings show that the political landscape of direct democracy is one that is particularly susceptible to elite manipulation. With most voters knowing little about the ballot measures they consider on Election Day, it should be no surprise that political elites can shape the way in which the law is implemented, which is often contrary to the intent of the law.⁶⁶ In other words, when representative democracy interferes with the outcomes of direct democracy, voters are at an insurmountable disadvantage concerning their ability to monitor and enforce the outcomes of direct democracy.

Elite interference may also begin well before Election Day. The results we present here, in conjunction with our previous research on the topic, show that voters know little about many kinds of ballot measures. This means that voters may rely disproportionately on the information that appears on the ballot—namely, the title and summary. With few exceptions, these titles and descriptions are written by a politically motivated figure.⁶⁷ Indeed, it is commonplace to see several challenges to the proposed titles and summaries of ballot measures every election cycle, most claiming that the verbiage encourages a particular outcome through biased language. As Burnett and Kogan show, this kind of elite manipulation can be impressively effective with just a few word changes, even on “easy issues” such as same-sex marriage.⁶⁸ To date, however, the task of writing these potentially manipulated titles and summaries remains largely in the hands of politically motivated individuals, and the courts consider challenges on a case-by-case basis.

While the three issues we just outlined are important policy concerns, there may be no single solution to creating a better direct democracy framework. What is clear, however, is that direct democracy asks much from the average voter, but provides little in the way of informing voters about the potential impact of their choice in a way that is useful to them. To be sure, some measures have active campaigns that attempt to inform (albeit selectively) voters about their choices. In other cases, official

⁶⁶ Previous research has documented that elected officials often fail to implement or only partially implement laws passed through direct democracy when it is not in their best interest. See Alan S. Gerber & Donald P. Green, *The Effects of Canvassing, Telephone Calls, and Direct Mail on Voter Turnout: A Field Experiment*, 94 AM. POL. SCI. REV. 653, 661–62 (2000).

⁶⁷ For example, this could be an attorney general or the measure’s proponents.

⁶⁸ Craig M. Burnett & Vladimir Kogan, *When Does Ballot Language Influence Voter Choices? Evidence from a Survey Experiment*, 32 POL. COMM. 109, 109–11 (2015) (demonstrating, using experimental evidence, that elites may easily manipulate voters with very slight changes in titles and descriptions).

election literature outlines the issue at hand. But, most voters are busy, and largely unconcerned with their choices on Election Day beyond the top of the ballot contests (e.g., presidency, governorship). Several rounds of surveying individuals concerning what they know about direct democracy has only emphasized the veracity of this observation.

One potential enhancement to the institution of direct democracy from the voter's-eye-view is to improve the information environment on the ballot. Most voters appear to know little about the measures they are considering, and most measures are not as easy as a social policy choice such as same-sex marriage. Thus, policymakers should endeavor to consider ways to improve the kinds of information that are available to voters at the point-of-decision (i.e., on the official ballot). As Burnett, Garrett, and McCubbins proposed in "The Dilemma of Direct Democracy," we argue that endorsements on the actual ballot would be helpful to many voters.⁶⁹ The challenge, however, is constructing a framework to select the endorsements that should be included and which ones should be excluded. Other kinds of information that would help improve decision making in direct democracy include, but are not limited to: clearly outlining the impact of a yes versus a no vote, longer descriptions of the measures, and the potential financial impact of a yes or no outcome (California already includes this information). While we cannot fully assess the feasibility or impact of any, or all, of these measures with the data we have, we suspect some of these additional pieces of information would drastically improve the quality of decisions in direct democracy elections for the average voter.

⁶⁹ Burnett et al., *Dilemma of Direct Democracy*, *supra* note 7, at 317–24.

2016]

Marriage on the Ballot

33

Appendix A**North Carolina Demographics**

	Survey	2011 Census Estimates
Age (Median)	39.9	37.7
Income (Median)	\$25,001–\$50,000	\$45,570
% High School Graduates, Age > 25	97.9	83.6
% Female	76.6	51.3
% White (Not Hispanic)	80.2	65
% Black	12.6	22
% Latino/Hispanic	2.2	8.6
% Asian	2.2	2.3

Minnesota Demographics

	Survey	2012 Census Estimates
Age (Median)	49	36.9
Income (Median)	\$50,001–\$75,000	\$58,476
% High School Graduates, Age > 25	98.8	91.6
% Female	63.4	50.3
% White (Not Hispanic)	94	82.4
% Black	1.1	5.5
% Latino/Hispanic	0.9	4.9
% Asian	2.2	4.4

Washington Demographics

	Survey	2012 Census Estimates
Age (Median)	49	37.3
Income (Median)	\$50,001–\$75,000	\$58,890
% High School Graduates, Age > 25	98.3	89.8
% Female	64.7	50.1
% White (Not Hispanic)	87.3	71.6
% Black	1.7	3.9
% Latino/Hispanic	2.1	11.7
% Asian	5.4	7.7

Appendix B

North Carolina

Amendment 1

1. Do you happen to know if President Barack Obama supported, opposed, or took no position on Amendment 1?
2. Do you happen to know if Governor Beverly Perdue supported, opposed, or took no position on Amendment 1?
3. To the best of your knowledge, do you know if North Carolina law currently prohibits same-sex marriage?

Minnesota

Amendment 1

1. Do you happen to know if President Barack Obama supported, opposed, or took no position on Amendment 1?
2. Do you happen to know if Governor Mark Dayton supported, opposed, or took no position on Amendment 1?
3. Do you happen to know if Representative Michele Bachmann supported, opposed, or took no position on Amendment 1?
4. To the best of your knowledge, does Amendment 1 leave open the possibility of civil unions between same-sex couples?
5. To the best of your knowledge, do you know if Minnesota law currently prohibits same-sex marriage?
6. Do you happen to know if the Minnesota state legislature has considered constitutional amendments to outlaw same-sex marriage before the current proposal?

Washington

Referendum Measure No. 74

1. Do you happen to know if Mark Bezos, CEO of Amazon.com, supported, opposed, or took no position on Amendment 1?
2. Do you happen to know if the Washington State Democrats supported, opposed, or took no position on Amendment 1?
3. Do you happen to know if the National Organization for Marriage supported, opposed, or took no position on Amendment 1?
4. To the best of your knowledge, as of today, do you know if same-sex couples are allowed to marry in Washington State?
5. If Referendum Measure No. 74 is confirmed—that is, voters support the referendum—do you happen to know what will happen to the majority of current domestic partnerships in the state?
6. Do you happen to know if confirming Referendum 74 will require religious organizations that receive state funding to recognize and serve same-sex couples seeking to adopt a child or become foster parents?

2015

The Differential Effects of Initiatives and Referenda on Voter Turnout in the United States, 1890-2008

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The Differential Effects of Initiatives and Referenda on Voter Turnout in the United States, 1890–2008

*Matt Childers & Mike Binder**

INTRODUCTION

A number of studies show that statewide ballot propositions increase voter turnout, but almost all of them focus on the citizen initiative. In this Article, we use a historical dataset with elections and census data dating back to 1890 to examine whether popular and legislative referenda also affect turnout. We also compare how they affect turnout compared to the citizen initiative. Like previous studies, we find that ballot propositions fail to significantly affect turnout in presidential elections over time, but do so during midterm elections.¹ Initiative races, both competitive and less competitive ones, increase turnout more than competitive legislative referenda, while uncompetitive legislative referenda and popular referenda do not affect turnout.

In their efforts to uncover the determinants of political participation, scholars often focus on individual-level factors like race, education, income, or age,² and external factors like campaigns and electoral institutions.³ Under the umbrella of the latter, students of direct democracy find that ballot propositions can draw voters to the polls. While they offer differing explanations for the causal mechanisms for *how* ballot questions draw more voters to the polls, they agree that turnout is higher when states have initiatives on the ballot.⁴

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¹ See Matt Childers & Mike Binder, *Engaged by the Initiative? How the Use of Citizen Initiatives Increases Voter Turnout*, 65 POL. RES. Q. 93, 93–103 (2012).

² See generally STEVEN ROSENSTONE & JOHN HANSEN, MOBILIZATION, PARTICIPATION AND DEMOCRACY IN AMERICA (Bruce Nichols & Robert Miller eds., 1993).

³ See Gary C. Jacobson, *How Do Campaigns Matter?*, 18 ANN. REV. POLIT. SCI. 31, 38–39 (2015) (discussing political science research on how campaigns affect voter turnout). See generally André Blais, *What Affects Voter Turnout?*, 9 ANN. REV. POLIT. SCI. 111, 111–25 (2006) (demonstrating how institutions affect voter turnout across multiple democracies).

⁴ See Childers & Binder, *supra* note 1; Daniel Schlozman & Ian Yohai, *How Initiatives Don't Always Make Citizens: Ballot Initiatives in the American States, 1978–2004*, 30 POL. BEHAV. 469 (2008); Mark A. Smith, *The Contingent Effects of Ballot*

Almost all of this research centers on the citizen initiative, and we speculate that this may be due to the nature of the institution itself. Initiatives often attract significant levels of media attention, like California's Proposition 8 in 2008, Washington's and Colorado's medical marijuana propositions in 2012, and California's Proposition 13 in 1978. Initiatives may also deal with controversial social issues and motivate people to pay attention and vote.⁵ For these reasons and others, scholars argue that the institution gives citizens great incentives to not only use initiatives but to also participate in politics.⁶ Consequently, the institution should engage the electorate in states where they are used.

We agree with other scholars that initiatives can stimulate political participation, but, in this Article we argue that other types of ballot propositions also have the potential to engage the electorate. Many states with the initiative also have the popular referendum, an institution that gives citizens the opportunity to reject unpopular laws by placing them on the ballot. On the other hand, all fifty states either allow or require the legislature to refer certain policies directly to the voters.⁷

We argue that, from the voter's perspective, referenda are not inherently different than initiatives and that their campaigns can mobilize voters. Thus, we explore the differential effects that citizen initiatives, popular referenda, and legislative referenda may have on voter turnout. Using a historical dataset dating back to 1890, we conduct a time-series cross-sectional analysis of these relationships, controlling for historically important electoral reforms, variations in the political environment, and changes in the population over time.

Our evidence shows that, in addition to initiatives, legislative referenda can stimulate turnout in states, but we argue that this is because of their campaigns to mobilize voters. As others show, ballot measures do not stimulate turnout in

Initiatives and Candidate Races on Turnout, 45 AM. J. POL. SCI. 700 (2001); Caroline J. Tolbert, Daniel C. Bowen & Todd Donovan, *Initiative Campaigns: Direct Democracy and Voter Mobilization*, 37 AM. POL. RES. 155 (2009); Caroline J. Tolbert, John A. Grummel & Daniel A. Smith, *The Effects of Ballot Initiatives on Voter Turnout in the American States*, 29 AM. POL. RES. 625 (2001); Caroline J. Tolbert & Daniel A. Smith, *The Educative Effects of Ballot Initiatives on Voter Turnout*, 33 AM. POL. RES. 283 (2005).

⁵ Daniel R. Biggers, *When Ballot Issues Matter: Social Issue Ballot Measures and Their Impact on Turnout*, 33 POL. BEHAV. 3, 8–15 (2011).

⁶ See generally DANIEL A. SMITH & CAROLINE J. TOLBERT, EDUCATED BY INITIATIVE: THE EFFECTS OF DIRECT DEMOCRACY ON CITIZENS AND POLITICAL ORGANIZATIONS IN THE AMERICAN STATES (2004).

⁷ *Initiative, Referendum and Recall*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/initiative-referendum-and-recall-overview.aspx> [<http://perma.cc/YB36-KTRG>].

presidential elections, but they do so in midterm elections.⁸ While initiatives and competitive legislative referenda lead to greater turnout rates, both competitive and uncompetitive initiatives increase turnout more than competitive legislative referenda. Neither less competitive legislative nor popular referenda have statistically significant effects on a state's turnout rate.

In the following sections, this Article will proceed as follows: we begin by discussing how the current literature on direct democracy and political engagement mainly focuses on initiatives and ignores legislative and popular referenda. Afterward, we discuss why it is an important oversight in the literature and theorize that referenda can also positively impact a state's turnout rate, though to lesser degrees than citizen initiatives. Finally, we present and discuss our findings and conclude.

I. DIRECT DEMOCRACY AND VOTER TURNOUT

Research on political engagement consistently demonstrates that electoral institutions both directly and indirectly impact political participation across the states. Some changes, like poll taxes, were designed with the intention of suppressing turnout among various population groups⁹ and, consequently, voter turnout rates were lower in the former Confederate states than the rest of the nation throughout most of the twentieth century.¹⁰ Turnout tends to be higher in states with more flexible voter registration laws than those with stricter registration procedures.¹¹ Changes to electoral institutions can also have unintended consequences on political participation rates. For example, as states gradually adopted the secret ballot in the late nineteenth and early twentieth centuries, turnout rates declined.¹²

⁸ See Childers & Binder, *supra* note 1; Schlozman & Yohai, *supra* note 4; Tolbert & Smith, *supra* note 4.

⁹ V.O. KEY, JR., *SOUTHERN POLITICS IN STATE AND NATION* (Univ. Tenn. Press 1984) (1949).

¹⁰ MELANIE J. SPRINGER, *HOW THE STATES SHAPED THE NATION: AMERICAN ELECTORAL INSTITUTIONS AND VOTER TURNOUT, 1920–2000*, at 137–43 (Benjamin I. Page, Susan Herbst, Lawrence R. Jacobs & Adam J. Berinsky eds., 2014).

¹¹ Barry C. Burden et al., *Election Laws, Mobilization, and Turnout: The Unanticipated Consequences of Election Reform*, 58 AM. J. POL. SCI. 95, 95–109 (2014).

¹² See Jac C. Heckelman, *The Effect of the Secret Ballot on Voter Turnout Rates*, 82 PUB. CHOICE 107, 118–19 (1995) (estimating that introducing the secret ballot decreased gubernatorial election turnout across the states by an average of 7% while controlling for changes in other electoral laws); see also Childers & Binder, *supra* note 4, at 99 (finding similar results, Childers and Binder show that presidential election turnout rates declined by approximately 5% across the states and congressional election year turnout rates declined by about 7%).

In the late nineteenth century, Progressives advocated for direct democracy because it would make Americans better citizens. “Progressives thought that having plebiscites on policy issues would encourage citizens to become more politically engaged, thereby mitigating the declining state of civic affairs and public discourse.”¹³ Nathan Cree argued in 1892 that direct democracy would lead voters to think about the substance of policy dilemmas instead of considering policy proposals as partisan appeals. The consequence would enlighten citizens and weaken the parties’ influence over politics.¹⁴

Since the turn of the twentieth century, twenty-four states have adopted either the citizen initiative or popular referendum. The initiative allows citizens to bypass the state’s legislature, putting a proposed policy on the ballot if they collect a certain number of signatures.¹⁵ The proposed policy may either be a statutory measure or a constitutional amendment (this varies by state). Popular referenda allow citizens to gather signatures to place a law on the ballot for the electorate to approve or reject. As seen in Table 1,¹⁶ most states that have the initiative also have the popular referendum, but there are a few with only one or the other.¹⁷

Table 1: States with Initiatives, Popular Referenda, and Legislative Referenda¹⁸

State	Initiative	Popular Referendum	Legislative Referenda ^A	
			Constitutional Amendments ^B	Statutes ^C
Alabama			X	
Alaska	X	X	X	
Arizona	X	X	X	X
Arkansas	X	X	X	X
California	X	X	X	X
Colorado	X	X	X	
Connecticut			X	
Delaware				X
Florida	X		X	
Georgia			X	
Hawaii			X	
Idaho	X	X	X	X

¹³ SMITH & TOLBERT, *supra* note 6, at xvi.

¹⁴ NATHAN CREE, DIRECT LEGISLATION BY THE PEOPLE 16 (1892).

¹⁵ Signature requirements vary by state.

¹⁶ See *infra* Table 1.

¹⁷ See Audrey Wall, *The Book of the States 2014*, COUNCIL ST. GOV'TS KNOWLEDGE CTR. (October 15, 2014, 12:00 AM), <http://knowledgecenter.csg.org/kc/category/content-type/bos-2014>.

¹⁸ See *State-by-State List on Initiative and Referendum Provisions*, INITIATIVE & REFERENDUM INST., http://www.iandr.institute.org/statewide_i%26r.htm [http://perma.cc/2FKX-D42X]; see also *Initiative, Referendum and Recall*, *supra* note 7.

2016]

The Differential Effects of Initiatives & Referenda

39

State	Initiative	Popular Referendum	Legislative Referenda ^A	
			Constitutional Amendments ^B	Statutes ^C
Illinois	X		X	X
Indiana			X	
Iowa			X	
Kansas			X	
Kentucky		X	X	X
Louisiana			X	
Maine	X	X	X	X
Maryland		X	X	X
Massachusetts	X	X	X	X
Michigan	X	X	X	X
Minnesota			X	
Mississippi	X		X	
Missouri	X	X	X	X
Montana	X	X	X	X
Nebraska	X	X	X	X
Nevada	X	X	X	X
New Hampshire			X	
New Jersey			X	
New Mexico		X	X	X
New York			X	
North Carolina			X	
North Dakota	X	X	X	X
Ohio	X	X	X	X
Oklahoma	X	X	X	X
Oregon	X	X	X	X
Pennsylvania			X	
Rhode Island			X	
South Carolina			X	
South Dakota	X	X	X	X
Tennessee			X	
Texas			X	
Utah	X	X	X	X
Vermont			X	
Virginia			X	
Washington	X	X	X	X
West Virginia			X	
Wisconsin			X	
Wyoming	X	X	X	
Number of States	24	24	49	23

A: Legislative referenda are divided into two categories: (1) constitutional amendments that are placed on the ballot by the legislature or by a government body; and (2) legislative statutes (binding or non-binding, depending on the state) placed on the ballot by the legislature or by the government.

B: Every state but Delaware is required by its constitution to place legislative amendments on the ballot for the voters' approval. Delaware is the only state that has a constitution that does not require public approval for constitutional amendments passed by the legislature.

C: These states are not required to place legislative statutes on the ballot, but the state's constitution gives the legislature the authority to place statutes on the ballot for the voter's approval.

Unfortunately, the adoption of direct democracy has not necessarily produced a more knowledgeable electorate. Tolbert, McNeal, and Smith use survey data from the 1996, 1998, and 2000 American National Election Studies to show that exposure has positively and statistically significant effects on their levels of general political knowledge in 1996, but not in 1998 or 2000.¹⁹ More recent research using the 2004 and 2008 National Annenberg Election Surveys and the 2006 Cooperative Congressional Election Study showed much of the same: exposure to initiatives did not lead to increases in Americans' general political knowledge.²⁰

Direct democracy has, on the other hand, increased voter turnout when citizen initiatives are on the ballot in nonpresidential election years. A number of the early studies on this topic showed that as the number of initiatives on a state's ballot increases, so too does the state's voter turnout rate in both presidential and nonpresidential election years.²¹ Those studies' authors inferred that the Progressives were right: the initiative process increases turnout because citizens learn about the issues on the ballot and are, therefore, more likely to vote. This effect increases in magnitude as the electorate places more policy questions on a state's ballot. Unfortunately, the time period of each study began in the 1970s, decades after states began adopting and placing policy questions on the ballot.²² From a research design perspective, it left open the possibility that other political phenomena that surfaced between the turn of the century and the time of their study may have affected voter turnout instead of initiative elections.

Subsequent work by the authors using elections and demographic data before and after states adopted the initiative process made a number of important findings that advanced our understanding of how direct democracy affects voter turnout.²³ First, simply adopting the institution into the state's constitution had no significant effect on a state's turnout rate over time. Second, having used it in the past also failed to stimulate turnout

19 Caroline J. Tolbert, Ramona S. McNeal & Daniel A. Smith, *Enhancing Civic Engagement: The Effect of Direct Democracy on Political Participation and Knowledge*, 3 ST. POL. & POL'Y Q. 23, 31–34 (2003).

20 Nicholas R. Seabrook, Joshua J. Dyck & Edward L. Lascher, Jr., *Do Ballot Initiatives Increase General Political Knowledge?*, 37 POL. BEHAV. 279, 297 (2015).

21 See Tolbert, Grummel & Smith, *supra* note 4, at 635–639; Tolbert & Smith, *supra* note 4, at 296–302.

22 Both studies use different, yet overlapping time periods: Tolbert, Grummel & Smith, *supra* note 4 (measuring the voting age population (VAP) turnout from 1970–1996); Tolbert & Smith, *supra* note 4 (evaluating the voting eligible population (VEP) turnout rate from 1980–2002).

23 Childers & Binder, *supra* note 1.

in a given election. Third, like Schlozman and Yohai found using fewer elections, initiatives on a ballot fail to significantly affect voter turnout during presidential elections, but they do increase turnout in off-year elections.²⁴ These results should not be terribly surprising because presidential campaigns are much more intense than any other election and dominate media coverage and the electorate's attention. Thus, it is difficult for initiative campaigns to connect with the electorate. Off-year electoral environments are much less intense and ballot measure campaigns stand a better chance to connect with voters.²⁵

Most importantly, the authors found that competitive initiative elections stimulate turnout much more so than less competitive ones.²⁶ This implies that campaigns and political competition mobilize voters to the polls, not just the presence of a policy question on the ballot. The authors conceded that the best measures of campaign intensity are campaign expenditure data or campaign advertising data, but those measures only recently became available on the federal level. Campaign expenditure data of any sort was not available before the 1970s, when the Federal Election Commission began requiring federal election campaigns to report their finances.²⁷ In more recent years, states began requiring state-level campaigns to report their finances.²⁸ Yet, recent work using *total* initiative campaign spending per capita (across all initiatives) in a given state shows that total spending leads to higher turnout. This lends additional credence to the notion that political competition in initiative campaigns mobilizes voters rather than just the mere presence of a ballot question in the election.

²⁴ Schlozman & Yohai, *supra* note 4 (using a time period similar to Smith and Tolbert studies, Schlozman and Yohai find that initiatives fail to statistically significantly increase turnout in presidential election years, but do so in midterm congressional election years).

²⁵ *Id.* at 476 (making a similar argument about presidential elections and initiative campaigns' inability to affect turnout).

²⁶ See Childers & Binder, *supra* note 1. Childers and Binder compared how the number of "competitive" initiatives on the ballot affected turnout compared to the number of "uncompetitive" ones. *Id.* at 97–100. They define a competitive campaign as an election where the margin of victory was within ten percentage points and uncompetitive elections were those with margins of victories greater than ten. *Id.* at 97. The authors based their definitions on the congressional elections literature, where elections are commonly considered to be competitive if the marginal of victory was within ten percentage points. *Id.*; see also GARY C. JACOBSON, *THE POLITICS OF CONGRESSIONAL ELECTIONS* (Reid Hester ed., 8th ed. 2013).

²⁷ JACOBSON, *supra* note 26, at 66, 179.

²⁸ See generally Tolbert, Bowen & Donovan, *supra* note 4.

II. THE ABSENCE OF LEGISLATIVE AND POPULAR REFERENDA

Research on how direct democracy affects political participation has centered on the citizen initiative even though in many state elections, citizens are also voting on ballot questions that are popular referenda or legislative referenda. Popular referenda allow citizens to place unpopular laws on the ballot by gathering a certain number of signatures. But, one reason why they may have received less attention in research than initiatives may be due to the fact that they are rarely used. Figures 1 and 2 plot the number of propositions on statewide ballots from 1900 through 2008.²⁹

Another reason why scholars may have focused almost exclusively on initiatives is because they may be more salient in an election year than referenda. Some ballot questions in the past have attracted substantial media attention and have shaped the debate in campaigns at the top of the ticket. Stephen Nicholson shows that in California elections, the most salient initiatives not only raise the public's awareness of the issues, they can shape the agenda of campaigns at the top of the ticket.³⁰ Furthermore, some initiative content centers on controversial social issues or wedge issues, and this helps them attract media attention and voters' attention.³¹ For example, in 2008, Proposition 8 was discussed regularly on the national news. In 2004, eleven states placed bans on same-sex marriage on their ballots and same-sex marriage subsequently was a salient issue in the campaign.³² Thus, initiatives may be logically more likely to impact political participation in a state than other ballot questions.

Popular referenda allow citizens the chance to reject unpopular laws passed by the state's legislature. They are available in twenty-four states; most also have the citizen initiative. It is not used as frequently as the other forms of democracy, as Figures 1 and 2 convey, but they have the potential to garner some campaign activity since signature gathering is a costly endeavor.³³

²⁹ See *infra* Figure 1, Figure 2.

³⁰ See STEPHEN P. NICHOLSON, *VOTING THE AGENDA: CANDIDATES, ELECTIONS, AND BALLOT PROPOSITIONS* 1 (2005).

³¹ See Daniel Biggers, *When Ballot Issues Matter: Social Issue Ballot Measures and Their Impact on Turnout*, 33 POL. BEHAV. 3, 6 (2011).

³² See Alan Abramowitz, *Terrorism, Gay Marriage, and Incumbency: Explaining the Republican Victory in the 2004 Presidential Election*, 2 FORUM 1, 4 (2004).

³³ See *infra* Figure 1, Figure 2.

Figure 1: The Number of Ballot Propositions in Presidential Elections, 1892–2008³⁴

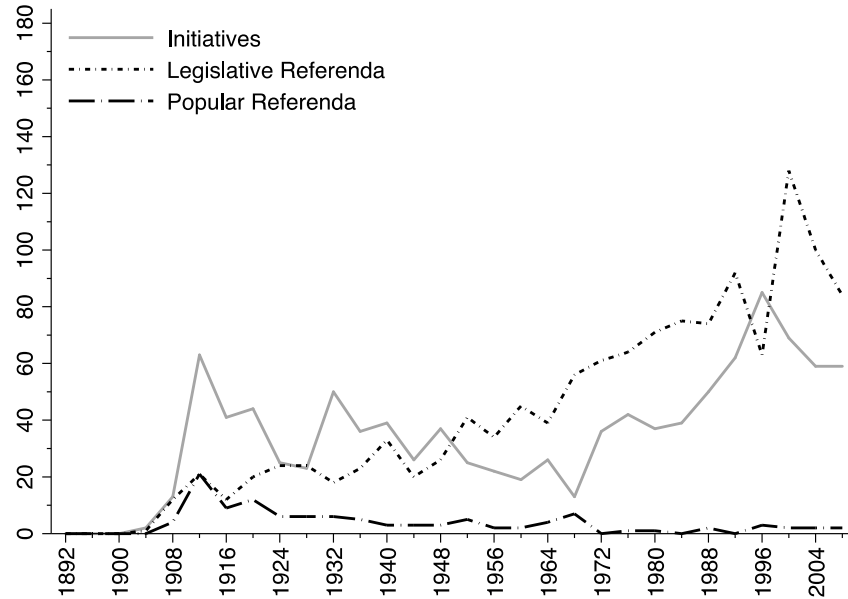
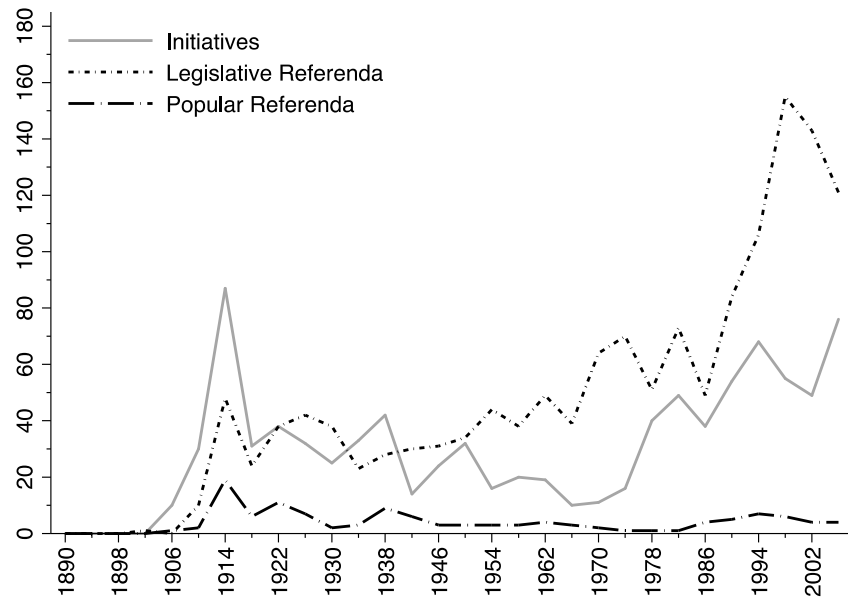


Figure 2: The Number of Ballot Propositions in Midterm Elections, 1890–2006³⁵



³⁴ *Ballot Measures Database*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/ballot-measures-database.aspx> (last visited Feb. 12, 2016).

³⁵ *Id.*

On the other hand, the nature of the legislative referendum reveals that it also may have the potential to garner campaigns and mobilize votes. The institution is a part of every state's constitution, and it is a policy question that the legislature refers to the voters, either because of a constitutional requirement or because the political environment incentivizes legislators to do so. In all but one state, Delaware, the constitution requires the legislature to refer any constitutional amendments to the electorate for approval (see Table 1). Many of them also require the legislature to place measures about bonds and tax changes on the ballot. Twenty-three states (*including* Delaware) allow the legislature to place statutes (binding and non-binding) on a statewide ballot.³⁶ At times, legislators may seek to refer issues to voters for their approval to avoid being responsible for the policy (like tax increases, for example) or because the political environment in the legislature pushes lawmakers to pass the policy question on to the voters to decide, rather than take on the issue themselves.³⁷

Legislative referenda are used more often than other forms of ballot questions, but they tend to tackle issues that are more technical and less controversial than those that many citizen initiatives do and are less likely to capture the public's attention.³⁸ Measures about issuing public bonds or changing tax rates are less controversial than much of the content of citizen initiatives, and may be less likely to affect voter turnout.³⁹ This argument has some empirical support. While it was not their primary concern, Kimball and Kropf noted that in their news coverage data, legislative referenda received significantly less media attention than citizen initiatives in the 2004 elections.⁴⁰

The data partially confirms claims that initiatives are more controversial than referenda. Figure 3 shows the percentage of ballot measures that meet the voters' approval (they garner majority support).⁴¹ The voters approved less than half of all citizen initiatives after 1910, but voters approved a majority of

³⁶ Table: 1.2: States with Legislative Referendum (LR) for Statutes and Constitutional Amendments, INITIATIVE & REFERENDUM INST., <http://www.iandrinstitute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Requirements/Legislative%20Referendum%20States.pdf> [<http://perma.cc/67KR-S69V>].

³⁷ See David F. Damore, Shaun Bowler & Stephen P. Nicholson, *Agenda Setting by Direct Democracy: Comparing the Initiative and the Referendum*, 12 ST. POL. & POL'Y Q. 367, 370 (2012).

³⁸ See *supra* Figure 1, Figure 2.

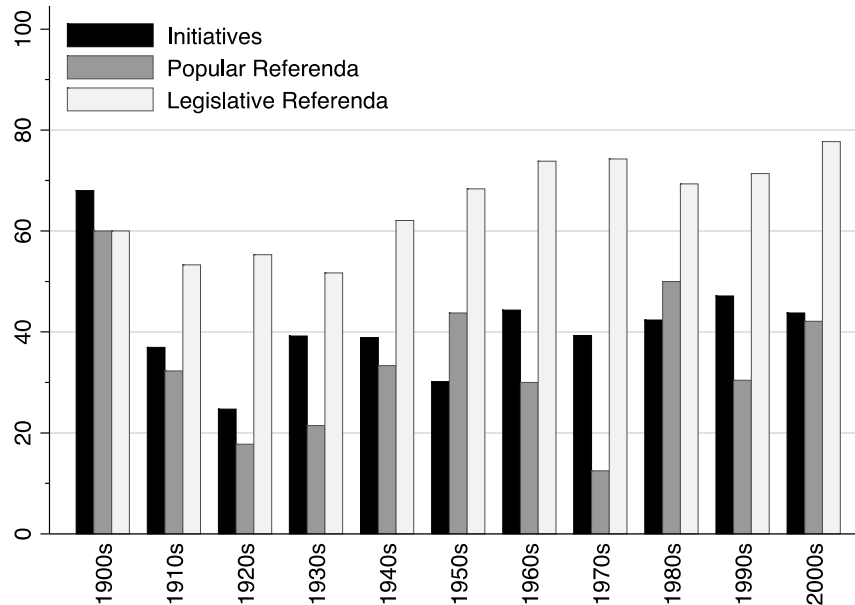
³⁹ See Tolbert, Grummel & Smith, *supra* note 4, at 627; accord Tolbert, Bowen & Donovan, *supra* note 4, at 158.

⁴⁰ See David C. Kimball & Martha Kropf, *Voting Technology, Ballot Measures, and Residual Votes*, 36 AM. POL. RES. 479, 483–84. (2008).

⁴¹ *Id.*

legislative referenda. Popular referenda are more successful than initiatives at times, but are not consistently so.

Figure 3: The Percentage of Ballot Measures that Receive Majority Support, by Decade, 1900–2008⁴²



III. WHY REFERENDA MAY ALSO STIMULATE TURNOUT

Despite the previous arguments and the pattern immediately above, we contend that it is worth exploring whether referenda mobilize voters or not. States use the legislative referenda more often than the other ballot measures and some of them may draw voters to the polls. Even though the content of legislative referenda may be less technical and, on the surface, less controversial than some citizen initiatives (like those that deal with social issues or wedge issues), ballot questions dealing with taxes, government spending, and public debt can draw the public's ire and motivate an interest group to organize a campaign in support of or opposition to the matter at hand. Popular referenda also require some campaign organization since those measures have to attract a certain number of signatures to get onto the ballot. Thus, they have the potential to stimulate turnout if their races are competitive.

If legislative referenda or popular referenda increase turnout, it is because their campaigns mobilize voters. Ballot

⁴² *Id.*

proposition campaigns, regardless of whether they are placed on the ballot by the legislature or by citizens, are typically low-information and low-salience affairs.⁴³ While a small number of initiatives attract a lot of media attention, many do not. Most Americans are not particularly politically knowledgeable about national politics and are often not very familiar with propositions that are on the ballot.⁴⁴ Unless an election is right around the corner, most Americans are not following politics very closely and are therefore *not* systematically differentiating between the three forms of ballot measures when they enter the voting booth or fill out their absentee ballot.⁴⁵ Thus, the typical citizen is not likely to be motivated to vote by an initiative or referendum *unless* a campaign engaged them.

We expect competitive races to stimulate turnout more than uncompetitive ones because they give rise to greater mobilization efforts than other races. The literature we have previously discussed shows that competitive initiatives elections stimulate turnout than less competitive elections.⁴⁶ Furthermore, campaigns mobilize voters by reducing the costs of learning about the measures and by lowering peoples' costs of getting to the polls.⁴⁷ They help inform citizens about proposed policies

⁴³ See DAVID B. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* 78 (1984); Tolbert, Grummel & Smith, *supra* note 4, at 627. See generally Robert J. Lacey, *The Electoral Allure of Direct Democracy: The Effect of Initiative Salience on Voting, 1990–96*, 5 ST. POL. & POL'Y Q. 168 (2005); Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63 (1994).

⁴⁴ MICHAEL X. DELLI CARPINI AND SCOTT KEETER, *WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS* *passim* (1996); see also Stephen P. Nicholson, *The Political Environment and Ballot Proposition Awareness*, 47 AM. J. POL. SCI. 403, 403–10 (2003). Nicholson analyzes fifty years of surveys done by the California Field Poll asking Californians about whether they had read, heard, or seen anything about particular ballot initiatives. On average, 64% of Californians reported being aware of the initiative in question, but the standard deviation was 19%. Nicholson notes that the Field Poll usually only inquires about ballot propositions that were already relatively salient in media coverage, implying that even fewer Californians were aware of ballot propositions that were not on the ballot. *Id.* at 404–06.

⁴⁵ Anthony Downs argued that most Americans are not primarily motivated by politics and are not motivated to learn a lot about their government or the people in it. See generally ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957). For example, only 15% of Americans admitted to following news about the 2014 midterm elections very closely in the first week of October 2014. See *Public Divided Over Whether Secret Service Lapses Signal 'Broader Problems'*, PEW RES. CTR. (Oct. 6, 2014), <http://www.people-press.org/2014/10/06/public-divided-over-whether-secret-service-lapses-signal-broader-problems/#the-weeks-news> [<http://perma.cc/A6LC-9BCV>].

⁴⁶ See Childers & Binder, *supra* note 1, at 93.

⁴⁷ See Gary C. Jacobson, *How Do Campaigns Matter?*, 18 ANN. REV. POL. SCI. 31, 31–47 (2015). Popkin shows how voters acquire information and use it while not closely following politics as well as how campaigns tailor their strategies to exploit that. See generally SAMUEL L. POPKIN, *THE REASONING VOTER: COMMUNICATIONS AND PERSUASION IN PRESIDENTIAL CAMPAIGNS* (2d ed. 1994). Riker and Ordeshook model the individual's cost and benefit calculus in deciding whether to vote and conclude that people vote if their

because they package their information in accessible formats and load their messages with informative cues.⁴⁸ Furthermore, campaigns raise and spend more money as races get more competitive.⁴⁹ Within each campaign, they allocate their resources in places where they expect the election to be closest and where they can mobilize as many supporters (and probable supporters) per dollar as possible.⁵⁰ For example, in the 2000 presidential election, the Bush and Gore campaigns allocated most of their resources to relatively few media markets in battleground states.⁵¹ Research on congressional and presidential elections shows that turnout and political awareness tend to be higher in areas where campaigns allocate more resources compared to areas where they allocate less.⁵² Political competition stimulates campaign intensity and campaign intensity mobilizes citizens.

It is also possible that the causal arrow can point in the opposite direction, that campaign intensity can make an election more competitive. We acknowledge that this can happen, but the nature and timing of an election cycle suggests that it is more often the case that political competition drives campaign intensity than the other way around. Candidates (and their campaigns), as well as party elites, have always had a strong grasp of what the political environment looked like early on in a campaign cycle and adjusted their strategies accordingly. Even in the late nineteenth century, politicians could accurately predict which races would be “sure victories, certain defeats, and which contests would be close and require attention. . . . They pinpointed the difference, and sought means to gain them.”⁵³ The congressional elections literature also shows that conditions early on in the election cycle, even well before the end of the primary season, determine whether quality challengers step up to challenge an incumbent or jump into the primaries of both parties to contend for open seats.⁵⁴

perceived benefits and their sense of duty in the democratic system outweigh the costs associated with voting. William H. Riker & Peter C. Ordeshook, *A Theory of the Calculus of Voting*, 62 AM. POL. SCI. REV. 25, 25 (1968).

⁴⁸ See Lupia, *supra* note 43, at 63. See generally POPKIN, *supra* note 47.

⁴⁹ See JACOBSON, *supra* note 26, at 42–43; DARON R. SHAW, THE RACE TO 270: THE ELECTORAL COLLEGE AND THE CAMPAIGN STRATEGIES OF 2000 AND 2004, at 73 (2006).

⁵⁰ See ROBERT D. MARCUS, GRAND OLD PARTY: POLITICAL STRUCTURE IN THE GILDED AGE 1880–1896, at 6 (1971); SHAW, *supra* note 49, at 78; Larry M. Bartels, *Resource Allocation in a Presidential Campaign*, 47 J. POL. 928, 929 (1985).

⁵¹ See SHAW, *supra* note 49, at 78.

⁵² See JACOBSON, *supra* note 26, at 85; SHAW, *supra* note 49, at 128.

⁵³ See MARCUS, *supra* note 50, at 11.

⁵⁴ See JACOBSON, *supra* note 26, at 47. See generally GARY C. JACOBSON & SAMUEL KERNELL, STRATEGY AND CHOICE IN CONGRESSIONAL ELECTIONS (1981).

We also expect to see that competitive initiatives will stimulate turnout more than competitive popular referenda and competitive legislative referenda because initiatives are more likely to stimulate active campaigns. Legislative referenda are placed on the ballot by a state's legislature whereas initiatives go through a costly statewide signature-gathering phase. The citizen initiative process has engendered campaign industries in its states as well as attracted growth in the number of interest groups tied to policy measures that are placed on the ballot.⁵⁵ Popular referenda entail a similar process, but it is in reaction to particular pieces of legislation. Thus, there is not quite the same interest group infrastructure centered on the institution.

IV. DATA

We explore how legislative and popular referenda affect turnout compared to initiatives using a time-series cross-sectional design with data from 1890–2008 and focus our analysis on federal election years. Our dataset pools statewide elections data from 1890–2008. Our study is not an experimental design (the gold standard for research analysis) because our causal mechanism (initiatives and referenda) is not randomly assigned to states across elections. Changes in the political conditions in a state affect whether initiatives or referenda appear on a statewide ballot and whether they engender campaigns, as the previous sections described; thus, our treatment is not randomly assigned. Our study also lacks a control group because every state has a form of the legislative referendum.

We are able to guard against some threats to the validity of our research design that are present when a causal mechanism is not randomly assigned. The study's long time series and repeated measurements (a state having ballot propositions in multiple elections over time) guard against historical threats to validity.⁵⁶ Different sets of states have ballot propositions on the ballot from election to election, allowing us to isolate the effects of different ballot measures on turnout over time, minimizing some threats to internal validity.⁵⁷

⁵⁵ Frederick J. Boehmke, *Sources of Variation in the Frequency of Statewide Initiatives: The Role of Interest Group Populations*, 58 POL. RES. Q. 565 (2005). See generally MAGLEBY, *supra* note 43.

⁵⁶ See WILLIAM R. SHADISH, THOMAS D. COOK & DONALD T. CAMPBELL, *EXPERIMENTAL AND QUASI-EXPERIMENTAL DESIGNS FOR GENERALIZED CASUAL INFERENCE* 39 (2002).

⁵⁷ See WILLIAM M.K. TROCHIM & JAMES P. DONNELLY, *RESEARCH METHODS KNOWLEDGE BASE 7* (3d ed. 2001).

Our dependent variable is the statewide voting-eligible population (VEP) turnout rate. The VEP rate is a more accurate measure of political participation over time than the voting age population measure.⁵⁸ The data comes from two sources: data from 1890–1978 is from Jerrold Rusk and data from 1980–2008 is from Michael McDonald.⁵⁹ We use the turnout rate based on the number of votes cast for the highest office. In midterm elections, we supplement Rusk’s congressional VEP data with Burnham, Clubb, and Flanigan’s senatorial and then gubernatorial election turnout data, if available.⁶⁰ If that data is not available, we use the congressional VEP turnout rate. For years that both Rusk’s and McDonald’s data overlap (1980–1996), they correlate at 0.99.

We expect political competition to increase turnout and we measure the effects of mobilization using competitiveness as a proxy. That is, we measure the number of competitive and “uncompetitive” initiative and referenda campaigns. We consider a campaign to be competitive if the margin of victory is within ten percentage points, as the authors did in their 2012 article measuring how initiatives affect turnout over time.⁶¹ By extension, a race is “uncompetitive” if the margin of victory is over ten points.

Our measure of competitiveness is an imperfect proxy for campaign intensity, but evidence from the literature strongly suggests that it captures political competition as well as campaign intensity. In the congressional elections literature, the most common threshold for determining whether an election is competitive is a margin of victory less than or equal to 10%.⁶² Holbrook and Wenschenk studied campaign intensity and turnout in mayoral elections and showed that the degree of parity in campaign expenditures between opposing candidates and the winner’s margin of victory are correlated at 0.67.⁶³ They

⁵⁸ See Michael P. McDonald & Samuel L. Popkin, *The Myth of the Vanishing Voter*, 95 AM. POL. SCI. REV. 963, 963 (2001).

⁵⁹ See generally JERROLD G. RUSK, A STATISTICAL HISTORY OF THE AMERICAN ELECTORATE (2001); Michael P. McDonald, *Voter Turnout*, U.S. ELECTIONS PROJECT, <http://www.electproject.org/home/voter-turnout/voter-turnout-data> [http://perma.cc/6FDJ-7LXJ].

⁶⁰ See W. Dean Burnham, Jerome M. Clubb & William Flanigan, *State-Level Congressional, Gubernatorial, and Senatorial Election Data for the United States, 1824-1972 (ICPSR 75)*, ICPSR (June 19, 1984), <http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/75/version/1>.

⁶¹ Childers & Binder, *supra* note 1, at 97.

⁶² JACOBSON, *supra* note 26, at 10; Alan I. Abramowitz, Brad Alexander & Matthew Gunning, *Incumbency, Redistricting, and the Decline of Competition in US House Elections*, 68 J. POL. 75, 75 (2006).

⁶³ Thomas M. Holbrook & Aaron C. Wienschenk, *Campaigns, Mobilization, and Turnout in Mayoral Elections*, 67 POL. RES. Q. 42, 46 (2014).

also go on to show that the gap in campaign expenditures between opposing party candidates strongly predicts the eventual winner's margin of victory.

Most elections are not competitive, as the data in Table 2 reflect. Through 2008, there have been 1970 citizen initiatives voted on during federal election years since the 1904 primary when Oregonians first cast a ballot for altering local liquor laws and creating direct primaries. Of those, 455 were "competitive" races, slightly over 23% of all initiative races. There have been 2863 legislative referenda during that same time span, of which 609 were competitive, just over 21% of the referenda. Popular referenda, by far the least popular form of ballot measure, had only 236 appearances on ballots and 47 were competitive, just under 20%.

Table 2: Proposition Type and Number in Federal Elections, 1892–2008⁶⁴

Form of Ballot Proposition	Total N in Federal Elections	Competitive Races	Uncompetitive Races	Percentage Competitive
Citizen Initiatives	1970	455	1515	23.1%
Legislative Referenda	2863	609	2254	21.3%
Popular Referenda	236	47	189	19.9%

We use data for all ballot measures from 1892–2008, provided by the National Conference of State Legislatures.⁶⁵ Previous studies of initiatives' effects on turnout use either the number of initiatives on the ballot⁶⁶ or a quadratic model with the number of initiatives and the number of initiatives squared.⁶⁷ As the authors explain, these approaches produce theoretically and empirically questionable results.⁶⁸ The former measure posits that the number of initiative campaigns has a linear effect on turnout. The latter predicts a positive relationship between ballot measures and turnout over a certain number of values but as the number of initiatives increases beyond a certain point, voter turnout declines (voter fatigue). Instead, we argue it is more likely that as the number of initiatives and referenda increase, turnout does as well, but at a diminishing rate. Thus, we use the square root of the number of initiatives and referenda.

⁶⁴ *Ballot Measures Database*, *supra* note 34.

⁶⁵ *Id.*

⁶⁶ Tolbert, Grummel & Smith, *supra* note 4, at 631.

⁶⁷ SMITH & TOLBERT, *supra* note 6, at 40–42; Tolbert, Grummel & Smith, *supra* note 4, at 635; Tolbert & Smith, *supra* note 4, at 296.

⁶⁸ See Childers & Binder, *supra* note 1, at 98.

We chose 1892 as a starting point for methodological and practical reasons. Our initiative and referenda data come from the National Conference of State Legislatures, and its database stretches back to the early 1890s. In 1892, Idaho's legislature placed a measure on the state ballot that would have changed how county commissioners were compensated. Otherwise, states did not begin to use initiatives or referenda until the first decade of the twentieth century after many Western states began adopting the initiative as part of their constitutions.⁶⁹ For most states, beginning the analysis before 1900 gives us some pre-treatment observations. We also include a number of institutional, electoral, and demographic control variables that the literature has shown also affect voter turnout, described in Table 3.

Most time-series cross-sectional data exhibits auto- and spatial-correlation, and we model our standard errors to address that. In time-series analysis, it is often the case that one's dependent variable is correlated from one time period to the next for each unit of analysis, and failing to control for that can bias regression results.⁷⁰ Our data also likely exhibits spatial correlation, meaning that our dependent variable may be correlated across states. For example, institutional reforms and policy innovations in one state can affect policy outcomes and political behavior across other states.⁷¹ At the same time, states may react differently to political events that commonly affect them. For example, the implementation of the National Voter Registration Act of 1993 had varying effects across states.⁷² We account for auto- and spatial-correlation using Driscoll and Kraay standard errors and model the errors to have a lag over four years.⁷³ Finally, we also use state fixed effects to account for changes within states over time that our model may not capture.

⁶⁹ For a chronology, see DAVID D. SCHMIDT, *CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION* (1989).

⁷⁰ See Nathaniel Beck, *Time-Series-Cross-Section Data: What Have We Learned in the Past Few Years?*, 4 ANN. REV. POL. SCI. 271, 281–82 (2001).

⁷¹ See, e.g., Charles R. Shipan & Craig Volden, *The Mechanisms of Policy Diffusion*, 52 AM. J. POL. SCI. 840, 853 (2008).

⁷² National Voter Registration Act of 1993, 42 U.S.C. §§ 1973gg–1973gg-10 (2012). See generally Cynthia Rugeley & Robert A. Jackson, *Getting on the Rolls: Analyzing the Effects of Lowered Barriers on Voter Registration*, 9 ST. POL. & POL'Y Q. 56 (2009).

⁷³ Driscoll and Kraay constructed a covariance matrix estimator “which is robust to very general forms of spatial and temporal dependence as the time dimensions become large.” John C. Driscoll & Aart C. Kraay, *Consistent Covariance Matrix Estimation with Spatially Dependent Panel Data*, 80 REV. ECON. & STAT. 549, 550 (1998). Models using these standard errors are easy to implement in time-series cross-sectional models in Stata using a user-written command `xtscc`. See Daniel Hoechle, *Robust Standard Errors for Panel Regressions with Cross-Sectional Dependence*, 7 STATA J. 281 (2007).

**Table 3: The Operationalization of the Analysis'
Independent Variables and their Sources**

Variables	Sources
<i>Independent Variables of Interest</i> The square root of the number of competitive initiatives and referenda and the square root of the number of uncompetitive initiatives and referenda. Competitive Initiatives Uncompetitive Initiatives Competitive Popular Referenda Uncompetitive Popular Referenda Competitive Legislative Referenda Uncompetitive Legislative Referenda	National Conference of State Legislature ⁷⁴
<i>Institutional Reforms</i> Adoption of the Secret Ballot Extension of Suffrage to Women Voters	Heckelman 1995 ⁷⁵ A Statistical History of the American Electorate ⁷⁶
<i>Changes in the Population</i> Percentage of Foreign Born Americans in Each State* Percentage of Nonwhite Americans in Each State* Percentage of the State's Residents Who Live in Urban Areas With a Population of At Least 2500 People* State's Rank in Education: To control for statewide levels and to maintain consistency over the time span of the data, we rank ordered the states for each election year on the given Census measure at the time. *The historical census data are provided every ten years, so we interpolate biannually across all states.	U.S. Census Bureau ⁷⁷ U.S. Census Bureau ⁷⁸ U.S. Census Bureau ⁷⁹ Inter-University Consortium for Political and Social Research ⁸⁰
<i>Electoral and Political Context</i> Party Competition: measures the average level of competition between the major party candidates in presidential (in presidential years), senatorial, House, and gubernatorial elections. The measure takes the average difference between the major	<i>A Statistical History of the American Electorate</i> for 1870–1996 data. 1998–2008 data are from CQ Press. ⁸²

⁷⁴ *Ballot Measures Database*, *supra* note 34.

⁷⁵ See generally Jac C. Heckelman, *The Effect of the Secret Ballot on Voter Turnout Rates*, 82 PUB. CHOICE 107 (1995).

⁷⁶ RUSK, *supra* note 59, at 17–57.

⁷⁷ Campbell Gibson & Kay Jung, U.S. CENSUS BUREAU, *Historical Census Statistics on the Foreign-Born Population of the United States: 1850-2000*, (Feb. 2006), <http://www.census.gov/population/www/documentation/twps0081/twps0081.pdf> [<http://perma.cc/4FVU-VEKV>].

⁷⁸ Campbell Gibson & Kay Jung, U.S. CENSUS BUREAU, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for Large Cities and Other Urban Places in the United States*, (Feb. 2005), <http://www.census.gov/population/www/documentation/twps0076/twps0076.pdf> [<http://perma.cc/5Z83-LVU8>].

⁷⁹ *Id.*

⁸⁰ Michael R. Haines, *Historical, Demographic, Economic, and Social Data: The United States, 1790-2002 (ICPSR 2896)*, ICPSR (Feb. 25, 2005), <http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/2896?q=Michael+R.+Haines&searchSource=find-analyze-home&sortBy=>.

Variables	Sources
party candidates across those elections and subtracts this value from 100. A zero reflects the complete absence of two-party competition across a state in a given year, whereas a score of 100 reflects “perfect competition between the parties.” ⁸¹	
Presence of a senate election, measured using a dichotomous measure.	<i>A Statistical History of the American Electorate</i> for 1870–1996 data. 1998–2008 data are from the Office of the Clerk, U.S. House of Representatives. ⁸³
Presence of a gubernatorial election, measured using a dichotomous measure.	<i>A Statistical History of the American Electorate</i> for 1870–1996 data. 1998–2008 data are from Carl Klarner’s “Governors Dataset.” ⁸⁴

V. THE DIFFERENTIAL EFFECTS THAT INITIATIVES AND REFERENDA HAVE ON TURNOUT

The evidence below largely supports our expectations and advances our understanding of how direct democracy affects voter participation. First, we corroborate previous work finding that low information midterm elections are more conducive to mobilization effects from ballot proposition campaigns than presidential elections over time. Second, and more importantly, we find that in addition to initiative races, legislative referenda races increase turnout. The regression results presented in Tables 3 and 4 confirm previous work on initiatives by the authors, showing that competitive and uncompetitive initiatives alike provide for a boost in turnout during midterm elections.

The regression model in Table 4 shows that initiatives and referenda do not affect voter turnout across the states in presidential elections. The table displays six models, and each one has a key independent variable of interest. In the first model, we see that the square root of the number of competitive initiatives has a negative but fails to have a statistically significant effect on a state’s turnout rate because the standard error (in parentheses) is larger than the coefficient itself. The

⁸² *Id.* at 568–84; *Voting and Elections Collection*, CQ PRESS (Mar. 11, 2010), <http://library.cqpress.com/elections/index.php>.

⁸¹ RUSK, *supra* note 59, at 558.

⁸³ RUSK, *supra* note 59, at 639–53; *Election Statistics, 1920 to Present*, HIST., ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, <http://history.house.gov/Institution/Election-Statistics/Election-Statistics/> (last visited Dec. 19, 2015).

⁸⁴ RUSK, *supra* note 59, at 667–88; *Voting and Elections Collection*, *supra* note 82. Data are also available from Carl Klarner, *Governors Dataset*, HARVARD DATAVERSE (July 13, 2015), <https://dataverse.harvard.edu/dataset.xhtml?persistentId=hdl:1902.1/20408>.

models show the same pattern for our key coefficients in columns two through five. Regardless of whether we are considering competitive or uncompetitive initiatives or referenda, they fail to reach statistical significance, indicating that they do not significantly affect state turnout in presidential elections.

The regressions in Table 5 show that initiatives and referenda do significantly affect statewide turnout in midterm elections. The asterisks next to the coefficients indicate that they have a statistically significant effect on turnout at the 0.05 level. In the first column, we see that the square root of competitive initiatives have a positive and significant effect on turnout. For each additional competitive initiative on the ballot, turnout increases by approximately 1.7%. Columns two and three reveal that uncompetitive initiatives and competitive legislative referenda positively and significantly increase statewide turnout. However, the coefficient for uncompetitive initiatives is greater than the coefficient for competitive legislative referenda, meaning that relatively less competitive initiative elections have greater impacts on turnout than competitive legislative referenda elections. Columns four through six show that uncompetitive legislative referenda and both types of popular referenda fail to significantly affect statewide turnout.

Figure 4 graphs the marginal effects that the number of initiatives and referenda can have on turnout in off-year elections, as calculated from the results in Table 5. We only present data for the coefficients that were statistically significant. Though the marginal effects show potentially large increase in turnout—up to eight percentage points when there are twenty-one competitive initiatives—the maximum number in our data was only eight. Colorado had eight in 1912, and our results estimate a five-point jump in turnout. However, the typical number of competitive initiatives on a ballot in any given state is much lower. There was a maximum of twenty-one uncompetitive initiatives in our sample, which predicts about a five-point increase in turnout. Again, there are typically many fewer of them on a ballot in any given year. Competitive legislative referenda are more prevalent than competitive initiatives and at the sample maximum of twelve in one election, turnout increases by about 3.74%.

2016]

The Differential Effects of Initiatives & Referenda

55

Table 4: The Effects of Initiatives and Referenda on Voter Turnout in the States During Presidential Elections, 1890–2008

	(1)	(2)	(3)	(4)	(5)	(6)
√Competitive Initiatives	-0.27 (0.32)					
√Competitive Leg. Ref.		0.70 (0.46)				
√Competitive Pop Ref.			-0.38 (1.62)			
√Uncomp. Initiatives				-0.20 (0.35)		
√Uncomp Leg Ref.					-0.16 (0.51)	
√Uncomp Pop Ref.						-0.76 (0.79)
Party Competition	0.33* (0.02)	0.33* (0.02)	0.33* (0.02)	0.33* (0.02)	0.33* (0.02)	0.33* (0.02)
Education	9.60* (3.28)	9.47* (3.21)	9.56* (3.30)	9.55* (3.31)	9.64* (3.27)	9.46* (3.29)
Foreign Born	0.29* (0.11)	0.29* (0.11)	0.29* (0.11)	0.29* (0.11)	0.29* (0.11)	0.29* (0.11)
Nonwhite	-0.31* (0.14)	-0.31* (0.14)	-0.31* (0.14)	-0.31* (0.14)	-0.31* (0.14)	-0.31* (0.14)
Percent Urban	0.08 (0.05)	0.07 (0.05)	0.08 (0.05)	0.08 (0.05)	0.08 (0.05)	0.07 (0.05)
Secret Ballot	-3.18 (2.26)	-3.17 (2.24)	-3.19 (2.26)	-3.21 (2.26)	-3.20 (2.25)	-3.19 (2.27)
Women's Suffrage	-7.77* (1.91)	-7.76* (1.91)	-7.78* (1.91)	-7.76* (1.90)	-7.78* (1.91)	-7.73* (1.91)
Gubernatorial Election	1.26 (0.70)	1.28 (0.70)	1.26 (0.69)	1.25 (0.69)	1.25 (0.68)	1.24 (0.70)
Senate Election	0.28 (0.40)	0.22 (0.41)	0.27 (0.40)	0.28 (0.39)	0.27 (0.39)	0.29 (0.37)
Constant	35.27* (7.90)	35.60* (7.88)	35.38* (7.93)	35.35* (7.90)	35.22* (8.05)	35.55* (7.93)
N	1451	1451	1451	1451	1451	1451
States	50	50	50	50	50	50
Within-R ²	0.44	0.44	0.44	0.44	0.44	0.44

*Indicates that the coefficient is statistically significant at the .05 level.

Note: Linear Regression with State Fixed Effects and Driscoll-Kraay Standard Errors in Parentheses.

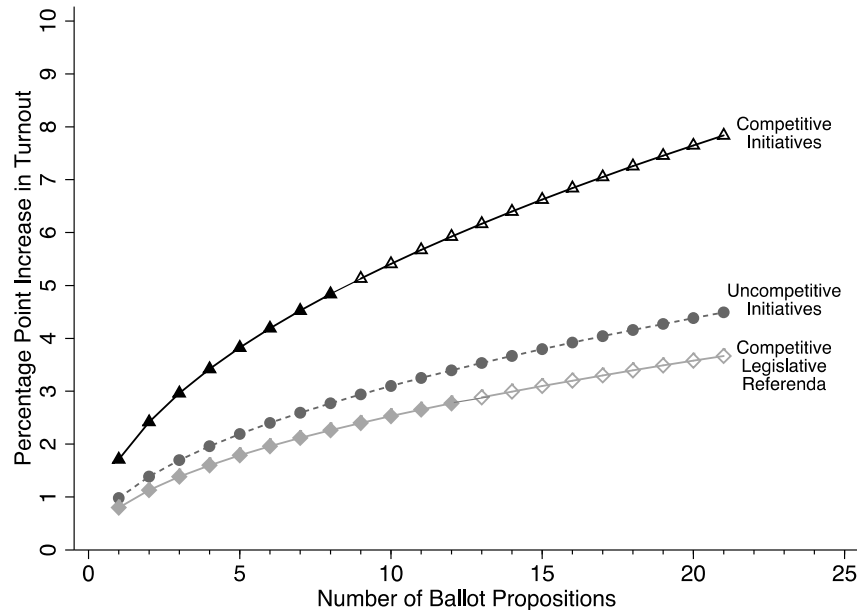
Table 5: The Effects of Initiatives and Referenda on Voter Turnout in the States During Midterm Elections, 1890–2006

	(1)	(2)	(3)	(4)	(5)	(6)
√Competitive Initiatives	1.71* (0.50)					
√Competitive Leg. Ref.		0.98* (0.47)				
√Competitive Pop Ref.			0.80* (0.38)			
√Uncomp. Initiatives				0.60 (0.52)		
√Uncomp Leg Ref.					-0.70 (1.41)	
√Uncomp Pop Ref.						-0.06 (0.66)
Party Competition	0.31* (0.01)	0.30* (0.01)	0.30* (0.01)	0.31* (0.01)	0.30* (0.01)	0.30* (0.01)
Education	2.22 (2.39)	1.99 (2.33)	2.01 (2.36)	2.04 (2.32)	1.77 (2.10)	2.04 (2.34)
Foreign Born	0.17 (0.11)	0.17 (0.11)	0.18 (0.11)	0.17 (0.11)	0.17 (0.11)	0.18 (0.11)
Nonwhite	-0.44* (0.09)	-0.43* (0.09)	-0.43* (0.09)	-0.44* (0.09)	-0.44* (0.09)	-0.43* (0.09)
Urban	-0.00 (0.03)	-0.01 (0.03)	-0.00 (0.03)	-0.01 (0.03)	-0.01 (0.03)	-0.00 (0.03)
Secret Ballot	-9.61* (0.98)	-9.52* (0.97)	-9.55* (0.96)	-9.57* (1.00)	-9.54* (0.97)	-9.55* (0.96)
Women's Suffrage	-8.58* (1.65)	-8.52* (1.65)	-8.48* (1.65)	-8.60* (1.67)	-8.53* (1.64)	-8.49* (1.64)
Gov. Election	-3.59* (0.45)	-3.60* (0.44)	-3.59* (0.47)	-3.63* (0.45)	-3.64* (0.45)	-3.59* (0.47)
Sen. Election	0.17 (0.75)	0.23 (0.74)	0.25 (0.74)	0.21 (0.75)	0.23 (0.75)	0.24 (0.74)
Constant	43.69* (4.31)	43.77* (4.30)	43.58* (4.31)	43.80* (4.29)	44.31* (4.14)	43.55* (4.32)
N	1441	1441	1441	1441	1441	1441
States	50	50	50	50	50	50
Within-R2	0.51	0.51	0.51	0.51	0.51	0.51

* Indicates that the coefficient is statistically significant at the .05 level.

Note: Linear Regression with State Fixed Effects and Driscoll-Kraay Standard Errors in Parentheses.

Figure 4: The Marginal Effects of Ballot Propositions on Turnout in Midterm Elections, 1890–2006⁸⁵



Control variables in both the midterm and presidential elections reinforce traditional findings in the literature about the role that institutions, demographics, and political context have on drawing voters to the polls. Women's suffrage and the secret ballot significantly decreased voting eligible turnout in both midterm and presidential elections. Their effects, however, vary slightly by whether it is a presidential or a midterm year. A state's rank in census education indicators (see Table 3 for an explanation) has a strong and robust effect on turnout in presidential election years, but little effect in midterm elections.

⁸⁵ See *supra* Table 5. This graphs the marginal effects of competitive initiatives, uncompetitive initiatives, and competitive legislative referenda on voter turnout in midterm elections as the number of each type of ballot proposition increases from zero to twenty-one. This is based on the regression results in Table 5. To calculate the marginal effects of an independent variable on the dependent variable in a linear regression, as the independent variable increases from zero to infinity (or another theoretically interesting limit), you multiply the independent variable's coefficient by the value of the independent variable. For example, each data point in the competitive initiatives plot line is equal to the coefficient for the square root of competitive initiatives (1.71) (see Table 5) multiplied by the respective number on the x-axis. The plot lines for uncompetitive initiatives and competitive legislative referenda were calculated similarly. Hollow markers indicate out of sample predictions. The maximum number of competitive initiatives in one election was eight in Colorado in 1912, and the maximum number of competitive legislative referenda was twelve in California in 1914 and Alabama in 1994. See *Initiative, Referendum and Recall*, *supra* note 7.

The size of a state's foreign-born population has significant negative effects on turnout in presidential elections while the size of its nonwhite population also negatively affects turnout (but in both presidential and midterm elections).

The state of political competition overall also has a major impact on a state's turnout rate in both presidential and midterm elections. In presidential elections, the most competitive states (close to 50–50 support for each major party) can have an approximately ten percentage point increase in turnout over very uncompetitive states (65–35 support for one party). The most competitive partisan atmosphere, when each party gets on average 50% of the two party share across elections in that state, equals 100 on Rusk's scale. A state where one party averages 65% support across elections while the other averages 35%, earns a 70 on Rusk's scale. Thus, turnout is about ten points higher in the most competitive state compared to one where there is a 65–35 split between Democrats and Republicans $((100 \cdot .33) - (70 \cdot .33) = 10)$. Party competition has almost the same impact in midterm elections when one performs the same calculation for coefficients in Table 5.

VI. CONCLUSION

This Article contributes to our understanding of how ballot propositions affect political participation in three ways. First, we show that legislative referenda races affect turnout. More specifically, competitive legislative referendums draw voters to the polls and less competitive ones do not. Secondly, they have weaker effects on turnout than either competitive or uncompetitive citizen initiatives. Thirdly, we also show that popular referenda do not boost turnout over time. They may garner some campaign activity because they require citizens to gather signatures across the state, but that does not translate into campaigns that are vigorous enough to stimulate the electorate.

Our evidence corroborates other claims suggesting that direct democracy draws voters to the polls via campaign mobilization. As we explained in a previous section, campaigns allocate their resources in areas where the race is most competitive and they spend more money overall as races get more competitive. Thus, they allocate their money to mobilize voters and do so in ways to get the most bang-for-their-buck. Tolbert, Bowen, and Donovan use campaign spending data from a few recent election years to illustrate that spending per capita on all

ballot questions in a state increases turnout.⁸⁶ Their work, along with our findings above and previous work on competitive versus uncompetitive initiatives, strongly suggests that ballot proposition campaigns mobilize voters.⁸⁷

We also acknowledge that our work, along with the others cited above, has an important limitation that future research needs to address. One take-home point of this Article is that all ballot measures are not created equal. Initiatives and referenda (legislative and popular) have differential impacts on the level of political engagement in a state. The mobilization thesis will be even more convincing when scholars are able to show that individual ballot races that are more intense have a stronger impact on turnout than races with less intensity using data on actual campaign expenditures from individual campaigns. Research on candidate elections shows this in abundance, and, hopefully, direct democracy scholars will soon join their ranks.

⁸⁶ Tolbert, Bowen & Donovan, *supra* note 4, at 181.

⁸⁷ *See generally* Childers & Binder, *supra* note 1.

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State Constitutional Initiative Processes and Governance in the Twenty-First Century

*John Dinan**

INTRODUCTION

Of the direct democratic devices available in American states, none has generated more scrutiny than constitutional initiative processes. There is no denying the key role played by other direct democratic mechanisms. Governors in California and Wisconsin have recently been subjected to—and in one case removed from office by—recall elections,¹ a device available in nineteen states.² Citizen-initiated statutory referendums, available in twenty-four states,³ were employed recently in Ohio to overturn a statute limiting collective bargaining and in Maine to restore election-day voter registration.⁴ Citizens have relied on the statutory initiative process to enact a range of policies⁵ in the twenty-one states providing for this device.⁶ However the constitutional initiative process, available in eighteen states,⁷ attracts particular interest in view of the importance of state constitutions and the ability to make changes in governing institutions, rights, and policies.

Consider a sample of changes achieved through constitutional initiative processes in the twenty-first century alone. Minimum-wage increases were adopted in Florida, Nevada,

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¹ *Recall of State Officials*, NAT'L CONF. ST. LEGISLATURES (Sept. 11, 2013), <http://www.ncsl.org/research/elections-and-campaigns/recall-of-state-officials.aspx> [<http://perma.cc/D3U6-6BNJ>].

² HENRY S. NOYES, *THE LAW OF DIRECT DEMOCRACY* 32 (2014).

³ *Id.* at 78.

⁴ Shanna Rose & Cynthia J. Bowling, *The State of American Federalism 2014–15: Pathways to Policy in an Era of Party Polarization*, 45 *PUBLIUS* 351, 356 (2015).

⁵ Caroline J. Tolbert, *Public Policy and Direct Democracy in the Twentieth Century: The More Things Change, the More They Stay the Same*, in *THE BATTLE OVER CITIZEN LAWMAKING* 35, 38–39 (M. Dane Waters ed., 2001).

⁶ *Initiative and Referendum States*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx> [<http://perma.cc/8NV3-SVZL>] (last updated Sept. 2012).

⁷ *Id.*

Colorado, and Ohio.⁸ Limits on affirmative action were imposed in Michigan and Nebraska.⁹ Colorado legalized recreational marijuana.¹⁰ Class sizes in Florida public schools were reduced.¹¹ The sales tax, as well as income taxes on upper-income earners, was raised in California.¹² Citizen-initiated amendments in Arizona, California, and Florida brought significant changes in the rules and procedures for drawing state and congressional districts.¹³

In view of the importance of constitutional initiative processes, scholars have been led to assess their consequences and consider ways they might be designed to best harness their beneficial effects and minimize their harms. A number of scholars have analyzed the constitutional initiative as part of broader studies of direct democratic devices.¹⁴ Some have focused on constitutional initiative processes in particular.¹⁵ Among other things, scholars have considered whether these processes permit enactment of reforms resisted by self-interested legislators¹⁶ or blocked by powerful groups,¹⁷ and on the other hand, whether they facilitate passage of measures unduly constraining policy

⁸ John Dinan, *Policy Provisions in State Constitutions: The Standards and Practice of State Constitution-Making in the Post-Baker v. Carr Era*, 60 WAYNE L. REV. 155, 190–91 (2014).

⁹ *Id.* at 190.

¹⁰ *Id.* at 189.

¹¹ See John Dinan, *The Past, Present, and Future Role of State Constitutions*, in GUIDE TO STATE POLITICS AND POLICY 19, 28–29 (Richard G. Niemi & Joshua J. Dycck eds., 2014).

¹² CAL. CONST. art. XIII, § 36(f); see also Dinan, *supra* note 8, at 192.

¹³ Dinan, *supra* note 8, at 187; Dinan, *supra* note 11, at 28.

¹⁴ See generally THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL (1989); RICHARD J. ELLIS, DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA (2002); ELISABETH R. GERBER, THE POPULIST PARADOX: INTEREST GROUP INFLUENCE AND THE PROMISE OF DIRECT LEGISLATION (1999); DANIEL C. LEWIS, DIRECT DEMOCRACY AND MINORITY RIGHTS: A CRITICAL ASSESSMENT OF THE TYRANNY OF THE MAJORITY IN THE AMERICAN STATES (2013); DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES (1984); JOHN G. MATSUSAKA, FOR THE MANY OR THE FEW: THE INITIATIVE, PUBLIC POLICY, AND AMERICAN DEMOCRACY (2004); KENNETH P. MILLER, DIRECT DEMOCRACY AND THE COURTS (2009); DAVID D. SCHMIDT, CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION (1989).

¹⁵ See generally Janice C. May, *The Constitutional Initiative: A Threat to Rights?, in HUMAN RIGHTS IN THE STATES: NEW DIRECTIONS IN CONSTITUTIONAL POLICYMAKING* (Stanley H. Friedelbaum ed., 1988); Dennis W. Arrow, *Representative Government and Popular Distrust: The Obstruction/Facilitation Conundrum Regarding State Constitutional Amendment by Initiative Petition*, 17 OKLA. CITY U.L. REV. 3 (1992); John F. Cooper, *The Citizen Initiative Petition to Amend State Constitutions: A Concept Whose Time Has Passed, or a Vigorous Component of Participatory Democracy at the State Level?*, 28 N.M. L. REV. 227 (1998); Marvin Krislov & Daniel M. Katz, *Taking State Constitutions Seriously*, 17 CORNELL J.L. & PUB. POL'Y 295 (2008).

¹⁶ See discussion *infra* Section II.A.

¹⁷ See discussion *infra* Section II.B.

flexibility¹⁸ or impairing rights.¹⁹ As for the design of these processes, analysts have focused on the wide range of rules for placing citizen-initiated amendments on the ballot and securing their ratification.²⁰

I revisit these scholarly analyses by compiling and drawing on a data-set of the full range of proposed and enacted constitutional initiatives in the twenty-first century. My purpose is to assess the extent to which citizen-initiated amendments adopted from 2000–2014 offer support for scholarly claims about their consequences, with the aim of evaluating options available for structuring these processes so they contribute to effective governance.

I. USE OF CONSTITUTIONAL INITIATIVE PROCESSES IN THE TWENTY-FIRST CENTURY

A total of 203 citizen-initiated amendments appeared on state ballots from 2000–2014, and 83 were approved.²¹ However, these measures were not distributed evenly across this period,²² or among the states.²³ Additionally, some topics were addressed on a particularly frequent basis.²⁴

¹⁸ See discussion *infra* Section II.C.

¹⁹ See discussion *infra* Section II.D.

²⁰ See discussion *infra* Part III.

²¹ These totals are drawn in nearly all cases from annual totals reported in *The Book of the States*, as modified for the year 2006 so as not to count one Nevada amendment that was approved on the first of two required passages and also not to count one Colorado measure that was mislabeled in *The Book of the States* as a rejected amendment but was actually a rejected statutory initiative, and as modified also for the year 2008 so as not to count one Colorado measure that was mislabeled in *The Book of the States* as a rejected amendment but was actually a rejected statutory initiative. See Janice C. May, *State Constitutions and Constitutional Revision 2000-2001*, in 34 THE BOOK OF THE STATES 2002, at 3, 22 tbl.1.6 (2002); Janice C. May, *Trends in State Constitutional Amendment and Revision*, in 35 THE BOOK OF THE STATES 2003, at 3, 18 tbl.1.6 (2003); *2003 Ballot Measures*, BALLOTPEdia, http://ballotpedia.org/2003_ballot_measures [<http://perma.cc/X73K-NUZX>]; Janice C. May, *State Constitutional Developments in 2004*, in 37 THE BOOK OF THE STATES 2005, at 3, 18 tbl.1.6 (2005); John Dinan, *State Constitutional Developments in 2005*, in 38 THE BOOK OF THE STATES 2006, at 3, 16 tbl.1.5 (2006); John Dinan, *State Constitutional Developments in 2006*, in 39 THE BOOK OF THE STATES 2007, at 3, 16 tbl.1.5 (2007); John Dinan, *State Constitutional Developments in 2007*, in 40 THE BOOK OF THE STATES 2008, at 3, 6 tbl.C (2008); John Dinan, *State Constitutional Developments in 2008*, in 41 THE BOOK OF THE STATES 2009, at 3, 7 tbl.C (2009); John Dinan, *State Constitutional Developments in 2009*, in 42 THE BOOK OF THE STATES 2010, at 3, 7 tbl.C (2010); John Dinan, *State Constitutional Developments in 2010*, in 43 THE BOOK OF THE STATES 2011, at 3, 7 tbl.C (2011); John Dinan, *State Constitutional Developments in 2011*, in 44 THE BOOK OF THE STATES 2012, at 3, 9 tbl.C (2012); John Dinan, *State Constitutional Developments in 2012*, in 45 THE BOOK OF THE STATES 2013, at 3, 6 tbl.C (2013); John Dinan, *State Constitutional Developments in 2013*, in 46 THE BOOK OF THE STATES 2014, at 3, 6 tbl.C (2014); John Dinan, *State Constitutional Developments in 2014*, in 47 THE BOOK OF THE STATES 2015, at 3, 6 tbl.C (2015).

²² See discussion *infra* Section I.A.

²³ See discussion *infra* Section I.B.

²⁴ See discussion *infra* Section I.C.

A. Use by Year

The rate of proposed and enacted citizen-initiated amendments varied during the years covered by this period, as shown in Table 1.²⁵ As is generally the case with other ballot measures, and largely because many states permit such measures only in even-numbered years, citizen-initiated amendments are considered less frequently in odd-numbered years. In several odd-numbered years, not a single citizen-initiated amendment appeared on a state ballot. But even-numbered years occasionally featured more than thirty citizen-initiated amendments.²⁶

Table 1: Constitutional Initiative Use by Year: Number of Enactments/Proposals²⁷

Year	Number of Enactments/Proposals
2000	13/32* ‡
2001	0/0
2002	9/21
2003	0/3
2004	17/31*
2005	0/8
2006	10/31*
2007	0/0
2008	12/28
2009	1/1
2010	9/17
2011	3/4
2012	7/18
2013	0/1
2014	2/8

* These totals exclude instances where Nevada voters gave the first of two required approvals to constitutional initiatives, as occurred in 2000, 2004 (two amendments), and 2006. In each of these cases, Nevada amendments are considered to have been proposed and enacted in the year they received their second and final approval by voters.

‡ The number of enacted amendments excludes one Oregon amendment, Proposition 7, that appeared to secure a majority, but the Secretary of State was precluded from conducting a final canvass of votes due to a legal challenge.

It is also worth noting that citizen-initiated amendments were proposed and enacted more frequently in the earlier part of the 2000–2014 period than in recent years. The year 2000 was the high-water mark for proposals (thirty-two), and the year 2004

²⁵ See *infra* Table 1. For an historical perspective on the rate of proposals and enactments by decade up through the mid-1980s, see May, *supra* note 15, at 165.

²⁶ See *supra* note 21.

²⁷ See *id.*

²⁷ See *id.*

featured the highest number of enactments (seventeen). At the other end of the spectrum, fewer constitutional initiatives were proposed (eight) and enacted (two) in 2014 than in any other even-numbered year in the twenty-first century.²⁸

B. Use by State

Constitutional-initiative use varied significantly across the eighteen states with such processes, as shown in Table 2.²⁹ On one hand, voters in two states—Illinois and Massachusetts—did not vote on any citizen-initiated amendments during this period. On the other hand, voters in several states considered constitutional initiatives on a regular basis. In California and Colorado, voters encountered, on average, more than two citizen-initiated amendments per year, with Oregon voters passing judgment on just under two citizen-initiated amendments per year. Florida voters approved more citizen-initiated amendments than any other state, voting in favor of seventeen of nineteen citizen-initiated amendments appearing on the ballot.

**Table 2: Constitutional Initiative Use by State from 2000–2014:
Number of Enactments/Proposals, as Well as the
Purpose of Each Enacted Measure**

State	Enactments/ Proposals	Purpose of Each Enacted Measure
Arizona	2/8	establish redistricting commission; ban real-estate transfer tax
Arkansas	2/5	ban same-sex marriage; authorize state lottery
California	13/41	reduce percentage of popular vote needed to approve local school bond referendums; facilitate local governments' ability to contract with architects and engineers; fund stem-cell research; limit eminent domain power; ban same-sex marriage; establish re-districting commission for state legislative districts; expand role of redistricting commission to apply to congressional districts; eliminate legislative supermajority requirement for passing appropriations bills; extend current legislative supermajority requirement for tax increases to cover fee increases; limit state's ability to use local revenue for non-designated purposes; expand victims' rights; increase sales tax and income tax rates; relax legislative term limits
Colorado	11/36	legalize medical marijuana; mandate annual increases

²⁸ See *id.*

²⁹ See *infra* Table 2. For historical data on use of the process by each state, up through the mid-1980s, see May, *supra* note 15, at 165. Patterns for twenty-first century constitutional-initiative use generally follow the patterns through the mid-1980s, in that California, Colorado, and Oregon are the top three states in proposals in both periods. See *infra* Table 2; May, *supra* note 15, at 165.

State	Enactments/ Proposals	Purpose of Each Enacted Measure
		in school spending; limit campaign contributions and expenditures; increase cigarette tax; limit gifts to elected officials; increase minimum wage; ban same-sex marriage; allow longer hours and higher wagers at casinos; limit campaign contributions from groups contracting with state; legalize recreational marijuana; instruct congressional delegation to support federal campaign-finance amendment
Florida	17/19	build high-speed rail system connecting major cities; limit confinement of pregnant pigs; ban workplace smoking; expand pre-K schooling; reduce K-12 class sizes; establish local board of trustees for each public university; repeal requirement to build high-speed rail system; limit contingency-fee arrangements in medical-malpractice cases; prevent licensing of doctors with three malpractice judgments; grant patient access to information about doctors' adverse medical incidents; increase minimum wage; allow voters in two counties to approve slot machines at horse-racing tracks; require tobacco-settlement funds to be used for smoking prevention; ban same-sex marriage; bar consideration of party and incumbency when drawing state legislative districts; bar consideration of party and incumbency when drawing congressional districts; dedicate proceeds from document tax to land acquisition trust fund
Illinois	0/0	none
Massachusetts	0/0	none
Michigan	4/13	require voter approval for new forms of gambling; ban same-sex marriage; limit affirmative action; authorize stem-cell research
Missouri	3/7	authorize stem-cell research; ban real-estate transfer tax; ensure gas tax only funds transportation programs
Mississippi	2/3	impose voter ID requirement; limit eminent domain power
Montana	2/2	ban same-sex marriage; ban real-estate transfer tax
Nebraska	4/6	adopt legislative term limits; ban same-sex marriage; limit legislative modification of statutes passed through initiative process; limit affirmative action
Nevada	5/9	legalize medical marijuana; ban same-sex marriage; increase minimum wage; limit eminent-domain power; require legislature to pass education appropriation bill before other appropriation bills
North Dakota	4/7	authorize state to join multi-state lottery; ban same-sex marriage; limit eminent domain-power; guarantee right to farm
Ohio	4/13	ban same-sex marriage; increase minimum wage; authorize casinos in four cities; bar enforcement of health-insurance mandate
Oklahoma	0/2	none
Oregon	9/27	establish commission to regulate home health-care; require legislature to fund schools adequately; limit civil-asset forfeiture; strengthen restrictions on paid signature-gatherers for initiatives; ban same-sex marriage; renew provision dedicating portion of

State	Enactments/ Proposals	Purpose of Each Enacted Measure
		lottery revenue to environmental program; ban real-estate transfer tax; require excess revenue from corporate taxes to be placed in the general fund rather than refunded; ban unequal treatment on account of sex
South Dakota	1/5	repeal inheritance tax

C. The Subjects of Constitutional Initiatives

In surveying the subjects addressed via constitutional initiative processes from 2000–2014, several topics attracted particular attention. Tax and finance measures appeared regularly on state ballots. The constitutional initiative process was also a frequent vehicle for proposing and, in some cases, enacting measures regarding education and gambling. Although the following survey is not an exhaustive list—and other amendments will be noted in the following section—it might be useful in highlighting topics taken up on a regular basis.

1. Taxes

Voters approved six constitutional initiatives limiting taxes, while defeating a number of other tax-limit measures. On the approval list were a 2000 South Dakota amendment repealing the inheritance tax;³⁰ a 2010 California amendment extending a two-thirds legislative-vote requirement for tax increases to also apply to fee increases;³¹ and bans on real-estate transfer taxes in Arizona in 2008,³² Missouri³³ and Montana³⁴ in 2010, and Oregon in 2012.³⁵ As for defeated measures, voters rejected a number of general limits on taxing and/or spending inspired, in some fashion, by Colorado's 1992 Taxpayers Bill of Rights (TABOR)

³⁰ *South Dakota Inheritance Tax, Amendment C (2000)*, BALLOTPEDIA, http://ballotpedia.org/South_Dakota_Inheritance_Tax_Amendment_C_%282000%29 [<http://perma.cc/Y94F-MLUM>].

³¹ *California Proposition 26, Supermajority Vote to Pass New Taxes and Fees (2010)*, BALLOTPEDIA, http://ballotpedia.org/California_Proposition_26_Supermajority_Vote_to_Pass_New_Taxes_and_Fees_%282010%29 [<http://perma.cc/4FHM-TSDZ>].

³² *Arizona Protect Our Homes, Proposition 100 (2008)*, BALLOTPEDIA, http://ballotpedia.org/Arizona_Protect_Our_Homes_Proposition_100_%282008%29 [<http://perma.cc/7U72-R2A2>].

³³ *Missouri Real Estate Taxation, Amendment 3 (2010)*, BALLOTPEDIA, http://ballotpedia.org/Missouri_Real_Estate_Taxation_Amendment_3_%282010%29 [<http://perma.cc/U4PX-PTFJ>].

³⁴ *Montana New Property Tax Elimination, CI-105 (2010)*, BALLOTPEDIA, http://ballotpedia.org/Montana_New_Property_Tax_Elimination_CI-105_%282010%29 [<http://perma.cc/TF4W-GSXN>].

³⁵ *Oregon Real Estate Transfer Tax Amendment, Measure 79 (2012)*, BALLOTPEDIA, http://ballotpedia.org/Oregon_Real_Estate_Transfer_Tax_Amendment_Measure_79_%282012%29 [<http://perma.cc/U52E-JCYS>].

amendment,³⁶ whether in Colorado³⁷ and Oregon³⁸ in 2000, Nebraska³⁹ and Oregon⁴⁰ in 2006, or Michigan in 2012.⁴¹ Several narrowly tailored tax-limitation amendments were also rejected, including a 2002 Arkansas measure eliminating taxes on food and medicine,⁴² a 2010 Colorado measure reducing property taxes,⁴³ and a 2012 North Dakota measure eliminating property taxes.⁴⁴

Constitutional initiatives seeking to increase taxes were also prevalent, although the vast majority were rejected. A 2012 California measure increasing the sales tax and the income tax on upper-income earners was the most prominent tax-increase measure enacted through the constitutional initiative process.⁴⁵ Voters generally defeated other constitutional initiatives increasing taxes and dedicating the revenue to particular purposes. Voters defeated measures in California, increasing telephone taxes to fund emergency rooms (in 2004),⁴⁶ increasing income taxes on upper-income earners to fund pre-K schooling (in 2006),⁴⁷ imposing a parcel tax on land to fund school spending

³⁶ *Colorado Taxpayer Bill of Rights, Initiative 1 (1992)*, BALLOTPEdia, [http://ballotpedia.org/Colorado_Taxpayer_Bill_of_Rights_Initiative_1_\(1992\)](http://ballotpedia.org/Colorado_Taxpayer_Bill_of_Rights_Initiative_1_(1992)) [<http://perma.cc/TU7G-964H>].

³⁷ *Colorado Tax Cuts, Initiative 21*, BALLOTPEdia, http://ballotpedia.org/Colorado_Tax_Cuts_Initiative_21_%282000%29 [<http://perma.cc/P5BL-6HDP>].

³⁸ *Oregon Limits on State Appropriations from Personal Income Tax, Measure 8 (2000)*, BALLOTPEdia, http://ballotpedia.org/Oregon_Limits_on_State_Appropriations_from_Personal_Income_Tax_Measure_8_%282000%29 [<http://perma.cc/AM3B-5VCH>].

³⁹ *Nebraska State Spending Limit, Measure 423 (2006)*, BALLOTPEdia, http://ballotpedia.org/Nebraska_Spending_Limit_Amendment_Initiative_Measure_423_%282006%29 [<http://perma.cc/ZR7S-2VRK>].

⁴⁰ *Oregon Ballot Measure 48, State Government Spending Limits (2006)*, BALLOTPEdia, http://ballotpedia.org/Oregon_Ballot_Measure_48_State_Government_Spending_Limits_%282006%29 [<http://perma.cc/K67G-N2TZ>].

⁴¹ *Michigan Taxation Amendment, Proposal 5 (2012)*, BALLOTPEdia, http://ballotpedia.org/Michigan_Taxation_Amendment_Proposal_5_%282012%29 [<http://perma.cc/7WMR-VQ6K>].

⁴² *Arkansas Taxes on Food and Medicine, Amendment 3 (2002)*, BALLOTPEdia, http://ballotpedia.org/Arkansas_Elimination_of_Taxes_on_Food_and_Medicine_Amendment_3_%282002%29 [<http://perma.cc/PAG9-Y3WJ>].

⁴³ *Colorado Property Taxes, Initiative 60 (2010)*, BALLOTPEdia, http://ballotpedia.org/Colorado_Property_Taxes_Initiative_60_%282010%29 [<http://perma.cc/PT73-2QGU>].

⁴⁴ *North Dakota Property Tax Amendment, Measure 2 (June 2012)*, BALLOTPEdia, http://ballotpedia.org/North_Dakota_Property_Tax_Amendment_Measure_2_%28June_2012%29 [<http://perma.cc/8A3V-Q6ZY>].

⁴⁵ *California Proposition 30, Sales and Income Tax Increase (2012)*, BALLOTPEdia, http://ballotpedia.org/California_Proposition_30_Sales_and_Income_Tax_Increase_%282012%29 [<http://perma.cc/6DUQ-JSCR>].

⁴⁶ *California Proposition 67, Tax on Telephone Calls (2004)*, BALLOTPEdia, http://ballotpedia.org/California_Proposition_67_Tax_on_Telephone_Calls_%282004%29 [<http://perma.cc/RB8N-P9PP>].

⁴⁷ *California Proposition 82, Free Half-Day Public Preschool Program (June 2006)*, BALLOTPEdia, http://ballotpedia.org/California_Proposition_82_Free_Half-Day_Public_Preschool_Program_%28June_2006%29 [<http://perma.cc/7UJ3-6NZ5>].

(in 2006),⁴⁸ and levying an oil severance tax to fund alternative energy programs (in 2006).⁴⁹ Other defeated constitutional initiatives took similar approaches, as in Colorado, where voters in 2008 turned back a series of measures that would have increased the sales tax to fund programs for the developmentally disabled,⁵⁰ used revenue from an existing severance tax to create a highway trust fund,⁵¹ and eliminated TABOR-mandated refunds of tax revenue and dedicated the money to schools instead.⁵² Colorado voters in 2013 also rejected a measure increasing income taxes to fund schools.⁵³

2. Education

Education-related measures were also prevalent. Along with various tax measures dedicating tax revenue to schools, voters also encountered—and in a handful of instances approved—several other school-related measures, most of which sought to boost spending or expand programs. Most importantly, Colorado voters in 2000 approved Initiative 23, which required funding for schools to increase by at least the rate of inflation plus one percentage point for each of the next ten years, and by at least the rate of inflation for each year thereafter.⁵⁴ Oregon voters in 2000 approved a measure altering the education clause to require the state to provide adequate funding for school “quality goals.”⁵⁵ Florida voters in 2002 approved a pair of education amendments: one established pre-K schooling⁵⁶ and the other set

⁴⁸ *California Proposition 88, Statewide \$50 Parcel Tax (2006)*, BALLOTPEDIA, [http://ballotpedia.org/California_Proposition_88,_Statewide_\\$50_Parcel_Tax_%282006%29](http://ballotpedia.org/California_Proposition_88,_Statewide_$50_Parcel_Tax_%282006%29) [<http://perma.cc/B5UW-92TW>].

⁴⁹ *California Proposition 87, Alternative Energy Oil Tax (2006)*, BALLOTPEDIA, http://ballotpedia.org/California_Proposition_87,_Alternative_Energy_Oil_Tax_%282006%29 [<http://perma.cc/DU6W-NX6H>].

⁵⁰ *Colorado Sales Tax for Developmentally Disabled, Initiative 51 (2008)*, BALLOTPEDIA, http://ballotpedia.org/Colorado_Sales_Tax_for_Developmentally_Disabled,_Initiative_51_%282008%29 [<http://perma.cc/D3AB-YY3J>].

⁵¹ *Colorado Severance Tax Revenue for Highways, Initiative 52 (2008)*, BALLOTPEDIA, http://ballotpedia.org/Colorado_Severance_Tax_Revenue_for_Highways,_Initiative_52_%282008%29 [<http://perma.cc/6RUV-45AP>].

⁵² *Colorado Education Funding and TABOR Rebates, Initiative 59*, BALLOTPEDIA, http://ballotpedia.org/Colorado_Education_Funding_and_TABOR_Rebates,_Initiative_59_%282008%29 [<http://perma.cc/LN49-HX2W>].

⁵³ *Colorado Tax Increase for Education, Amendment 66 (2013)*, BALLOTPEDIA, http://ballotpedia.org/Colorado_Tax_Increase_for_Education,_Amendment_66_%282013%29 [<http://perma.cc/V9W7-PS7X>].

⁵⁴ *Colorado Funding for Public Schools, Initiative 23 (2000)*, BALLOTPEDIA, http://ballotpedia.org/Colorado_Funding_for_Public_Schools,_Initiative_23_%282000%29 [<http://perma.cc/F63J-XKRG>].

⁵⁵ *Oregon Public School Funding and Equalization, Measure 1 (2000)*, BALLOTPEDIA, http://ballotpedia.org/Oregon_Public_School_Funding_and_Equalization,_Measure_1_%282000%29 [<http://perma.cc/2P9P-8KVS>].

⁵⁶ *Florida Universal Pre-Kindergarten, Amendment 8 (2002)*, BALLOTPEDIA, http://ballotpedia.org/Florida_Universal_Pre-Kindergarten,_Amendment_8_%282002%29

maximum K–12 class sizes.⁵⁷ A Nevada amendment had a different aim. In response to a complex state supreme court decision, *Guinn v. Legislature of Nevada*,⁵⁸ Nevada voters gave final approval in 2006 to an “education first” amendment, requiring the legislature to pass an education appropriations bill before approving any other appropriations bills.⁵⁹

Voters also rejected a sizable number of education-related constitutional initiatives. Voters in Nevada in 2004⁶⁰ and in Oklahoma in 2010⁶¹ rejected measures requiring K–12 per-pupil spending to be at least as high as the average of other states, whether all states (as in the Nevada measure) or neighboring states (as in the Oklahoma proposal). Vouchers for students attending private schools were rejected in California⁶² and Michigan⁶³ in 2000, as were measures tying teacher pay to student learning outcomes in Oregon⁶⁴ and Missouri (in 2014).⁶⁵ Colorado voters rejected measures requiring use of English in K–12 schools (in 2002)⁶⁶ and requiring districts to spent at least 65% of their budget on classroom learning (in 2006).⁶⁷

[<http://perma.cc/5GN9-6X25>].

⁵⁷ *Florida Reduce Class Size, Amendment 9 (2002)*, BALLOTPEDIA, http://ballotpedia.org/Florida_Reduce_Class_Size_Amendment_9_%282002%29 [<http://perma.cc/PH96-YUXP>].

⁵⁸ *Guinn v. Legislature of Nev.*, 71 P.3d 1269 (Nev. 2003), *overruled by Nevadans for Nev. v. Beers*, 142 P.3d 339 (Nev. 2006).

⁵⁹ *Nevada Fund Education First, Question 1 (2006)*, BALLOTPEDIA, http://ballotpedia.org/Nevada_Fund_Education_First_Question_1_%282006%29 [<http://perma.cc/HL5D-2L8K>].

⁶⁰ *Nevada Per Pupil Expenditure, Question 2 (2004)*, BALLOTPEDIA, http://ballotpedia.org/Nevada_Per_Pupil_Expenditure_Question_2_%282004%29 [<http://perma.cc/D3Q3-UN59>].

⁶¹ *Oklahoma State Funds for Common Schools, State Question 744 (2010)*, BALLOTPEDIA, http://ballotpedia.org/Oklahoma_State_Funds_for_Common_Schools_State_Question_744_%282010%29 [<http://perma.cc/CEE5-ZB3Z>].

⁶² *California Proposition 38, School Vouchers (2000)*, BALLOTPEDIA, http://ballotpedia.org/California_Proposition_38_School_Vouchers_%282000%29 [<http://perma.cc/G66R-NPTC>].

⁶³ *Michigan Vouchers and Teacher Testing Amendment, Proposal 1 (2000)*, BALLOTPEDIA, http://ballotpedia.org/Michigan_Vouchers_and_Teacher_Testing_Amendment_Proposal_1_%282000%29 [<http://perma.cc/PKDS-NFF4>].

⁶⁴ *Oregon Teacher Pay Determined by Student Learning, Measure 95 (2000)*, BALLOTPEDIA, http://ballotpedia.org/Oregon_Teacher_Pay_Determined_by_Student_Learning_Measure_95_%282000%29 [<http://perma.cc/4KVP-UFMT>].

⁶⁵ *Missouri Teacher Performance Evaluation, Amendment 3 (2014)*, BALLOTPEDIA, http://ballotpedia.org/Missouri_Teacher_Performance_Evaluation_Amendment_3_%282014%29 [<http://perma.cc/QAH2-NQG6>].

⁶⁶ *Colorado English Language Education, Initiative 31 (2002)*, BALLOTPEDIA, http://ballotpedia.org/Colorado_English_Language_Education_Initiative_31_%282002%29 [<http://perma.cc/4RTA-BSEX>].

⁶⁷ *Colorado School District Spending Requirements, Initiative 39 (2006)*, BALLOTPEDIA, http://ballotpedia.org/Colorado_School_District_Spending_Requirements_Initiative_39_%282006%29 [<http://perma.cc/RQ98-V32G>].

3. Gambling

Gambling measures figured prominently on state ballots. On rare occasions, constitutional initiatives sought to limit gambling, as with a voter-approved measure in Michigan in 2004 requiring voter approval for most new forms of gambling⁶⁸ and a voter-rejected measure in South Dakota in 2000 disallowing video lottery games.⁶⁹

For the most part, constitutional initiatives sought to authorize or expand gambling. Voters approved several gambling-expansion amendments: North Dakota voters in 2002 allowed the state to join a multi-state lottery;⁷⁰ Florida voters in 2004 authorized residents of two counties to vote on approving slot machines at horse-racing tracks;⁷¹ Colorado voters in 2008 approved an amendment allowing extended hours at casinos and higher limits on wagers;⁷² and Arkansas voters in 2008 authorized a state lottery.⁷³ An amendment approved by Ohio voters in 2009 authorized construction of four casinos and designated their particular locations.⁷⁴

Voters rejected other gambling-expansion measures. They turned back measures to implement video lottery games (in Colorado in 2003),⁷⁵ allow floating gambling facilities (in Missouri in 2004),⁷⁶ expand allowable slot machines (in Ohio in 2006),⁷⁷ authorize a casino in the southwest part of the state

⁶⁸ *Michigan Gambling Outlets Amendment, Proposal 1 (2004)*, BALLOTPEDIA, http://ballotpedia.org/Michigan_Gambling_Outlets_Amendment_Proposal_1_%282004%29 [http://perma.cc/XMQ7-472V].

⁶⁹ *South Dakota Repeal Video Lottery, Amendment D (2000)*, BALLOTPEDIA, http://ballotpedia.org/South_Dakota_Repeal_Video_Lottery_Amendment_D_%282000%29 [http://perma.cc/92MZ-CBZ5].

⁷⁰ *North Dakota Multi-State Lottery, Initiated Constitutional Measure 2 (2002)*, BALLOTPEDIA, http://ballotpedia.org/North_Dakota_Multi-State_Lottery_Initiated_Constitutional_Measure_2_%282002%29 [http://perma.cc/7JJP-EE7H].

⁷¹ *Florida Slot Machines, Amendment 4 (2004)*, BALLOTPEDIA, http://ballotpedia.org/Florida_Slot_Machines_Amendment_4_%282004%29 [http://perma.cc/Z2HX-BR45].

⁷² *Colorado Limited Gaming in Central City, Black Hawk and Cripple Creek, Initiative 50 (2008)*, BALLOTPEDIA, http://ballotpedia.org/Colorado_Limited_Gaming_in_Central_City_Black_Hawk_and_Cripple_Creek_Initiative_50_%282008%29 [http://perma.cc/XN5K-26TH].

⁷³ *Arkansas State Lottery, Proposed Constitutional Amendment 3 (2008)*, BALLOTPEDIA, http://ballotpedia.org/Arkansas_State_Lottery_Proposed_Constitutional_Amendment_3_%282008%29 [http://perma.cc/62Z2-LE8L].

⁷⁴ *Ohio Casino Approval and Tax Distribution, Amendment 3 (2009)*, BALLOTPEDIA, http://ballotpedia.org/Ohio_Casino_Initiative_Issue_3_%282009%29 [http://perma.cc/E274-XB2E].

⁷⁵ *Colorado Video Lottery and Tourism Promotion, Initiative 33 (2003)*, BALLOTPEDIA, http://ballotpedia.org/Colorado_Video_Lottery_and_Tourism_Promotion_Initiative_33_%282003%29 [http://perma.cc/C8F7-GFA7].

⁷⁶ *Missouri Floating Gambling Facilities, Amendment 1 (August 2004)*, BALLOTPEDIA, http://ballotpedia.org/Missouri_Floating_Gambling_Facilities_Amendment_1_%28August_2004%29 [http://perma.cc/Q36H-6KBV].

⁷⁷ *Ohio Casino Gambling, Amendment 3 (2006)*, BALLOTPEDIA, <http://ballotpedia.org/>

(in Ohio in 2008),⁷⁸ authorize private casinos (in Oregon in 2012),⁷⁹ and expand gambling at horse-tracks (in Colorado in 2014).⁸⁰ California voters in 2004 rejected a pair of measures that would have facilitated negotiation of tribal gaming compacts.⁸¹

4. Tobacco

Constitutional initiatives were, on various occasions, a vehicle for increasing cigarette taxes or regulating smoking, although most of these measures were defeated. Voters in Colorado approved a 2004 amendment increasing the cigarette tax,⁸² but cigarette-tax hikes were defeated in Missouri⁸³ and California⁸⁴ in 2006. Meanwhile, voters in Florida approved a 2002 amendment banning “smoking in enclosed indoor workplaces,”⁸⁵ but Ohio voters in 2006 turned back a tobacco-company backed amendment that would have overturned local public-smoking bans in favor of a statewide public-smoking policy.⁸⁶ Additionally, voters in Florida in 2006 approved an amendment requiring the state to reserve funds received as part of a legal settlement between the state and tobacco companies solely for smoking-prevention programs,⁸⁷ but Michigan voters in

Ohio_Casino_Gambling_Amendment_3 (2006) [<http://perma.cc/K9DC-V99Y>].

⁷⁸ *Ohio Casino Approval and Tax Distribution, Amendment 6 (2008)*, BALLOTPEDIA, [http://ballotpedia.org/Ohio_Casino_Approval_and_Tax_Distribution_Amendment_6_\(2008\)](http://ballotpedia.org/Ohio_Casino_Approval_and_Tax_Distribution_Amendment_6_(2008)) [<http://perma.cc/H2FY-H6RH>].

⁷⁹ *Oregon Privately-Owned Casinos Amendment, Measure 82 (2012)*, BALLOTPEDIA, http://ballotpedia.org/Oregon_Privately-Owned_Casinos_Amendment_Measure_82_%282012%29 [<http://perma.cc/LKU5-W598>].

⁸⁰ *Colorado Horse Racetrack Limited Gaming Proceeds for K-12 Education, Amendment 68 (2014)*, BALLOTPEDIA, http://ballotpedia.org/Colorado_Horse_Racetrack_Limited_Gaming_Proceeds_for_K-12_Education_Amendment_68_%282014%29 [<http://perma.cc/U6PK-HB8C>].

⁸¹ *California Proposition 68, Tribal Gaming Compact Renegotiation (2004)*, BALLOTPEDIA, http://ballotpedia.org/California_Proposition_68_Tribal_Gaming_Compact_Renegotiation_%282004%29 [<http://perma.cc/FB5T-TY9C>]; *California Proposition 70, Tribal Gaming Compacts Amendment (2004)*, BALLOTPEDIA, http://ballotpedia.org/California_Proposition_70_Tribal_Gaming_Compacts_Amendment_%282004%29 [<http://perma.cc/9FLC-SRVK>].

⁸² *Colorado Tobacco Tax Increase for Health-Related Purposes, Initiative 35 (2004)*, BALLOTPEDIA, http://ballotpedia.org/Colorado_Tobacco_Tax_Increase_for_Health-Related_Purposes_Initiative_35_%282004%29 [<http://perma.cc/2QNN-3S48>].

⁸³ *Missouri Healthy Future Trust Fund, Amendment 3 (2006)*, BALLOTPEDIA, http://ballotpedia.org/Missouri_Healthy_Future_Trust_Fund_Amendment_3_%282006%29 [<http://perma.cc/E4F3-9DAL>].

⁸⁴ *California Proposition 86, Cigarette Taxes (2006)*, BALLOTPEDIA, http://ballotpedia.org/California_Proposition_86_Cigarette_Taxes_%282006%29 [<http://perma.cc/BF8U-M4TN>].

⁸⁵ *Florida Prohibit Workplace Smoking, Amendment 6 (2002)*, BALLOTPEDIA, http://ballotpedia.org/Florida_Prohibit_Workplace_Smoking_Amendment_6_%282002%29 [<http://perma.cc/R7WP-24NC>].

⁸⁶ *Ohio Partial Smoking Ban, Amendment 4 (2006)*, BALLOTPEDIA, http://ballotpedia.org/Ohio_Measure_4_Partial_Smoking_Ban_%282006%29 [<http://perma.cc/353N-4N6R>].

⁸⁷ *Florida Amendment 4, Use of Tobacco Settlement Funds (2006)*, BALLOTPEDIA, http://ballotpedia.org/Florida_Amendment_4_Use_of_Tobacco_Settlement_Funds_%282006%29 [<http://perma.cc/ECK5-P7SR>].

2002 rejected an amendment specifying the purposes for which such funds could be used.⁸⁸

5. Labor Unions

Constitutional initiatives restricting or expanding the rights of labor unions appeared with some regularity on state ballots. However, only one of these amendments was approved: a 2008 Colorado amendment, later invalidated by the state supreme court,⁸⁹ which would have had the effect of limiting labor unions' ability to contribute to political campaigns.⁹⁰ Voters rejected all other constitutional initiatives limiting unions. This included two other measures on the 2008 Colorado ballot, one that would have banned union-shop arrangements⁹¹ and another that would have barred payroll deductions for union dues,⁹² as well as a 2000 Oregon measure that would have barred payroll deductions for political purposes without each worker's express consent.⁹³ Constitutional initiatives seeking to expand collective-bargaining rights fared no better, as voters defeated amendments of this sort in Michigan⁹⁴ and Missouri⁹⁵ in 2002 and then again in Michigan in 2012.⁹⁶

6. Abortion

Constitutional initiatives with implications for abortion appeared regularly on certain state ballots but were never

⁸⁸ *Michigan Relocation of Tobacco Revenue Amendment, Proposal 4 (2002)*, BALLOTPEDIA, http://ballotpedia.org/Michigan_Relocation_of_Tobacco_Revenue_Amendment_Proposal_4_%282002%29 [<http://perma.cc/SB9M-5FD9>].

⁸⁹ *Dallman v. Ritter*, 225 P.3d 610 (Colo. 2010) (invalidating state constitutional amendment enacted by voter approval of Amendment 54 for violating the Federal Constitution).

⁹⁰ *Colorado Campaign Contributions from Government Contractors, Initiative 54 (2008)*, BALLOTPEDIA, http://ballotpedia.org/Colorado_Campaign_Contributions_from_Government_Contractors_Initiative_54_%282008%29 [<http://perma.cc/4HET-BYQW>].

⁹¹ *Colorado Mandatory Labor Union Membership Prohibition, Initiative 47 (2008)*, BALLOTPEDIA, http://ballotpedia.org/Colorado_Mandatory_Labor_Union_Membership_Prohibition_Initiative_47_%282008%29 [<http://perma.cc/E4ZX-9M6G>].

⁹² *Colorado Limitation on Public Payroll Deductions, Initiative 49 (2008)*, BALLOTPEDIA, http://ballotpedia.org/Colorado_Limitation_on_Public_Payroll_Deductions_Initiative_49_%282008%29 [<http://perma.cc/TY2T-WE46>].

⁹³ *Oregon Prohibits Payroll Deductions for Political Purposes, Measure 92 (2000)*, BALLOTPEDIA, http://ballotpedia.org/Oregon_Prohibits_Payroll_Deductions_For_Political_Purposes_Measure_92_%282000%29 [<http://perma.cc/F5BY-LC83>].

⁹⁴ *Michigan Collective Bargaining Amendment, Proposal 3 (2002)*, BALLOTPEDIA, http://ballotpedia.org/Michigan_Collective_Bargaining_Amendment_Proposal_3_%282002%29 [<http://perma.cc/K6A4-2PMW>].

⁹⁵ *Missouri Collective Bargaining, Amendment 2 (2002)*, BALLOTPEDIA, http://ballotpedia.org/Missouri_Collective_Bargaining_Amendment_2_%282002%29 [<http://perma.cc/2DMR-738G>].

⁹⁶ *Michigan "Protect Our Jobs" Amendment, Proposal 2 (2012)*, BALLOTPEDIA, http://ballotpedia.org/Michigan_%22Protect_Our_Jobs%22_Amendment_Proposal_2_%282012%29 [<http://perma.cc/P2GK-Y9W3>].

approved by voters during this period. California voters rejected parental notification measures in 2005,⁹⁷ 2006,⁹⁸ and 2008.⁹⁹ Additionally, voters in Colorado in 2008¹⁰⁰ and 2010¹⁰¹ and in Mississippi in 2011¹⁰² defeated personhood amendments that generally defined life as beginning at conception and, in a way, intended to challenge U.S. Supreme Court precedent limiting state restrictions on abortion.¹⁰³ Voters in Colorado in 2014 defeated another personhood amendment that was more narrowly tailored, in that it sought to define fetuses as persons for purposes of the state criminal code and wrongful death act.¹⁰⁴

II. CONSEQUENCES OF STATE CONSTITUTIONAL INITIATIVES FOR GOVERNANCE

The benefit of compiling a record of citizen-initiated amendments enacted between 2000 and 2014 is to be able to test various claims about the consequences of constitutional initiative processes. On one hand, they are said to facilitate passage of institutional reforms at odds with the interests of public officials¹⁰⁵ and secure passage of policies blocked due to legislative unresponsiveness or interest-group opposition.¹⁰⁶ At the same time, they are said to limit policy flexibility¹⁰⁷ and

⁹⁷ *California Proposition 73, Parental Notification for Minor's Abortion (2005)*, BALLOTPEDIA, http://ballotpedia.org/California_Proposition_73_Parental_Notification_for_Minor%27s_Abortion_%282005%29 [http://perma.cc/VT59-EPEC].

⁹⁸ *California Proposition 85, Parental Notification for Minor's Abortion (2006)*, BALLOTPEDIA, http://ballotpedia.org/California_Proposition_85_Parental_Notification_for_Minor%27s_Abortion_%282006%29 [http://perma.cc/2NVE-AT5G].

⁹⁹ *California Proposition 4, Parental Notification for Minor's Abortion (2008)*, BALLOTPEDIA, http://ballotpedia.org/California_Proposition_4_Parental_Notification_for_Minor%27s_Abortion_%282008%29 [http://perma.cc/W2BA-F2KT].

¹⁰⁰ *Colorado Definition of Person, Initiative 48 (2008)*, BALLOTPEDIA, http://ballotpedia.org/Colorado_Definition_of_Person_Initiative_48_%282008%29 [http://perma.cc/GC8G-QKSF].

¹⁰¹ *Colorado Fetal Personhood, Initiative 62 (2010)*, BALLOTPEDIA, [http://ballotpedia.org/Colorado_Fetal_Personhood_Initiative_62_\(2010\)](http://ballotpedia.org/Colorado_Fetal_Personhood_Initiative_62_(2010)) [http://perma.cc/8EKS-4E99].

¹⁰² *Mississippi Life Begins at the Moment of Fertilization Amendment, Initiative 26 (2011)*, BALLOTPEDIA, http://ballotpedia.org/Mississippi_Life_Begins_at_the_Moment_of_Fertilization_Amendment_Initiative_26_%282011%29 [http://perma.cc/C3CX-8WMZ].

¹⁰³ See Dinan, *State Constitutional Developments in 2011*, *supra* note 21, at 5 ("Personhood amendments have been proposed in several states in recent years, with supporters viewing them as a means of creating a conflict between state and federal law and thereby helping to generate a legal challenge to the U.S. Supreme Court's abortion jurisprudence, in the hopes that a majority of justices might be open to modifying prior precedents.").

¹⁰⁴ *Colorado Definition of "Personhood" Initiative, Amendment 67 (2014)*, BALLOTPEDIA, http://ballotpedia.org/Colorado_Definition_of_%22Personhood%22_Initiative_Amendment_67_%282014%29 [http://perma.cc/KXP7-E89T].

¹⁰⁵ See Cooper, *supra* note 15, at 233–34.

¹⁰⁶ See *id.* at 234–36.

¹⁰⁷ Elisabeth R. Gerber, *Reforming the California Initiative Process: A Proposal to Increase Flexibility and Legislative Accountability*, in CONSTITUTIONAL REFORM IN CALIFORNIA: MAKING STATE GOVERNMENT MORE EFFECTIVE AND RESPONSIVE 291, 298–99

restrict minority rights.¹⁰⁸ However, few empirical analyses have assessed these claims in a systematic fashion across the full set of states.¹⁰⁹

Janice C. May's 1988 study of constitutional initiative use through the mid-1980s is the most comprehensive analysis to date. Although ostensibly focused primarily on the consequences for the protection of rights, May's study of the 628 proposed and 221 adopted constitutional initiatives from 1906–1986 was actually much broader and took note of some effects on government institutions and processes.¹¹⁰

My purpose is to conduct an empirical analysis of the kind undertaken by May. As she wrote, referring in particular to the claim—which she concluded was only partly supported—that the constitutional initiative threatens rights:

After eighty years of experience with the constitutional initiative, a record exists on which to make an informed judgment about such a serious charge. The record consists of initiative proposals and adoptions from the time of the first initiative proposal in 1906 to the present. Although questions may always be raised about the data, the compilation of statewide initiatives provides essential information about the number and general categories, as well as the specific content of propositions.¹¹¹

My aim is to follow May's approach by making use of data from twenty-first century constitutional-initiative adoptions to assess the degree of support for the leading claims about consequences for governance.

(Bruce E. Cain & Roger G. Noll eds., 1995).

¹⁰⁸ See James M. Fischer, *Ballot Propositions: The Challenge of Direct Democracy to State Constitutional Jurisprudence*, 11 HASTINGS CONST. L.Q. 43, 69 (1983).

¹⁰⁹ There are, to be sure, additional claims that I am not able to address based on the evidentiary record I have compiled. For instance, much attention has been paid in recent years to the question of whether ballot measures boost voter turnout and, therefore, have the capacity to affect the results of other elections on the ballot. A full assessment would require examining voter turnout records and in a way that goes beyond the focus of this study. In general, scholars have concluded that certain types of initiated measures can boost turnout, especially in midterm elections and occasionally in presidential elections. See, e.g., DANIEL R. BIGGERS, *MORALITY AT THE BALLOT: DIRECT DEMOCRACY AND POLITICAL ENGAGEMENT IN THE UNITED STATES* 88–89 (2014). Perhaps most important, in a claim subjected to scrutiny elsewhere, critics express concern that the constitutional initiative process enables well-financed groups to prevail over the public interest. A full assessment would require examining the campaign-finance records for each of the citizen-initiated amendments from 2000–2014 and, therefore, would go beyond an analysis of the purpose and effects of these amendments, which is the focus of this study. For two leading studies, see generally GERBER, *supra* note 14, and MATSUSAKA, *supra* note 14. The dominant view in the literature is that well-financed groups can succeed in blocking passage of measures backed by a popular majority but are rarely able to secure passage of measures in their favor. GERBER, *supra* note 14, at 138–39.

¹¹⁰ May, *supra* note 15, at 165.

¹¹¹ *Id.* at 164, 167.

A. Bypassing Self-Interested Legislators

Constitutional initiative processes have been touted as beneficial, in part, because they facilitate adoption of governmental reforms targeting legislators' interests or prerogatives. As Delos Wilcox, a Progressive-era champion of direct democracy, argued in a 1912 book, *Government by All the People*:

By what right of reason can we expect a partisan legislature to consent to the establishment of a non-partisan legislative ballot? . . . How can we appeal to a state legislature to divest itself of the powers of interference in municipal affairs? How can legislators and aldermen be expected to forbid themselves to use railroad passes?¹¹²

Prior studies of twentieth century constitutional initiatives have found evidence that the process was indeed a vehicle for adopting political reforms of this kind.¹¹³ Meanwhile, in her study of the twentieth century record, May found evidence that the process was a vehicle for adopting reforms of this kind, including "Nebraska's unicameral legislature, Missouri's merit selection of judges, Illinois' reduction in the size of the lower house of the state legislature and the substitution of single-member districts for the unique cumulative voting system, Florida's 'sunshine amendment' on ethics and financial disclosure, Ohio's county home rule amendment, and countless others."¹¹⁴

The twenty-first century record demonstrates that the constitutional initiative process continues to perform this function on a regular basis. Several structural reforms adopted via the constitutional initiative process would likely not have been enacted in the absence of such a process. The particular reforms adopted in the twenty-first century differ in some respects from reforms enacted in earlier decades. But the common theme is the reliance on constitutional initiative processes to enact reforms opposed by legislators who view them as a threat to their tenure in office, prerogatives, or powers.

Legislative term limits present the clearest case of a measure adopted on a regular basis through the constitutional initiative process and rarely enacted through other mechanisms.¹¹⁵ Of the fifteen states that currently limit the number of terms state legislators can serve, all but two did so

¹¹² DELOS F. WILCOX, *GOVERNMENT BY ALL THE PEOPLE: THE INITIATIVE, THE REFERENDUM AND THE RECALL AS INSTRUMENTS OF DEMOCRACY* 118 (Da Capo Press 1972) (1912).

¹¹³ See, e.g., SCHMIDT, *supra* note 14, at 15.

¹¹⁴ May, *supra* note 15, at 179.

¹¹⁵ MILLER, *supra* note 14, at 162.

through the constitutional initiative process.¹¹⁶ The exceptions are Maine, where terms limits were adopted via the statutory initiative process in 1993,¹¹⁷ and Louisiana, which is the truly exceptional case because term limits were adopted via a legislature-referred amendment in 1995.¹¹⁸ In all other states where legislative terms are currently limited, citizen-initiated amendments were the means of accomplishing this goal and overcoming legislative resistance, beginning in 1990 with passage of term-limits amendments in California, Colorado, and Oklahoma, and concluding in 2000 with Nebraska,¹¹⁹ the one occasion when a measure enacting legislative term limits was adopted during the 2000–2014 period covered by this study.¹²⁰

The constitutional initiative process also played a key role during the twenty-first century in adopting limits on drawing congressional and state legislative districts. To be sure, on several occasions in prior years, legislatures were willing to cede responsibility for line-drawing by referring for voter approval amendments establishing redistricting commissions.¹²¹ For the most part, however, legislators have been reluctant to part with this responsibility, such that during the twenty-first century, the principal redistricting reform measures have been adopted via the constitutional initiative process, generally in the face of legislative resistance.¹²² A 2000 Arizona constitutional initiative established an independent commission to re-draw congressional and state legislative districts.¹²³ California voters resorted to the constitutional initiative process for this purpose on two

¹¹⁶ *Id.* at 163.

¹¹⁷ *Maine State Official Term Limits, Question 1 (1993)*, BALLOTPEDIA, http://ballotpedia.org/Maine_State_Official_Term_Limits,_Question_1_%281993%29 [http://perma.cc/VHS7-BZWR].

¹¹⁸ MILLER, *supra* note 14, at 162 n.28.

¹¹⁹ *Id.* at 163.

¹²⁰ It should be noted that on one occasion during this 2000–2014 period, in California in 2012, the constitutional initiative was a vehicle for *relaxing* legislative term limits. *California Proposition 28, Change in Term Limits (June 2012)*, BALLOTPEDIA, http://ballotpedia.org/California_Proposition_28,_Change_in_Term_Limits_%28June_2012%29 [http://perma.cc/KAN8-3639].

¹²¹ In the twentieth century, Washington, Montana, and Idaho adopted independent redistricting commissions via legislature-referred constitutional amendments. Dinan, *supra* note 8, at 187.

¹²² Nicholas Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail*, 23 J.L. & POL. 331, 332, 388–89 (2007). One exception is a 2014 legislature-referred amendment in New York establishing a commission, but it fell short of an independent commission. *New York Redistricting Commission Amendment, Proposal 1 (2014)*, BALLOTPEDIA, http://ballotpedia.org/New_York_Redistricting_Commission_Amendment,_Proposal_1_%282014%29 [http://perma.cc/4H4U-8Q3N].

¹²³ *Arizona Creation of a Redistricting Commission, Proposition 106 (2000)*, BALLOTPEDIA, http://ballotpedia.org/Arizona_Creation_of_a_Redistricting_Commission,_Proposition_106_%282000%29 [http://perma.cc/8L7Y-826D].

occasions—first in 2008 to establish a commission to draw state legislative districts¹²⁴ and then in 2010 to add congressional districting to the commission's charge.¹²⁵ Florida voters took a different approach. A pair of citizen-initiated amendments, approved in 2010, permitted legislators to retain control over redistricting but restricted their ability to consider partisanship or incumbency in drawing legislative¹²⁶ and congressional¹²⁷ districts.

On two occasions in the twenty-first century, voters approved citizen-initiated amendments imposing campaign finance or lobbying restrictions in ways that threatened legislators' tenure or prerogatives. The connection between passage of campaign finance and ethics reforms and the availability of constitutional initiative processes is not quite as strong as in the case of term-limits and redistricting reform. Legislatures have been willing to limit the campaign donations or gifts they can receive in a way that they have been invariably opposed to do when it comes to limiting their own terms and generally reluctant to do when it comes to ceding control of drawing the districts in which they run for office.¹²⁸ Nevertheless, the constitutional initiative process has been essential for enacting campaign finance restrictions in several instances in Colorado—including passage of campaign finance and disclosure rules in 2002,¹²⁹ and passage of a strict ban on gifts to elected officials and creation of an ethics commission in 2006.¹³⁰ The 2002 Colorado measure is of particular interest. Colorado voters initially enacted a package of campaign-finance restrictions via the statutory initiative process in 1996, only to watch as

¹²⁴ *California Proposition 11, Creation of the California Citizens Redistricting Commission (2008)*, BALLOTPEdia, http://ballotpedia.org/California_Proposition_11,_Creation_of_the_California_Citizens_Redistricting_Commission_%282008%29 [http://perma.cc/JJ4S-YLNC].

¹²⁵ *California Proposition 20, Congressional Redistricting (2010)*, BALLOTPEdia, http://ballotpedia.org/California_Proposition_20,_Congressional_Redistricting_%282010%29 [http://perma.cc/EV2T-HTYQ].

¹²⁶ *Florida Legislative District Boundaries, Amendment 5 (2010)*, BALLOTPEdia, http://ballotpedia.org/Florida_Legislative_District_Boundaries,_Amendment_5_%282010%29 [http://perma.cc/XE7D-3CCL].

¹²⁷ *Florida Congressional District Boundaries, Amendment 6 (2010)*, BALLOTPEdia, http://ballotpedia.org/Florida_Congressional_District_Boundaries,_Amendment_6_%282010%29 [http://perma.cc/82BA-RLD2].

¹²⁸ *Legislator Gift Restrictions Overview*, NAT'L CONF. ST. LEGISLATURES (Dec. 19, 2014), <http://www.ncsl.org/research/ethics/50-state-table-gift-laws.aspx> [http://perma.cc/37LP-YGQC].

¹²⁹ *Colorado Campaign Finance, Initiative 27 (2002)*, BALLOTPEdia, http://ballotpedia.org/Colorado_Campaign_Finance,_Initiative_27_%282002%29 [http://perma.cc/D2N J-GQT2].

¹³⁰ *Colorado Standards of Conduct in Government, Initiative 41 (2006)*, BALLOTPEdia, http://ballotpedia.org/Colorado_Standards_of_Conduct_in_Government,_Initiative_41_%282006%29 [http://perma.cc/2MFS-VCJG].

legislators “gutted” the statutory campaign finance reforms in 2000.”¹³¹ At that point, voters turned to the constitutional initiative process and reenacted a number of these reforms on a constitutional basis, with an eye toward preventing further legislative interference.¹³²

In each of the preceding cases, voters resorted to constitutional initiatives to overcome resistance rooted in legislators’ concern about their careers or the perks of office, but the process is also used to overcome legislative resistance to ceding institutional power. On various occasions in prior years, constitutional initiatives have been a vehicle for reducing legislative control over local government powers and policies, at times by adopting home-rule provisions.¹³³ The one twenty-first century occasion when voters approved a constitutional initiative of this sort occurred with passage of a 2010 California amendment preventing the state from delaying distribution of tax revenue designated for distribution to local governments.¹³⁴

To conclude that the constitutional initiative process has played a notable role in securing passage of governmental reforms in the face of legislative resistance, as is evident from a review of term-limits, redistricting, campaign-finance, and home-rule measures, is not to pass judgment on the wisdom of these measures. Reasonable persons can disagree about whether and to what extent they are effective in accomplishing their intended goals. The point is that the record of twenty-first century citizen-initiated amendments provides strong support for claims that constitutional initiative processes facilitate passage of structural changes that would otherwise fail to pass.

B. Overcoming Unresponsive Legislatures

Another claim about the effects of constitutional initiative processes is that they secure passage of policies blocked due to

¹³¹ Anne G. Campbell, *Direct Democracy and Constitutional Reform: Campaign Finance Initiatives in Colorado*, in 1 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE POLITICS OF STATE CONSTITUTIONAL REFORM 175, 180, 182 (G. Alan Tarr & Robert F. Williams eds., 2006).

¹³² Dinan, *supra* note 8, at 191–92.

¹³³ SCHMIDT, *supra* note 14, at 15 (noting the use of initiatives to adopt “home rule for municipalities” in Colorado and Oregon). On passage of a 1906 citizen-initiated amendment in Oregon, see *Oregon Power to Amend City and Town Charters, Measure 6 (June 1906)*, BALLOTPEDIA, http://ballotpedia.org/Oregon_Power_to_Amend_City_and_Town_Charters_Measure_6_%28June_1906%29 [<http://perma.cc/G4KW-4X9K>]. On passage of a 1912 citizen-initiated amendment in Colorado, see *Colorado Home Rule for Cities and Towns, Measure 8 (1912)*, BALLOTPEDIA, http://ballotpedia.org/Colorado_Home_Rule_for_Cities_and_Towns_Measure_8_%281912%29 [<http://perma.cc/LM76-P5WF>].

¹³⁴ *California Proposition 22, Ban on State Borrowing from Local Governments (2010)*, BALLOTPEDIA, http://ballotpedia.org/California_Proposition_22_Ban_on_State_Borrowing_from_Local_Governments_%282010%29 [<http://perma.cc/2Q5K-BTJA>].

legislative unresponsiveness, on account of a disconnect between legislators' and citizens' preferences or interest-group influence in the legislative process. This claim figured prominently in Progressive-era debates surrounding adoption of the constitutional initiative process, as when Lawton Hemans, delegate to the Michigan Constitutional Convention of 1907–1908, argued that legislatures were sometimes unduly influenced by powerful groups that prevented passage of policies with broad popular support:

When the contest comes between the great commercial and industrial interests, and what might be termed the popular interest, then too often the great commercial interests by reason of their great strength, as compared with the numerical strength of the constituency, exercise a preponderating influence upon the minds of the legislature.¹³⁵

The intent of providing for the constitutional initiative process was in part to overcome these obstacles and interests.

The twenty-first century record provides ample support for claims that the constitutional initiative process can at times secure passage of policies that would otherwise have been blocked or delayed. However, it is important to be clear about what the evidence demonstrates. In most cases where voters resorted to the constitutional initiative process to secure passage of policy reforms and prevent future legislative interference with them, legislatures in other states were enacting these same policies. Therefore, for the most part, the evidence does not point to universal failings of the legislative process in terms of an inability to respond to voter preferences, but rather supports a more modest conclusion. In some states and in some circumstances, constitutional initiatives played a role in securing speedy enactment of policies.

The constitutional initiative process is occasionally a vehicle for enacting policies opposed by influential groups. On two occasions in the twenty-first century, voters approved citizen-initiated amendments opposed by tobacco companies. In Florida, which provides for the constitutional initiative process but does not allow statutory initiatives, voters resorted to the constitutional initiative process in 2002 to enact a ban on workplace smoking.¹³⁶ In addition, in Colorado, which provides for the constitutional and statutory initiative process and sets similar requirements for qualifying measures for the ballot under

¹³⁵ See JOSEPH H. BREWER, CHAS H. BENDER, & CHAS H. MCGURRIN, PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MICHIGAN 592 (1908).

¹³⁶ *Florida Prohibit Workplace Smoking, Amendment 6 (2002)*, *supra* note 85.

both processes, voters approved a 2004 constitutional initiative increasing the cigarette tax by sixty-four cents a pack.¹³⁷

On other occasions, constitutional initiative processes have been a vehicle to overcome doctors' groups seen as particularly influential in the legislative process. Florida voters in 2004 approved two constitutional initiatives imposing restrictions on doctors. One measure denies medical licenses to doctors with three or more malpractice judgments.¹³⁸ Another grants patients access to information about doctors' adverse medical incidents.¹³⁹

In weighing the importance of the constitutional initiative process for overcoming group influence in the legislative process, however, it is important to note that legislatures in other states were generally enacting the same policies. This includes legislation restricting smoking in the workplace and other public places,¹⁴⁰ as well as increasing cigarette taxes by significant amounts and on a regular basis.¹⁴¹ The one policy with no counterpart in statutes or legislature-referred amendments in other states—and the chief piece of evidence in favor of the group-bypassing function of constitutional initiatives—is the passage of Florida's three-strike medical-malpractice amendment, which is stricter than any physician-related measure enacted by a state legislature.¹⁴²

The twenty-first century record provides somewhat more support for claims that the constitutional initiative process can overcome legislative unresponsiveness to citizen preferences. On several matters from 2000 to 2014—namely marijuana legalization, stem-cell research, minimum-wage hikes, and eminent domain limits—voters in multiple states resorted to constitutional initiatives to secure speedy passage of a policy change. In each instance, it should be stressed, legislative statutes and legislature-referred constitutional amendments

¹³⁷ *Colorado Tobacco Tax Increase for Health-Related Purposes, Initiative 35 (2004)*, *supra* note 82.

¹³⁸ *Florida Medical Malpractice Protection, Amendment 8 (2004)*, BALLOTPEdia, http://ballotpedia.org/Florida_Medical_Malpractice_Protection,_Amendment_8_%282004%29 [<http://perma.cc/U9U3-8QG8>].

¹³⁹ *Florida Patient's Right to Know, Amendment 7 (2004)*, BALLOTPEdia, http://ballotpedia.org/Florida_Patient%27s_Right_to_Know,_Amendment_7_%282004%29 [<http://perma.cc/98P6-PTKV>].

¹⁴⁰ *State Smoke-Free Laws and Health*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/health/enacted-indoor-smoke-free-laws.aspx> [<http://perma.cc/RLZ2-NNF7>] (last updated Feb. 2013).

¹⁴¹ *State Cigarette Excise Taxes: 2011 and 2012*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/health/2011-state-cigarette-excise-taxes.aspx> [<http://perma.cc/BB7Z-YM5D>] (last updated Aug. 1, 2013).

¹⁴² See *Florida Passes Three-Strikes Malpractice Law*, N.Y. TIMES (Nov. 26, 2004), http://www.nytimes.com/2004/11/26/us/florida-passes-threestrikes-malpractice-law.html?_r=0 [<http://perma.cc/U4KB-NATH>].

were the vehicle for passing the same policy in other states. Nevertheless, legislatures were unresponsive to popular preferences on multiple occasions and in a way that was addressed through the constitutional initiative process.

Marijuana legalization is the leading case. By 2015, twenty-three states had legalized medical marijuana and four had legalized recreational marijuana.¹⁴³ Eleven of the twenty-three medical-marijuana legalization measures were enacted through the initiative process, generally through statutory initiatives but on two occasions—in Colorado and Nevada in 2000—through constitutional initiatives.¹⁴⁴ Meanwhile, all four states that legalized recreational marijuana have done so through the initiative process, and in one case—Colorado in 2012—through a constitutional initiative.¹⁴⁵ In short, legislatures have regularly been unresponsive to popular support for marijuana legalization measures, necessitating a resort to initiative processes to accomplish this goal. For the most part, the statutory initiative process was the method of choice. On three occasions, however, voters relied on constitutional initiatives for medical and recreational legalization measures.

A disjunction between legislators' and citizens' preferences was also evident regarding support for embryonic stem-cell research and addressed at times through passage of constitutional initiatives.¹⁴⁶ In some states, to be sure, legislatures enacted statutes authorizing and funding research in this area.¹⁴⁷ But some legislatures were unwilling to fund or

¹⁴³ 23 *Legal Medical Marijuana States and DC*, PROCON.ORG, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> [<http://perma.cc/3YGU-7AQD>] (last updated July 7, 2015, 4:32 PM) (listing the twenty-three states that have passed medical marijuana policy); *State Marijuana Laws Map*, GOVERNING, <http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html> [<http://perma.cc/N6BE-6QLU>] (last updated June 19, 2015).

¹⁴⁴ Dinan, *supra* note 8, at 189 n.205 (noting the eleven states approving medical marijuana measures through the initiative process); 23 *Legal Medical Marijuana States and DC*, *supra* note 143 (listing the twenty-three states that have passed medical marijuana policy); *State Marijuana Laws Map*, *supra* note 143.

¹⁴⁵ *Alaska Marijuana Legalization, Ballot Measure 2 (2014)*, BALLOTPEDIA, [http://ballotpedia.org/Alaska_Marijuana_Legalization_Ballot_Measure_2_\(2014\)](http://ballotpedia.org/Alaska_Marijuana_Legalization_Ballot_Measure_2_(2014)) [<http://perma.cc/AN4R-B5LD>]; *Colorado Marijuana Legalization Initiative, Amendment 64 (2012)*, BALLOTPEDIA, [http://ballotpedia.org/Colorado_Marijuana_Legalization_Initiative_Amendment_64_\(2012\)](http://ballotpedia.org/Colorado_Marijuana_Legalization_Initiative_Amendment_64_(2012)) [<http://perma.cc/MNV4-EUXX>]; *Oregon Legalized Marijuana Initiative, Measure 91 (2014)*, BALLOTPEDIA, [http://ballotpedia.org/Oregon_Legalized_Marijuana_Initiative_Measure_91_\(2014\)](http://ballotpedia.org/Oregon_Legalized_Marijuana_Initiative_Measure_91_(2014)) [<http://perma.cc/E6X8-9NH5>]; *Washington Marijuana Legalization and Regulation, Initiative 502 (2012)*, BALLOTPEDIA, [http://ballotpedia.org/Washington_Marijuana_Legalization_and_Regulation_Initiative_502_\(2012\)](http://ballotpedia.org/Washington_Marijuana_Legalization_and_Regulation_Initiative_502_(2012)) [<http://perma.cc/EHQ4-WRDP>].

¹⁴⁶ John Dinan, *State Constitutional Amendment Processes and the Safeguards of American Federalism*, 115 PENN ST. L. REV. 1007, 1020–21 (2011).

¹⁴⁷ JUDITH A. JOHNSON & ERIN D. WILLIAMS, CONG. RESEARCH SERV., RL33524, STEM CELL RESEARCH: STATE INITIATIVES 2–4, 6–7 (2006).

authorize this type of research at a time when the public was supportive, necessitating a resort to the constitutional initiative process. California voters approved a 2004 amendment funding stem-cell research, at a time when the Legislature balked at providing the desired funding.¹⁴⁸ Voters in Missouri (in 2006)¹⁴⁹ and Michigan (in 2008)¹⁵⁰ approved constitutional initiatives in situations where legislatures had banned or were considering bans on stem-cell research.¹⁵¹

Minimum-wage increases above the federal minimum level have generally been supported and enacted by legislatures,¹⁵² but on multiple occasions during the twenty-first century, advocates resorted to the initiative process, often because Republican-controlled legislatures opposed increases supported by a wide majority of voters.¹⁵³ On seven occasions, the statutory initiative process was the chosen mechanism for raising the minimum wage.¹⁵⁴ But in four states—Florida in 2004 and Colorado, Nevada, and Ohio in 2006—the minimum wage was increased and annual inflation adjustments mandated by constitutional initiatives.¹⁵⁵

Limits on the eminent domain power were also adopted on several occasions in the twenty-first century via the constitutional initiative process, in situations where legislatures were seen as insufficiently supportive of restrictions commanding broad popular support. In the wake of public backlash against the U.S. Supreme Court's 2005 ruling in *Kelo v. City of New London*,¹⁵⁶ that the Federal Takings Clause did not bar use of

¹⁴⁸ *California Proposition 71, Stem Cell Research (2004)*, BALLOTPEDIA, http://ballotpedia.org/California_Proposition_71,_Stem_Cell_Research_%282004%29 [http://perma.cc/WL7T-EKV8].

¹⁴⁹ *Missouri Stem Cell Research, Amendment 2 (2006)*, BALLOTPEDIA, http://ballotpedia.org/Missouri_Stem_Cell_Research,_Amendment_2_%282006%29 [http://perma.cc/AB22-GJUS].

¹⁵⁰ *Michigan Stem Cell Amendment, Proposal 2 (2008)*, BALLOTPEDIA, http://ballotpedia.org/Michigan_Stem_Cell_Amendment,_Proposal_2_%282008%29 [http://perma.cc/ACR3-JY6M].

¹⁵¹ Dinan, *supra* note 146, at 1021.

¹⁵² *State Minimum Wages: 2015 Minimum Wage by State*, NAT'L CONF. ST. LEGISLATURES (June 30, 2015), <http://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx> [http://perma.cc/GGX7-6CNV].

¹⁵³ J.B. Wogan, *4 Red States that May Raise the Minimum Wage*, GOVERNING (April 4, 2014), <http://www.governing.com/news/headlines/gov-four-red-states-that-may-raise-minimum-wage.html> [http://perma.cc/A378-UPAV].

¹⁵⁴ In 2006, minimum-wage increases were achieved through initiated statutes in Arizona, Missouri, and Montana. Dinan, *supra* note 146, at 1018 n.68. In 2014, minimum-wage increases were passed through the statutory initiative process in Alaska, Arkansas, Nebraska, and South Dakota. *2014 Minimum Wage Ballot Measures*, NAT'L CONF. ST. LEGISLATURES (Nov. 6, 2014), <http://www.ncsl.org/research/labor-and-employment/minimum-wage-ballot-measures.aspx> [http://perma.cc/2ZRD-3LD3].

¹⁵⁵ Dinan, *supra* note 146, at 1018–19.

¹⁵⁶ *Kelo v. City of New London*, 545 U.S. 469 (2005).

eminent domain to condemn land for economic-development purposes, a number of legislatures enacted statutes or approved constitutional amendments limiting situations when government can condemn private property or strengthening guarantees that must be followed in the eminent domain process.¹⁵⁷ On several occasions, however, eminent domain limits restrictions were enacted through constitutional initiative processes, as with amendments in 2006 in North Dakota,¹⁵⁸ in 2008 in Nevada,¹⁵⁹ and in 2011 in Mississippi,¹⁶⁰ that generally provided stronger protection than measures passed through legislative statutes or legislature-referred amendments,¹⁶¹ as well as a less stringent 2008 California amendment.¹⁶²

C. Constraining Policy Flexibility

Whereas supporters of the constitutional initiative process stress benefits such as overcoming legislative resistance and unresponsiveness, critics contend that constitutional initiatives tend to impose undue limits on legislative flexibility. In characterizing this claim, Elizabeth R. Gerber wrote: “opponents of the initiative argue that the use of initiatives reduces policy flexibility. By flexibility, I mean the ability of policy actors to alter legislation that has unintended consequences, that is poorly written, or that ceases to attract popular support.”¹⁶³ In particular, Gerber cited, as have a number of other scholars, the consequences for California of citizen-initiated amendments in the 1970s and 1980s that “severely constrain[ed] the ability of state and local governments to raise taxes” and also “constrain[ed] the legislature’s flexibility by earmarking general fund revenues for narrowly specified purposes.”¹⁶⁴

In considering whether and to what extent this concern is borne out by the 2000–2014 record, it should be acknowledged

¹⁵⁷ ILYA SOMIN, *THE GRASPING HAND: KELO V. CITY OF NEW LONDON AND THE LIMITS OF EMINENT DOMAIN* 2, 145 (2015).

¹⁵⁸ *North Dakota Taking of Private Property, Measure 2 (2006)*, BALLOTPEdia, http://ballotpedia.org/North_Dakota_Taking_of_Private_Property_Measure_2_%282006%29 [http://perma.cc/FX2L-5TT8].

¹⁵⁹ *Nevada Property Owner’s Bill of Rights Amendment, Question 2 (2008)*, BALLOTPEdia, http://ballotpedia.org/Nevada_Property_Owner%27s_Bill_of_Rights_Amendment,_Question_2_%282008%29 [http://perma.cc/Y92X-8WSG].

¹⁶⁰ *Mississippi Eminent Domain Amendment, Initiative 31 (2011)*, BALLOTPEdia, http://ballotpedia.org/Mississippi_Eminent_Domain_Amendment,_Initiative_31_%282011%29 [http://perma.cc/4B2H-GS2U].

¹⁶¹ SOMIN, *supra* note 157, at 157, 160.

¹⁶² *California Proposition 99, Rules Governing Eminent Domain (June 2008)*, BALLOTPEdia, http://ballotpedia.org/California_Proposition_99,_Rules_Governing_Eminent_Domain_%28June_2008%29 [http://perma.cc/3THU-9ZLD].

¹⁶³ Gerber, *supra* note 14, at 298.

¹⁶⁴ *Id.* at 291–92.

that objective criteria and standards are particularly lacking in this area. That is, the intended purpose of a number of constitutional provisions, whether generated by legislatures or the citizenry, is to constrain policy flexibility: to proscribe certain courses of action and prescribe others. The question, therefore, is not whether constitutional initiatives reduce policy flexibility, but—and Gerber’s framework is useful in pinpointing the concern—whether they impose undue constraints on policy-makers’ ability to respond to changing preferences and circumstances.

By this standard, several twenty-first century constitutional initiatives lend support to critics’ concerns. There are, to be sure, other citizen-initiated amendments enacted during this period that limited policy flexibility. A 2010 Oregon amendment dedicating a certain portion of lottery revenue to an environmental program¹⁶⁵ and a 2014 Florida amendment dedicating revenue from a document tax to a land acquisition trust fund both limited legislative discretion in allocating revenue.¹⁶⁶ Similarly, the four amendments enacted between 2008 and 2012 banning real-estate transfer taxes limit the potential revenue sources from which legislators could draw.¹⁶⁷ But none of these amendments have had the wide-ranging and occasionally unintended consequences of the kind seen with several other amendments that have generated varying degrees of concern.

At times, twenty-first century citizen-initiated amendments have interacted with prior citizen-initiated amendments in such a way as to generate concerns about undue constraints on policy flexibility, as with a 2000 Colorado amendment requiring school spending to increase each year by the inflation rate plus 1% for the next ten years and by the rate of inflation each year afterward.¹⁶⁸ This amendment followed the passage of Colorado’s TABOR amendment in 1992, which imposed caps on annual increases in spending and also limited the ability to raise revenue.¹⁶⁹ The overall effect of these provisions—and this resembles in some ways the effects in California of certain constitutional initiatives limiting tax rates and increases and

¹⁶⁵ *Oregon Lottery Funds for Natural Resources Amendment, Measure 76 (2010)*, BALLOTPEDIA, http://ballotpedia.org/Oregon_Lottery_Funds_for_Natural_Resources_Amendment_Measure_76_%282010%29 [<http://perma.cc/8AWR-P6P5>].

¹⁶⁶ *Florida Water and Land Conservation Initiative, Amendment 1 (2014)*, BALLOTPEDIA, http://ballotpedia.org/Florida_Water_and_Land_Conservation_Initiative,_Amendment_1_%282014%29 [<http://perma.cc/WS9V-AEVB>].

¹⁶⁷ See *supra* notes 31–34.

¹⁶⁸ *Colorado Funding for Public Schools, Initiative 23 (2000)*, *supra* note 54.

¹⁶⁹ *Colorado Taxpayer Bill of Rights, Initiative 1 (1992)*, *supra* note 36.

other constitutional initiatives requiring a certain portion of the budget to be dedicated to school spending¹⁷⁰—has been to constrain budgeting flexibility to a significant degree.¹⁷¹

Another education-related measure, a 2002 Florida amendment limiting K–12 class sizes, has generated even more concern from the standpoint of policy inflexibility. The Florida measure specifies that kindergarten through third grade classes must be capped at eighteen students, classes from fourth through eighth grade can have no more than twenty-two students, and high-school classes are limited to twenty-five students. Approved by voters by a 52–48% margin, the measure generated significant opposition in subsequent years.¹⁷² Some public officials contend that the requirement prioritizes class-size goals to the detriment of other priorities.¹⁷³ And some districts have been led to take steps that are not seen as improving educational outcomes.¹⁷⁴ In fact, when voters in 2010 considered a legislature-referred constitutional amendment to ease these constitutional limits, they supported easing the class-size limits by a 54–46% margin.¹⁷⁵ However, an intervening change in Florida’s constitution required post-2006 amendments to secure support of 60% of voters,¹⁷⁶ leading to the amendment’s defeat. These and other developments provide strong evidence that this 2002 amendment has unduly constrained policy flexibility, in a judgment shared by commentators and public officials across the political spectrum.¹⁷⁷

Two other twenty-first century constitutional initiatives—one in Florida and another in Ohio—are also widely viewed as imposing undue constraints on policy flexibility to the extent that they generated subsequent amendments bringing about their

170 Dinan, *supra* note 11, at 29.

171 See, e.g., THERESE J. MCGUIRE & KIM S. RUEBEN, *THE COLORADO REVENUE LIMIT: THE ECONOMIC EFFECTS OF TABOR 3* (2006), <http://www.epi.org/files/page/-/old/briefingpapers/172/bp172.pdf> [<http://perma.cc/GZ82-R9ZA>] (noting that the ultimate result is “less revenue left for other categories of spending”).

172 Jeffrey S. Solochek & Kathleen McGrory, *After a Dozen Years, Florida Class-Size Foes May Finally Prevail*, MIAMI HERALD (Apr. 6, 2015), <http://www.miamiherald.com/news/politics-government/article17583149.html> [<http://perma.cc/76EX-XXEP>]; Rhema Thompson, *Florida State Legislators Re-examine Class-Size Mandate*, WJCT (Jan. 15, 2004), <http://news.wjct.org/post/florida-state-legislators-re-examine-class-size-mandate> [<http://perma.cc/VS5M-NRUC>].

173 Solochek & McGrory, *supra* note 172.

174 *Id.*

175 *Florida Class Size, Amendment 8 (2010)*, BALLOTPEDIA, http://ballotpedia.org/Florida_Class_Size,_Amendment_8_%282010%29 [<http://perma.cc/PSB6-T9BH>].

176 *Florida Amendment 3, Supermajority Vote Required to Approve a Constitutional Amendment (2006)*, BALLOTPEDIA, http://ballotpedia.org/Florida_Amendment_3,_Supermajority_Vote_Required_to_Approve_a_Constitutional_Amendment_%282006%29 [<http://perma.cc/MGK2-KTUX>].

177 See Solochek & McGrory, *supra* note 172.

repeal or modification. In 2000, Florida voters approved a citizen-initiated amendment calling for construction of a high-speed rail system to “link the five largest urban areas of the State” and proclaiming: “The Legislature, the Cabinet and the Governor are hereby directed to proceed with the development of such a system by the State and/or by a private entity . . . with construction to begin on or before November 1, 2003.”¹⁷⁸ However, after the amendment’s approval by 53% of voters, critics expressed increasing concern about the cost, which was eventually calculated as amounting to at least \$20 billion and perhaps more.¹⁷⁹ In response, Florida voters in 2004 approved, by a 64–36% margin, a citizen-initiated amendment repealing the original amendment in its entirety.¹⁸⁰

No twenty-first century constitutional initiative has generated more concern about undue constraints on policy inflexibility than a 2009 Ohio amendment authorizing construction of casinos in four cities and going so far as to designate the precise location of each casino.¹⁸¹ For instance, the amendment designated that the Columbus casino—the descriptions of the sites for several of the other casinos are even longer—would be built in the following site: “Being an approximate 18.312 acre area in the city of Columbus, Franklin County, Ohio, as identified by the Franklin County Auditor, as of 03/05/09, as tax parcel numbers 010-005518-80, 010-005518-90, 010-020215-80, 010-020215-90, 010-008443-80 and 010-008443-90.”¹⁸² As one indication of the undue constraints imposed by this constitutional initiative, shortly after it was approved by voters in November 2009, officials of Columbus and the surrounding Franklin County objected to the site of the planned Columbus casino.¹⁸³ However, because the location was now enshrined in the text of the Ohio Constitution, it could not be changed merely by passage of a legislative statute. This change would have to be achieved by passage of another constitutional amendment

¹⁷⁸ *Florida Monorail, Amendment 1 (2000)*, BALLOTPEdia, http://ballotpedia.org/Florida_Monorail_Amendment_1_%282000%29 [http://perma.cc/CC23-NKBF].

¹⁷⁹ Jack Lyne, *Derailed: Florida Amendment for \$25B Bullet Train Bites Dust in Vote*, SITE SELECTION (Nov. 8, 2004), <http://www.siteselection.com/ssinsider/snapshot/sf041108.htm> [http://perma.cc/E98S-W732].

¹⁸⁰ *Florida High Speed Rail, Amendment 6 (2004)*, BALLOTPEdia, http://ballotpedia.org/Florida_High_Speed_Rail_Amendment_6_%282004%29 [http://perma.cc/9T2S-CWKY].

¹⁸¹ *Ohio Casino Approval and Tax Distribution, Amendment 3 (2009)*, BALLOTPEdia, [http://ballotpedia.org/Ohio_Casino_Approval_and_Tax_Distribution_Amendment_3_\(2009\)](http://ballotpedia.org/Ohio_Casino_Approval_and_Tax_Distribution_Amendment_3_(2009)) [http://perma.cc/KKY9-JD9A].

¹⁸² OHIO CONST. art. XV, § 6.

¹⁸³ See Jim Siegel, *Ohioans Will Vote on Moving Columbus Casino*, COLUMBUS DISPATCH (Jan. 27, 2010, 3:33 PM), <http://www.dispatch.com/content/stories/local/2010/01/27/columbus-casino-issue-going-to-statewide-ballot.html> [http://perma.cc/9KFP-4CS9].

modifying the original amendment. To this end, the Legislature approved, and voters in a May 2010 election ratified, a legislature-referred constitutional amendment changing the site of the Columbus casino “from the area known as ‘The Arena District’ to the site of a former General Motors/Delphi Corp. manufacturing plant.”¹⁸⁴

In assessing the degree to which concerns about undue constraints on policy flexibility have ultimately been borne out, the twenty-first century record provides solid supporting evidence. To be sure, the number of constitutional initiatives generating these concerns between 2000 and 2014 is not high. Moreover, citizens and public officials have, in various ways, been able to overcome some of the constraints imposed by problematic measures by enacting subsequent citizen-initiated or legislature-referred amendments overturning or modifying the earlier amendment. However, in several instances, constraints on policy flexibility imposed via the constitutional initiative process have been significant and, at times, enduring.

D. Impairing Minority Rights

None of the claims about the consequences of the constitutional initiative process has attracted more scholarly attention than the possibility that it facilitates passage of measures impairing individual rights. For the most part, scholars analyzing this question have focused on the broad question of the consequences of measures enacted through any direct democratic devices, whether on a statutory or constitutional basis.¹⁸⁵ Janice May’s 1988 study is notable in that it focused specifically on the *constitutional* initiative.¹⁸⁶ May drew several conclusions from the 1906–1986 record. She noted that, “[i]n view of the concern over the threat to liberty posed by the constitutional initiative, the fact that the device has been used to promote rights has been overlooked,”¹⁸⁷ although on balance, “[t]here is considerable evidence that, although not numerous, more of the electorally successful constitutional initiatives have reduced rather than expanded rights.”¹⁸⁸ Having offered this overall negative

¹⁸⁴ *Ohio Columbus Casino Relocation, Amendment 2 (May 2010)*, BALLOTPEdia, http://ballotpedia.org/Ohio_Columbus_Casino_Relocation,_Issue_2_%28May_2010%29 [<http://perma.cc/X7JC-CBFT>].

¹⁸⁵ For some of the leading studies, see generally LEWIS, *supra* note 14; MILLER, *supra* note 14, at 124–56; Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI.-KENT L. REV. 707 (1991); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503 (1990); Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245 (1997).

¹⁸⁶ See generally May, *supra* note 15.

¹⁸⁷ *Id.* at 168.

¹⁸⁸ *Id.* at 169.

assessment, May nevertheless stressed that the empirical record did not offer strong support for claims about the negative consequences for rights: “The prediction that the constitutional initiative would destroy rights and liberties has not been borne out, although it is true that a few proposals were designed to reduce rights.”¹⁸⁹ Her ultimate conclusion was that the constitutional initiative process had its shortcomings, but these had to be understood in relation to the record of representative institutions.¹⁹⁰

The twenty-first century record provides little ground for modifying May’s assessment. In keeping with May’s observation about the passage of rights-protecting measures, several twenty-first century constitutional initiatives protect rights. The leading example is a 2014 Oregon amendment prohibiting unequal treatment on account of sex.¹⁹¹ One could also point to protections for property rights, including a 2000 Oregon amendment requiring a conviction before government officials can begin a civil-asset forfeiture proceeding,¹⁹² as well as eminent domain amendments protecting property rights in North Dakota in 2006, California and Nevada in 2008, and Mississippi in 2011.¹⁹³ Additionally—although this is a contested case that illustrates the challenges of categorizing measures as either rights-protecting or rights-impairing¹⁹⁴—one could point to the passage of Marsy’s Law, a 2008 California citizen-initiated measure combining constitutional and statutory changes.¹⁹⁵ On one hand, this measure extended protection for victims’ rights. On the other hand, a provision intended to help victims of crime—later invalidated by a federal district court—required longer wait times between parole hearings with the effect of limiting the rights of imprisoned persons.¹⁹⁶

As for passage of rights-impairing measures, an assessment of the 2000–2014 record would also generally follow May’s conclusion, in that voters on several occasions approved

¹⁸⁹ *Id.* at 170.

¹⁹⁰ *Id.* at 179.

¹⁹¹ *Oregon Equal Rights for Women Initiative, Measure 89 (2014)*, BALLOTPEDIA, http://ballotpedia.org/Oregon_Equal_Rights_for_Women_Initiative_Measure_89_%282014%29 [<http://perma.cc/ND5E-GPU7>].

¹⁹² *Oregon Property Forfeiture Requirements, Measure 3 (2000)*, BALLOTPEDIA, http://ballotpedia.org/Oregon_Property_Forfeiture_Requirements_Measure_3_%282000%29 [<http://perma.cc/YQ2Y-TQL8>].

¹⁹³ See *supra* notes 158–60, 162.

¹⁹⁴ For discussions of this challenge, see MILLER, *supra* note 14, at 124–25, 155, and May, *supra* note 15, at 168.

¹⁹⁵ *California Proposition 9, Marsy’s Law (2008)*, BALLOTPEDIA, http://ballotpedia.org/California_Proposition_9_Marsy%27s_Law_%282008%29 [<http://perma.cc/88Z3-2H6W>].

¹⁹⁶ See *Valdivia v. Brown*, No. CIV. S-94-671 LKK/GGH, 2012 WL 219342, at *1, *5 (E.D. Cal. Jan. 24, 2012).

citizen-initiated amendments that were opposed by racial, ethnic, or gender minorities, but these amendments generally did not differ greatly from similar measures approved by legislatures. The main evidence for claims that constitutional initiative processes are more threatening to minority groups than processes requiring legislative participation comes from passage of citizen-initiated amendments limiting affirmative action in Michigan in 2006¹⁹⁷ and Nebraska in 2008¹⁹⁸ (voters in Colorado defeated a similar measure in 2008).¹⁹⁹ Of course, reasonable persons can disagree about whether these measures might also be considered rights-protecting measures. Moreover, similarly framed measures were adopted through other processes—through legislature-referred constitutional amendments in Arizona in 2010²⁰⁰ and Oklahoma in 2012²⁰¹ and through a legislative statute passed in New Hampshire in 2011²⁰² and an executive order issued in Florida in 1999.²⁰³ Nevertheless, when considering the pre- and post-2000 period, a full half of the measures limiting affirmative action have been approved through citizen-initiated measures, whether constitutional initiatives, as in California (1996), Michigan (2006), and Nebraska (2008), or statutory initiatives, as in Washington (1998).²⁰⁴ Additionally, several of the measures enacted through means other than the initiative process, as in Florida, were proposed in reaction to groups that were seeking support for constitutional initiatives limiting affirmative action, and, therefore, could be attributed indirectly to the availability of the constitutional initiative process.²⁰⁵

Drawing lessons from the eleven citizen-initiated amendments barring recognition of same-sex marriage is more

197 *Michigan Civil Rights Amendment, Proposal 2 (2006)*, BALLOTPEdia, http://ballotpedia.org/Michigan_Civil_Rights_Amendment,_Proposal_2_%282006%29 [http://perma.cc/6LY5-B4EY].

198 *Nebraska Civil Rights, Measure 424 (2008)*, BALLOTPEdia, http://ballotpedia.org/Nebraska_Civil_Rights_Initiative,_424_%282008%29 [http://perma.cc/H6TA-26NN].

199 *Colorado Discrimination and Preferential Treatment by Governments, Initiative 46 (2008)*, BALLOTPEdia, http://ballotpedia.org/Colorado_Discrimination_and_Preferential_Treatment_by_Governments,_Initiative_46_%282008%29 [http://perma.cc/GB6F-C5HM].

200 *Affirmative Action: State Action*, NAT'L CONF. ST. LEGISLATURES (April 2014), <http://www.ncsl.org/research/education/affirmative-action-state-action.aspx> [http://perma.cc/P65V-LKVV]. The reliance on constitutional initiative processes to adopt the California, Michigan, and Nebraska measures is noted in Dinan, *supra* note 146, at 1017. The reliance on the statutory initiative process to adopt the Washington measure is noted in *id.* at 1017 n.58.

201 *Affirmative Action: State Action*, *supra* note 200.

202 *Id.*

203 *Id.*

204 *Id.* A Texas measure was passed by the legislature at the instigation of a federal court and is therefore not included in this count. *Id.*

205 LEWIS, *supra* note 14, at 43.

difficult. These were passed in several waves; first in response to a 1993 Hawaii Supreme Court decision signaling that the court was poised to recognize a state constitutional right to same-sex marriage and then, later, in response to a 2003 Massachusetts Supreme Court decision recognizing a state constitutional right to same-sex marriage.²⁰⁶ The first wave saw passage of a Nebraska amendment in 2000²⁰⁷ and a Nevada amendment that received its requisite second and final approval in 2002.²⁰⁸ The second wave included passage of same-sex marriage-ban citizen-initiated amendments in Arkansas,²⁰⁹ Michigan,²¹⁰ Montana,²¹¹ North Dakota,²¹² Ohio,²¹³ and Oregon²¹⁴ in 2004, Colorado in 2006,²¹⁵ and Florida²¹⁶ and California²¹⁷ in 2008. In only one case, in Arizona in 2006,²¹⁸ did voters reject a citizen-initiated same-sex marriage-ban amendment.

However, caution is in order in interpreting this evidence. In nearly all of these states, and with the notable exception of the

²⁰⁶ *Id.* at 18.

²⁰⁷ *Nebraska Marriage Definition, Measure 416 (2000)*, BALLOTPEDIA, http://ballotpedia.org/Nebraska_Marriage_Definition_Amendment,_Initiative_416_%282000%29 [http://perma.cc/2VS8-VYVT].

²⁰⁸ *Nevada Marriage Amendment, Question 2 (2002)*, BALLOTPEDIA, http://ballotpedia.org/Nevada_Marriage_Amendment,_Question_2_%282002%29 [http://perma.cc/8DWK-9SBC].

²⁰⁹ *Arkansas Same-Sex Marriage Ban, Proposed Constitutional Amendment 3 (2004)*, BALLOTPEDIA, http://ballotpedia.org/Arkansas_Same-Sex_Marriage_Ban,_Proposed_Constitutional_Amendment_3_%282004%29 [http://perma.cc/UW33-DWWL].

²¹⁰ *Michigan Marriage Amendment, Proposal 2 (2004)*, BALLOTPEDIA, http://ballotpedia.org/Michigan_Marriage_Amendment,_Proposal_2_%282004%29 [http://perma.cc/RYS35-XQHT].

²¹¹ *Montana Definition of Marriage, CI-96 (2004)*, BALLOTPEDIA, http://ballotpedia.org/Montana_Definition_of_Marriage,_CI-96_%282004%29 [http://perma.cc/2LYQ-MJAG].

²¹² *North Dakota Definition of Marriage, Constitutional Measure 1 (2004)*, BALLOTPEDIA, http://ballotpedia.org/North_Dakota_Definition_of_Marriage,_Constitutional_Measure_1_%282004%29 [http://perma.cc/2WJ9-C3M6].

²¹³ *Ohio Definition of Marriage, Amendment 1 (2004)*, BALLOTPEDIA, http://ballotpedia.org/Ohio_Issue_1,_the_Marriage_Amendment_%282004%29 [http://perma.cc/FEL7-HZMT].

²¹⁴ *Oregon Marriage Measure 36 (2004)*, BALLOTPEDIA, http://ballotpedia.org/Oregon_Marriage_Measure_36_%282004%29 [http://perma.cc/5WBZ-NY7Z].

²¹⁵ *Colorado Definition of Marriage, Initiative 43 (2006)*, BALLOTPEDIA, http://ballotpedia.org/Colorado_Definition_of_Marriage,_Initiative_43_%282006%29 [http://perma.cc/ZKE7-ZNQ6].

²¹⁶ *Florida Definition of Marriage, Amendment 2 (2008)*, BALLOTPEDIA, http://ballotpedia.org/Florida_Definition_of_Marriage,_Amendment_2_%282008%29 [http://perma.cc/ZD2K-K2ZW].

²¹⁷ *California Proposition 8, the "Eliminates Right of Same-Sex Couples to Marry" Initiative (2008)*, BALLOTPEDIA, http://ballotpedia.org/California_Proposition_8,_the_%22Eliminates_Right_of_Same-Sex_Couples_to_Marry%22_Initiative_%282008%29 [http://perma.cc/U9D3-U73S].

²¹⁸ *Arizona Protect Marriage, Proposition 107 (2006)*, BALLOTPEDIA, http://ballotpedia.org/Arizona_Protect_Marriage,_Proposition_107_%282006%29 [http://perma.cc/BZY6-YSAU].

2008 California amendment that overturned a state supreme court decision legalizing same-sex marriage, the constitutional initiatives barring recognition of same-sex marriage were confirming policies already in place, many of which were enacted via legislative statute.²¹⁹ Additionally, and focusing on the total universe of thirty same-sex marriage-ban constitutional amendments, although eleven were generated via the initiative process, the others were enacted via legislature-referred amendments.²²⁰ Moreover, there is little indication that legislatures were more reluctant than citizens to support same-sex marriage-ban amendments²²¹ or that amendments enacted via legislature-referred processes were less restrictive than amendments enacted via constitutional initiative processes.²²²

In summary, the conclusions to be drawn from the twenty-first century record regarding constitutional initiatives and rights parallel May's assessment of the 1906–1986 era. Constitutional initiative processes were occasionally used to

²¹⁹ See LEWIS, *supra* note 14, at 20–21.

²²⁰ A total of thirty constitutional amendments were enacted between 1998 and 2012 that prohibited the state legislature from recognizing same-sex marriage. In addition, a 1998 Hawaii constitutional amendment reserved the definition of same-sex marriage to the Legislature and thereby prohibited the state supreme court from legalizing same-sex marriage. The states adopting same-sex marriage-ban amendments and the dates of enactment are listed in *States with Constitutional Amendments Banning Gay Marriage*, PROCON.ORG, <http://gaymarriage.procon.org/view.resource.php?resourceID=003979> [<http://perma.cc/BGL5-JASK>] (last updated May 10, 2012).

²²¹ When one takes into account a number of factors, it appears from an empirical analysis that states with direct democracy were more likely than other states to approve same-sex marriage bans. But in this case, it would be important to distinguish between states with constitutional initiative processes and states that only provide for statutory initiative processes, given that the key concern was with enacting *constitutional* provisions designed to prevent state courts from issuing decisions requiring legalization of same-sex marriage. LEWIS, *supra* note 14, at 20, 33–34.

²²² Of the thirty same-sex marriage-ban amendments, twenty were seen as comparatively more restrictive, in that they limited recognition of both same-sex marriage and civil unions, and in some cases domestic partnerships (Alabama, Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, and Wisconsin), whereas ten were seen as comparatively less restrictive in that they only barred recognition of same-sex marriage (Alaska, Arizona, California, Colorado, Mississippi, Missouri, Montana, Nevada, Oregon, and Tennessee). For this categorization and a list of states in each category, see Daniel R. Pinello, *The Difference Between Super-DOMAs and Mini-DOMAs*, DANPINELLO.COM, <http://www.danpinello.com/SuperDOMAs.htm> [<http://perma.cc/AZ7S-56GA>]. There is little indication that amendments passed through the constitutional-initiative process were more restrictive than amendments referred to voters by the legislature. Five of the ten *less* restrictive amendments were passed through the constitutional initiative process (California, Colorado, Montana, Nevada, and Oregon), whereas the other five were referred to voters by the legislature. Meanwhile, six of the twenty *more* restrictive amendments (Nebraska, Arkansas, Michigan, North Dakota, Ohio, and Florida) were passed through the constitutional initiative process, whereas the other fourteen were referred to voters by the legislature. See *supra* notes 200–18 and accompanying text.

protect rights. They were used more frequently to pass measures that could be seen as impairing rights, even allowing for disagreement about what counts as a rights-impairing measure. However, when comparing constitutional initiative processes with processes requiring legislative participation, constitutional initiative processes were generally no more likely to be a vehicle for approving measures opposed by minority groups, with the exception of affirmative-action limits.

III. OPTIONS FOR DESIGNING CONSTITUTIONAL INITIATIVE PROCESSES

An analysis of twenty-first century constitutional initiative use might be helpful not only for scholars interested in whether the empirical record supports various claims in the literature, but also for citizens and public officials concerned with designing constitutional initiative processes to harness their benefits and minimize their harms. Citizens and officials in the thirty-two states not currently providing for the constitutional initiative might benefit from considering various options when establishing such a process. Likewise with residents of the eighteen constitutional-initiative states—which vary significantly in the rules for qualifying measures for the ballot, approving them, and specifying the topics they can address. My purpose in this final section is identifying the main options to be considered in designing a constitutional initiative process and assessing which decisions might secure the main benefits (primarily overcoming self-interested legislators and secondarily bypassing unresponsive legislatures) while also minimizing the main harms (primarily constraining policy flexibility and secondarily impairing minority rights).

Students of the constitutional initiative process, and direct democratic institutions more broadly, have given some attention to reforms that might contribute to more effective governance.²²³ Marvin Krislov and Daniel M. Katz, in a 2008 article, “Taking State Constitutions Seriously,” analyzed a number of reform options, such as increasing signature requirements for qualifying constitutional initiatives, adopting an indirect constitutional initiative process, requiring a supermajority popular vote to approve constitutional initiatives, or requiring popular approval

²²³ See generally GERBER, *supra* note 14; COLO. CONSTITUTION PANEL, UNIV. OF DENVER, FOUNDATION OF A GREAT STATE: THE FUTURE OF COLORADO'S CONSTITUTION (2007), http://www.du.edu/issues/media/documents/Constitution_Report.pdf [<http://perma.cc/83WY-DQ77>]; NCSL I&R TASK FORCE, NAT'L CONF. ST. LEGISLATURES, INITIATIVE AND REFERENDUM IN THE TWENTY-FIRST CENTURY: FINAL REPORT AND RECOMMENDATIONS OF THE NCSL I&R TASK FORCE (2002), http://www.ncsl.org/Portals/1/documents/legismgt/irtaskfc/1andR_report.pdf [<http://perma.cc/XP5F-W53B>].

in consecutive elections.²²⁴ Their concerns were primarily with improving “the information environment so that voters can obtain the proximate data necessary to ensure they vote consistent with their individual interests”²²⁵ and also better distinguishing “between the methods for modifying mere statutory law and methods for modifying a state’s constitution.”²²⁶

The concerns guiding my analysis in this Article overlap to some degree with the concerns of other scholars, especially the concern about not entrenching matters in constitutions that are more properly placed in statutes, but are also somewhat different. In particular, I am concerned with determining how constitutional initiative processes can be designed to maximize their benefits, while at the same time minimizing harms associated with their use. As the previous section demonstrated, based on a review of the twenty-first century record, constitutional initiative processes have been beneficial primarily insofar as they have secured passage of governmental reforms resisted by legislators and, secondarily, to the extent that they have facilitated enactment of policies blocked by unresponsive legislatures. Meanwhile, the record of constitutional initiatives enacted in the twenty-first century indicates that the chief concern is passage of measures imposing undue constraints on policy flexibility, and a secondary concern is the passage of measures impairing minority rights. The question is how to design a process that maximizes these particular benefits while minimizing these specific harms.

To preview my conclusions, I argue that several proposals, such as making it more difficult to qualify measures for the ballot or secure voter approval, are unlikely to achieve the desired goals of securing the benefits and reducing the harms of the process. However, other options—such as permitting legislatures to craft alternatives to citizen-initiated amendments as part of an indirect constitutional initiative process, requiring voter approval of constitutional initiatives in consecutive elections, limiting the subject-matter of constitutional initiatives, and protecting statutory initiatives—are well tailored to preserving the main benefits of the process while reducing the principal harms.

²²⁴ Krislov & Katz, *supra* note 15.

²²⁵ *Id.* at 329–38.

²²⁶ *Id.* at 336.

A. Increasing Signature Requirements for Proposing Constitutional Initiatives

One option available to public officials in designing constitutional initiative processes is making it more difficult to place measures on the ballot, by increasing the signature requirements. The eighteen states vary widely in the signature requirements they impose, thereby leading some commentators to urge states with lower requirements to increase them as a way of limiting harmful effects of these processes.²²⁷

Comparing state signature requirements is difficult, because of the wide range of ways that states calculate the signatures needed to qualify amendments for the ballot. Most states require signatures equal to a certain percentage of votes cast for governor in the last election.²²⁸ But some states base this percentage on the number of votes cast for some other office. Still other states require signature-gatherers to obtain support from a percentage of the state population or of registered voters. Nevertheless, and despite the difficulty in making comparisons, it is possible to distinguish between certain states that set low barriers and others that establish high barriers. Massachusetts (3% of votes for Governor) and Colorado (5% of votes for Secretary of State) are among the most accessible. At the other end of the spectrum are Arizona and Oklahoma, both of which require signatures equal to 15% of votes for governor. Nearly half of the states go further and mandate that signature-gatherers must satisfy a geographic-distribution requirement. These range from rules that no more than a certain percentage of the signatures can come from a single county (as in Massachusetts) or congressional district (as in Mississippi) to rules requiring a certain percentage of signatures to be collected in each of one-half of the counties (as in Ohio) or in each of one-half of the congressional districts (as in Florida).²²⁹

Although increasing the signature requirement and tightening geographic-distribution rules are prominent reform proposals,²³⁰ upon consideration, it is not clear that they would

²²⁷ *Id.* at 315, 336.

²²⁸ For a list of the signature requirements set out in this paragraph, see Dinan, *State Constitutional Developments in 2013*, *supra* note 21, at 14 tbl.1.3.

²²⁹ *Id.* It should be noted that several court rulings have invalidated geographic-distribution requirements. See NOYES, *supra* note 2, at 256 tbl.6.6.

²³⁰ Voters in Oregon in 2000 rejected an amendment increasing the signature requirement. *Oregon Increased Signature Requirements for Constitutional Initiative, Measure 79 (May 2000)*, BALLOTPEdia, http://ballotpedia.org/Oregon_Increased_Signature_Requirements_for_Constitutional_Initiative,_Measure_79_%28May_2000%29 [<http://perma.cc/Z9LH-RW85>]. Voters in Colorado in 2008 defeated an amendment increasing the signature requirement and imposing a geographic-distribution

harness the benefits and minimize the harms of the process. Higher signature requirements are just as likely to reduce the ability to enact measures overcoming resistant or unresponsive legislatures as to reduce the likelihood of passing measures constraining policy flexibility or restricting rights. There is no apparent reason why erecting higher barriers to placing measures on the ballot would keep out the harmful measures more so than the beneficial measures.

Additionally, to the extent that the consequences of higher signature requirements are likely to cut in favor of certain measures and against others, this is likely to be in the direction of making it tougher to pass beneficial measures that overcome influential and well-organized groups. This has been the judgment reached by several groups and commissions who have studied the constitutional initiative process. For instance, a 2007 Colorado Constitution Panel noted in its final report that panelists considered increasing the signature requirement (and increasing the voter ratification requirement), but ultimately rejected this option, because it was

not likely to reduce the number of petitions from large, well-funded special interests. What raising these thresholds is likely to do, however, will be to make it more difficult for Colorado-based grassroots organizations to get their issues on the ballot. These groups, typically less well funded than large national organizations, would likely be the ones disadvantaged by changing signature and election requirements.²³¹

B. Increasing Thresholds for Ratifying Constitutional Initiatives

Proposals to increase the threshold for voter ratification of constitutional initiatives have been advanced with nearly the same regularity as proposals to increase signature requirements for placing them on the ballot.²³² Although there is not a great

requirement. *Colorado Citizen-Initiated State Laws, Referendum O (2008)*, BALLOTPEDIA, http://ballotpedia.org/Colorado_Citizen-Initiated_State_Laws,_Referendum_O_%282008%29 [<http://perma.cc/U3GD-978R>].

²³¹ COLO. CONSTITUTION PANEL, *supra* note 223, at 11–12.

²³² In recent decades, measures have occasionally been placed on the ballot to raise the threshold for ratifying amendments. At times, they have sought to impose supermajority requirements on voter passage of all amendments, as with a failed measure in Colorado in 1996. *Colorado Amendment Approval, Referendum A (1996)*, BALLOTPEDIA, http://ballotpedia.org/Colorado_Amendment_Approval,_Referendum_A_%281996%29 [<http://perma.cc/3LDE-MQHW>]. Such a measure was successfully passed in Florida in 2006. *Florida Amendment 3, Supermajority Vote Required to Approve a Constitutional Amendment (2006)*, BALLOTPEDIA, http://ballotpedia.org/Florida_Amendment_3,_Supermajority_Vote_Required_to_Approve_a_Constitutional_Amendment_%282006%29 [<http://perma.cc/692F-SX3W>]. Other proposals would have imposed a supermajority requirement on initiated amendments only. See *Initiative and Referendum in the 21st Century*, NAT'L CONF. ST. LEGISLATURES 61, www.ncsl.org/Portals/1/documents/legismgt/irtaskfc/landR_

deal of variation among constitutional-initiative states in their voter-ratification thresholds, the differences have given rise to discussion about the effects of adopting higher thresholds.²³³

Most of the eighteen constitutional-initiative states permit approval by a majority of voters, but several set higher thresholds.²³⁴ In a rule that rarely makes a practical difference, several states require the majority of voters approving a constitutional initiative to exceed a certain percentage of voters participating in the entire election: 35% in Nebraska (a rule that also applies to legislature-referred amendments), 30% in Massachusetts and 40% in Mississippi. Illinois stipulates that constitutional amendments (citizen-initiated as well as legislature-referred) must be ratified by either a majority of voters participating in the entire election or three-fifths of voters casting ballots on the question. Florida sets the highest threshold.²³⁵ Since 1996, Florida has required two-thirds of voters participating in the election to approve all amendments imposing new taxes or fees.²³⁶ Additionally, after 2006, Florida has required other amendments to be approved by three-fifths of voters.²³⁷

In assessing the consequences of these different rules, it is worth focusing on Florida and comparing the proposal and enactment rate of constitutional initiatives before and after the post-2006 change (for non-tax increases) from a majority to a three-fifths supermajority rule. In the four even-year elections in the twenty-first century prior to this change taking effect (2000, 2002, 2004, and 2006), thirteen constitutional initiatives qualified for the ballot and voters ratified all of them.²³⁸

report.pdf [http://perma.cc/SE7T-QP23].

²³³ See Krislov & Katz, *supra* note 15, at 338.

²³⁴ For a list of the approval requirements, see Dinan, *State Constitutional Developments in 2013*, *supra* note 21, at 14 tbl.1.3. One might also take note of another requirement along these lines. Oregon requires that initiatives that establish a supermajority requirement for approving future acts must themselves be approved by an equivalent supermajority of voters. *Id.*

²³⁵ The voter-approval requirements for citizen-initiated amendments in these states are found in *id.* For comparison, the voter-approval requirements for legislature-referred amendments in each of these states are found in *id.* at 12–13 tbl.1.2. The voter-approval requirement for Nebraska legislature-referred amendments is found in *id.* at 13 tbl.1.2(f). The voter-approval requirement for Illinois legislature-referred amendments is found in *id.* at 13 tbl.1.2(g).

²³⁶ *Florida Tax Limitation, Amendment 1 (1996)*, BALLOTPEdia, http://ballotpedia.org/Florida_Tax_Limitation_Amendment_1_%281996%29 [http://perma.cc/4V62-UH9M].

²³⁷ *Florida Amendment 3, Supermajority Vote Required to Approve a Constitutional Amendment (2006)*, BALLOTPEdia, http://ballotpedia.org/Florida_Amendment_3_Supermajority_Vote_Required_to_Approve_a_Constitutional_Amendment_%282006%29 [http://perma.cc/G98Z-VHJ8].

²³⁸ The specific totals for each election are as follows. In 2000, voters approved the one constitutional initiative on the ballot. May, *State Constitutions and Constitutional*

However, in the four even-year elections held after this change (2008, 2010, 2012, and 2014), six constitutional initiatives qualified for the ballot and only four of them were approved.²³⁹ It is reasonable to conclude that increasing the ratification requirement prevented some individuals and groups from proposing amendments they would otherwise have worked to place on the ballot; moreover, the higher ratification threshold definitely led to the defeat of one amendment, a 2014 medical-marijuana legalization measure that attracted the support of more than 57% of voters but fell short of the 60% threshold.²⁴⁰

There is little reason to conclude, however, that increasing voter ratification requirements in this or other ways would, in particular, increase the prospects of passing beneficial measures or reduce the prospects of passing harmful measures. By definition, the effect of increasing the ratification requirement would be to reduce the likelihood of enacting measures enjoying the support of a majority of voters, but less than a supermajority. But measures defeated with this level of support (a majority but not a supermajority) are as likely to be beneficial measures that overcome resistant or unresponsive legislatures as harmful measures that limit policy flexibility or impair rights. In short, if the goal is to reduce the passage rate of all measures, this option is likely to be effective; but in so far as the goal is to design the process to harness the benefits and minimize the harms, this strategy is not well-tailored to this end.

C. Requiring Constitutional Initiatives to Be Approved by Voters in Consecutive Elections

Another option adopted by one state, Nevada, and endorsed by some commentators, is to require voters to approve

Revision 2000-2001, *supra* note 21, at 22 tbl.1.6. In 2002, voters approved all five constitutional initiatives on the ballot. May, *Trends in State Constitutional Amendment and Revision*, *supra* note 21, at 18 tbl.1.6. In 2004, voters approved all six constitutional initiatives on the ballot. May, *State Constitutional Developments in 2004*, *supra* note 21, at 18 tbl.1.6. In 2006, voters approved the one constitutional initiative on the ballot. Dinan, *State Constitutional Developments in 2006*, *supra* note 21, at 16 tbl.1.5.

²³⁹ The specific totals for each election are as follows. In 2008, voters approved the one constitutional initiative on the ballot. Dinan, *State Constitutional Developments in 2008*, *supra* note 21, at 7 tbl.C. In 2010, voters approved two of the three constitutional initiatives on the ballot. Dinan, *State Constitutional Developments in 2010*, *supra* note 21, at 7 tbl.C. In 2012, no constitutional initiatives qualified for the ballot. Dinan, *State Constitutional Developments in 2012*, *supra* note 21, at 6 tbl.C. In 2014, voters approved one of two constitutional initiatives on the ballot. Dinan, *State Constitutional Developments in 2014*, *supra* note 21, at 6 tbl.C.

²⁴⁰ *Florida Right to Medical Marijuana Initiative, Amendment 2 (2014)*, BALLOTPEDIA, http://ballotpedia.org/Florida_Right_to_Medical_Marijuana_Initiative,_Amendment_2_%282014%29 [http://perma.cc/D5TH-T7U2].

constitutional initiatives in two separate elections.²⁴¹ Nevada is the one state to require amendments of any sort to be approved by a majority of voters on two separate occasions.²⁴² This requirement, dating from 1962, applies only to citizen-initiated amendments.²⁴³ Legislature-referred amendments are approved in a single election.

Based on the twenty-first century record, it is not evident that this requirement has had a meaningful effect. Of the nine citizen-initiated amendments appearing on the Nevada ballot from 2000–2014, five were approved in consecutive elections and took effect; the other four were defeated in the initial vote, with no need for a second vote.²⁴⁴ That is, no measures during this period (as distinct from the pre-2000 period when this occurred on several occasions)²⁴⁵ secured majority support in the first election, only to be defeated in the second election.

Although the double-passage rule has not had an apparent effect in Nevada in the twenty-first century, this rule might, nevertheless, be considered well-tailored, in certain situations, to preserving the benefits of the constitutional initiative process while minimizing some potential harms. It is unlikely that this requirement would reduce the prospects of passing reforms blocked by resistant or unresponsive legislatures but backed by a popular majority capable of sustaining such support through multiple ballot campaigns. Therefore, adding such a requirement

²⁴¹ Krislov & Katz, *supra* note 15, at 338.

²⁴² Dinan, *State Constitutional Developments in 2013*, *supra* note 21, at 14 tbl.1.3. Recent efforts have occasionally been made to impose double-passage rules for *all* constitutional amendments, whether legislature-referred or citizen-initiated, as in Nebraska in 2000, where voters rejected such a change. *Nebraska Two Votes to Amend Constitution, Amendment 3A (2000)*, BALLOTPEdia, http://ballotpedia.org/Nebraska_Two_Votes_to_Amend_Constitution,_Amendment_3A_%282000%29 [<http://perma.cc/KJ4H-NL9S>].

²⁴³ MICHAEL W. BOWERS, *THE NEVADA STATE CONSTITUTION* 180 (2d ed. 2014).

²⁴⁴ Regarding the five times that constitutional initiatives were approved in consecutive elections during this 2000–2014 period, Nevada voters gave their second required approval to one constitutional initiative in 2000, one constitutional initiative in 2002, two constitutional initiatives in 2006, and one constitutional initiative in 2008. As for the four times during this 2000–2014 period that constitutional initiatives were rejected during the initial presentation—eliminating the need for a second election—Nevada voters rejected one amendment in 2002 on its initial presentation and three amendments in 2004 on their first presentation. See May, *State Constitutions and Constitutional Revision 2000-2001*, *supra* note 21, at 22 tbl.1.6; May, *Trends in State Constitutional Amendment and Revision*, *supra* note 21, at 18 tbl.1.6; May, *State Constitutional Developments in 2004*, *supra* note 21, at 18 tbl.1.6; Dinan, *State Constitutional Developments in 2006*, *supra* note 21, at 16 tbl.1.5; Dinan, *State Constitutional Developments in 2008*, *supra* note 21, at 7 tbl.C.

²⁴⁵ This occurred on three occasions—in 1980, when a limit on property taxes was defeated in the second vote; in 1982, when a ban on taxing food was defeated in the second vote; and in 1996, in an unusual situation, in that a measure limiting the terms of judges and other state officials had passed in the first vote but when a court ordered the measures to be split into separate measures voters defeated term limits for judges and approved term limits for other officials. NCSL I&R TASK FORCE, *supra* note 223, at 60.

would still allow beneficial measures to pass. On the other hand, requiring voter approval on separate occasions with a two-year intervening period could well reduce the likelihood of passing measures violating minority rights. That is, to the extent that rights-violating measures might be a product of temporary passion rather than reasoned judgment, the double-passage requirement could help distinguish between measures that are supported by an ephemeral majority rather than an enduring majority. Measures of the latter kind would withstand the double-passage requirement; the former measures might survive the initial election only to fail in the next election as popular support dissipates.

D. Providing for the Indirect Constitutional Initiative

Another option, in effect in two states and occasionally recommended for consideration by other states,²⁴⁶ is to provide for an indirect, rather than a direct, constitutional initiative process. In sixteen constitutional-initiative states, the legislature does not play a role in approving or amending citizen-initiated amendments before they are placed on the ballot.²⁴⁷ However, Massachusetts and Mississippi provide that citizen-initiated amendments receiving the requisite number of signatures must first be submitted to the legislature, which has several options for responding, depending on the state.²⁴⁸

In Massachusetts, which adopted the constitutional initiative process in 1918, the Legislature can prevent a citizen-initiated amendment from appearing on the ballot, or craft a substitute amendment to be placed on the ballot alongside the original measure, or amend the original measure before it appears on the ballot.²⁴⁹ In particular, citizen-initiated amendments must secure the approval of one-fourth of the members of a joint meeting of both houses of the Legislature and in two consecutive legislative sessions.²⁵⁰ The Massachusetts Legislature exercised this power to block voter consideration of citizen-initiated amendments on one notable occasion in the twenty-first century. In response to the Massachusetts Supreme Court's 2003 same-sex marriage legalization ruling, opponents secured the requisite signatures in 2005 for a citizen-initiated amendment limiting marriage to opposite-sex couples.²⁵¹ The

²⁴⁶ *Id.* at 7–8.

²⁴⁷ Dinan, *State Constitutional Developments in 2013*, *supra* note 21, at 14 tbl.1.3.

²⁴⁸ *Id.*

²⁴⁹ MASS. CONST. art. XLVIII.

²⁵⁰ *Id.* art. XLVIII, pt. IV, § 4.

²⁵¹ Dinan, *State Constitutional Developments in 2007*, *supra* note 21, at 4–5.

Legislature eventually gave the requisite first approval to this amendment, by a 62–132 vote, on the last day of the legislative session, January 2, 2007.²⁵² However, when the amendment was taken up in the next session, on June 14, 2007, it failed to secure the requisite one-fourth of the votes, failing on a 45–151 vote.²⁵³ The Legislature has two other options for responding to citizen-initiated amendments aside from blocking them. It can, by a majority vote, approve a substitute amendment that appears on the ballot alongside the initiated amendment.²⁵⁴ It can also, by a three-fourths vote, amend the original amendment and place this on the ballot instead of the initiated amendment.²⁵⁵ The Legislature has rarely exercised these options, whether in the twenty-first century or in prior years.²⁵⁶

The Mississippi Legislature is not empowered to block citizen-initiated amendments; but it can, by majority vote, craft an amended or alternative amendment to be submitted to voters alongside of the original measure.²⁵⁷ Mississippi has not had extensive experience with the constitutional initiative process (originally adopted in the early 1900s, then invalidated by the state supreme court in 1922, but reestablished in 1992) and the Legislature did not, prior to 2014, exercise its option to craft alternative amendments.²⁵⁸ All three citizen-initiated amendments securing the requisite number of signatures between 2000 and 2014 appeared on the Mississippi ballot unaccompanied by legislative alternatives. However, in 2015 the Mississippi Legislature, for the first, time approved an alternative amendment for submission to voters, in response to a citizen-initiated amendment that would revise the state's education clause to guarantee a fundamental right to educational opportunities to be enforced by the state chancery courts.²⁵⁹ The alternative legislature-crafted amendment would make more modest revisions to the education clause and would not include fundamental-right or judicial-enforcement language.²⁶⁰ When presented with a citizen-initiated amendment and a

²⁵² *Id.* at 5.

²⁵³ *Id.*

²⁵⁴ MASS. CONST. art. XLVIII, pt. III, § 2.

²⁵⁵ *Id.* art. XLVIII, pt. IV, § 3.

²⁵⁶ Memorandum from Steven H. Steinglass, Senior Policy Advisor, Ohio Constitution Modernization Comm'n, on Indirect Constitutional Initiative to Members of the Constitutional Revision Comm. 3 (Dec. 10, 2013), <http://www.ocmc.ohio.gov/ocmc/uploads/Constitutional%20Revision%20and%20Updating%20Committee/2014-10-09%20%20CRU%20Meeting%20Materials.pdf> [<http://perma.cc/LDG3-RVUD>].

²⁵⁷ MISS. CONST. art. 15, § 273(6)–(7).

²⁵⁸ Steinglass, *supra* note 256, at 1, 3; *see also* Dinan, *State Constitutional Developments in 2014*, *supra* note 21, at 6–7.

²⁵⁹ Dinan, *State Constitutional Developments in 2014*, *supra* note 21, at 6–7.

²⁶⁰ *Id.*

legislature-approved alternative, Mississippi voters are asked whether they want to make any change to the current constitutional language and, if so, which of the two proposals they prefer.²⁶¹

In view of the infrequent use of indirect constitutional initiative processes in the twenty-first century, any assessment of the consequences has to be based less on the empirical record than on tendencies of legislative behavior.²⁶² Such an analysis would likely lead to a mixed assessment in terms of whether the indirect constitutional initiative would preserve the benefits of the process while reducing the harms. On one hand, and focusing first on the Massachusetts approach, permitting the legislature to block initiated amendments would be potentially meritorious in preventing passage of harmful measures that violate minority rights, given the capability of representative institutions to gain distance from popular passions. On the other hand, the Massachusetts approach might be just as likely to sacrifice some potential benefits of the constitutional initiative, by enabling the legislature to block amendments designed to overcome legislators' self-interest. As for the Mississippi approach and the ability of legislatures to craft alternative amendments, this would not seem to put at risk any of the potential benefits of the constitutional initiative, in the sense of overcoming resistant or unresponsive legislatures, and it might, under some circumstances, minimize the potential harms, in the sense of allowing legislators to craft alternative measures imposing fewer constraints on policy flexibility.

E. Limiting the Subject Matter of Constitutional Initiatives

Of all the options for designing constitutional initiative processes to secure the benefits and reduce the harms, none is perhaps better tailored to this goal than specifying the subjects that can be addressed through these processes. This approach, which has been encouraged by some commentators,²⁶³ has been followed by several constitutional-initiative states,²⁶⁴ whether in the form of provisions specifying permissible topics or prohibitions on other topics.²⁶⁵

²⁶¹ See MISS. CONST. art. 15, § 273(8).

²⁶² There is much more experience with indirect *statutory* initiative processes, available in seven states. For a list of states, see NCSL I&R TASK FORCE, *supra* note 223, at 8 tbl.1.

²⁶³ See generally GERALD BENJAMIN, *Constitutional Amendment and Revision*, in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM 177 (G. Alan Tarr & Robert F. Williams eds., 2006).

²⁶⁴ See *id.* at 189.

²⁶⁵ MATSUSAKA, *supra* note 14, at 153–55 tbl.A1.2.

Illinois follows the first approach, in specifying that citizen-initiated amendments “shall be limited to structural and procedural subjects contained in Article IV,” the legislative article of the state constitution.²⁶⁶ The logic of confining constitutional initiatives in this fashion is apparent. As Gerald Benjamin has written, “this is the area of the constitution in which the legislature is likely to be most self-interested, and therefore least likely to initiate change.”²⁶⁷

Other states have pursued the second type of approach and marked certain subjects as off limits for constitutional initiatives.²⁶⁸ In part out of a concern that the process could be used to impose undue constraints on budget policy, two states prevent initiatives that require specific appropriations of funds.²⁶⁹ Massachusetts prohibits initiatives making “a specific appropriation of money from the treasury of the commonwealth.”²⁷⁰ Missouri does not allow the initiative process to “be used for the appropriation of money other than of new revenues created and provided for thereby.”²⁷¹ Meanwhile, after passage of a 2004 amendment,²⁷² Arizona initiatives providing for appropriation of money for any purpose must “provide for an increased source of revenues sufficient to cover the immediate and future costs of the proposal.”²⁷³

Out of a concern that initiatives could violate individual rights, two states prevent initiatives dealing with bills of rights in general or certain rights in particular. Among other limitations, Mississippi disallows use of the initiative process “[f]or the proposal, modification, or repeal of any portion of the Bill of Rights” of its constitution.²⁷⁴ Massachusetts lists a number of items off limits for initiatives, including proposals

inconsistent with any one of the following rights of the individual, as at present declared in the declaration of rights . . . [t]he right to receive compensation for private property appropriated to public use;

²⁶⁶ ILL. CONST. art. XIV, § 3.

²⁶⁷ BENJAMIN, *supra* note 263, at 186.

²⁶⁸ *Id.* at 189–90.

²⁶⁹ North Dakota voters in 2014 rejected a legislature-referred amendment that would have prohibited initiated amendments making an appropriation of funds or requiring the legislature to make such an appropriation. *North Dakota Referral and Initiative Reform Amendment, Measure 4 (2014)*, BALLOTPEdia, http://ballotpedia.org/North_Dakota_Referral_and_Initiative_Reform_Amendment,_Measure_4_%282014%29 [<http://perma.cc/2VPD-QVFU>].

²⁷⁰ MASS. CONST. art. XLVIII, § 2.

²⁷¹ MO. CONST. art. III, § 51.

²⁷² *Arizona Initiative and Referendum Measures, Proposition 101 (2004)*, BALLOTPEdia, http://ballotpedia.org/Arizona_Initiative_and_Referendum_Measures,_Proposition_101_%282004%29 [<http://perma.cc/3M2Z-VC8K>].

²⁷³ ARIZ. CONST. art. IX, § 23.

²⁷⁴ MISS. CONST. art. XV, § 273(5)(a).

the right of access to and protection in courts of justice; the right of trial by jury; protection from unreasonable search, unreasonable bail and the law martial; freedom of the press; freedom of speech; freedom of elections; and the right of peaceable assembly.²⁷⁵

Massachusetts also bars use of the initiative process for any "measure that relates to religion, religious practices or religious institutions; or to the appointment, qualification, tenure, removal, recall or compensation of judges; or to the reversal of a judicial decision; or to the powers, creation or abolition of courts."²⁷⁶

The advantage of specifying permissible and impermissible subjects is that this allows designers of constitutional initiative processes to tailor them so they can secure the main benefits and minimize the harms associated with their use. To the extent that the primary benefit of constitutional initiatives is overcoming self-interested legislators, the process can be designed to allow citizen-initiated amendments on these matters. In so far as the primary concern associated with constitutional initiatives is that they impose undue constraints on policy flexibility, and fiscal policy in particular, the process can be structured to bar measures of this sort. If a secondary concern about constitutional initiatives is that they are used to violate individual rights, this can be addressed by prohibiting measures dealing with this topic.

F. Encouraging Use of Statutory Initiative Processes

Although the preceding reform options all deal with the design of constitutional initiative processes, scholars and public officials are aware that the design of *statutory* initiative processes has implications for constitutional initiative usage. In particular, some scholars and commentators have argued that groups advocating policy changes will sometimes face a choice between proceeding through the statutory initiative process or through the constitutional initiative process. In a number of instances, this choice will not present itself. Changes in government structure, for example, will often require passage of a constitutional amendment. But in other cases, advocates of policy changes will face such a choice of whether to frame their proposal on statutory or constitutional grounds and are likely to be influenced by the availability of a statutory initiative process, the relative ease of proceeding through the statutory or constitutional initiative process, and the degree to which initiated statutes are protected from legislative interference

²⁷⁵ MASS. CONST. art. XLVIII, § 2.

²⁷⁶ *Id.* art. XLVIII, § 1.

post-enactment. On the view that advocates might in some cases choose to propose statutory initiatives when such a process is available,²⁷⁷ and more accessible than the constitutional initiative process,²⁷⁸ and there is some assurance that initiated states are protected from legislative interference,²⁷⁹ analysts have recommended that states with the constitutional initiative process consider various design options regarding the *statutory* initiative process.²⁸⁰

In considering the current relationship between constitutional and statutory initiative processes, it should first be noted that all but three states providing for a constitutional initiative process also allow statutory initiatives. Florida (1968), Illinois (1970), and Mississippi (1992) adopted the constitutional initiative process long after most other constitutional-initiative states did so in the Progressive Era,²⁸¹ and without also adopting the statutory initiative process.

In the fifteen states providing for both processes, all but one state makes it easier to enact statutory initiatives than constitutional initiatives. This distinction is generally achieved in the ballot qualification stage, by requiring more signatures for initiated amendments than for initiated statutes.²⁸² Nevada, one of only two states maintaining the same signature-gathering requirements, achieves this distinction at the ratification stage, by requiring constitutional initiatives, but not statutory initiatives, to secure voter approval in consecutive elections.²⁸³ Colorado is the only state that does not make a distinction between initiated amendments and initiated statutes in ballot-qualification or voter-ratification rules.²⁸⁴

As for the rules regarding post-enactment modification of initiated statutes in the fifteen states with constitutional and statutory initiative processes, seven states provide some level of protection against legislative amendment or repeal.²⁸⁵ This is

²⁷⁷ See NCSL I&R TASK FORCE, *supra* note 223, at 10 (advancing this recommendation).

²⁷⁸ See Krislov & Katz, *supra* note 15, at 337 (advancing this recommendation).

²⁷⁹ COLO. CONSTITUTION PANEL, *supra* note 216, at 11.

²⁸⁰ See NCSL I&R TASK FORCE, *supra* note 223, at 10–11.

²⁸¹ Montana and South Dakota are the only other two states to adopt the constitutional initiative process after the Progressive Era. Both states initially provided only for statutory initiatives and then added the constitutional initiative process in 1972. See JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* 313 n.132 (2006); MATSUSAKA, *supra* note 14, at 149–52 tbl.A1.1.

²⁸² See MATSUSAKA, *supra* note 14, at 149–52 tbl.A1.1.

²⁸³ *Id.* at 151 tbl.A1.1.

²⁸⁴ *Id.* at 149. Colorado voters in 2008 rejected a legislature-referred amendment that would, among other things, have introduced such a distinction. *Colorado Citizen-Initiated State Laws, Referendum O (2008)*, *supra* note 230.

²⁸⁵ NOYES, *supra* note 2, at 337 tbl.8.3.

generally achieved by requiring any efforts by the legislature to amend or repeal an initiated statute to secure a legislative supermajority vote, whether a two-thirds vote, as in Arkansas, Nebraska, and North Dakota (during the first seven years post-enactment), or a three-fourths vote, as in Michigan or Arizona.²⁸⁶ Some of these states go even further. Arizona does not allow the Legislature to repeal initiated statutes; it may only amend them in keeping with the purpose of the statute. Nevada does not allow legislative repeal or amendment for three years after enactment. California imposes a permanent bar against the Legislature repealing or amending an initiated statute unless expressly permitted by the ballot initiative.²⁸⁷ These various protections for statutory initiatives were in some cases adopted in recent decades. For instance, some of the heightened protections for Arizona statutory initiatives were adopted via a 1998 constitutional initiative.²⁸⁸ And the Nebraska rule was adopted in 2004, through a constitutional initiative backed by pro-gaming groups who were also supporting several other pro-gaming statutory initiatives on the ballot the same year.²⁸⁹

In assessing whether proposals to increase the accessibility and attractiveness of the *statutory* initiative process would secure the benefits and minimize the harms associated with the *constitutional* initiative process, the main consideration is whether they would reduce the prospects of enacting any harmful constitutional initiatives by diverting advocates to the statutory initiative process. That is, any effort to add a statutory initiative process in constitutional-initiative states currently lacking such a process, or reduce the signature requirements for qualifying statutory initiatives for the ballot, or prevent legislative impairment of initiated statutes is unlikely to sacrifice any of the benefits associated with the constitutional initiative process; but some of these proposals (especially ensuring the availability of a statutory initiative process and protecting initiated statutes) could, under some circumstances, reduce potential harms (especially regarding constraints on policy flexibility).

To consider the effects of specific reforms, it is reasonable to conclude that the absence of a statutory initiative process in Florida could have accounted for the sizable number of

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Arizona Voter Protection, Proposition 105 (1998)*, BALLOTPEDIA, http://ballotpedia.org/Arizona_Voter_Protection_Proposition_105_%281998%29 [http://perma.cc/X7VR-LGFJ].

²⁸⁹ *Nebraska Legislative Majority to Modify Initiatives, Measure 418 (2004)*, BALLOTPEDIA, http://ballotpedia.org/Nebraska_2/3_Legislative_Majority_to_Modify_Initiatives_Amendment_Measure_418_%282004%29 [http://perma.cc/46LF-TFGV].

constitutional initiatives enacted between 2000 and 2014, more than any other state. To the extent that some constitutional initiatives in Florida were motivated by a desire to adopt policies blocked by the Legislature, this energy might have been diverted to the statutory initiative process if such a process were available, and with the effect of reducing constraints on policy flexibility. Additionally, to the extent that some constitutional initiatives adopted in other states were motivated by a desire to entrench policies against legislative interference, this energy might have been diverted to the statutory initiative process if initiated statutes were afforded a greater degree of protection from legislative changes. Here as well, diverting this energy to the statutory initiative process and requiring a supermajority legislative vote for changes to initiated statutes would impose somewhat fewer constraints on policy flexibility than enshrining these policy changes in constitutional provisions.

CONCLUSION

State constitutional initiative processes are a vehicle for enacting a number of consequential measures and have attracted significant attention from scholars and public officials concerned with whether these processes are beneficial or harmful for governance and with how they might be designed to contribute to effective governance. My purpose has been to compile a data-set of twenty-first century constitutional initiatives in order to permit an empirical assessment of various claims about the effects of these processes and thereby contribute to a better understanding of the consequences of leading reform proposals.

Several lessons can be drawn from the eighty-three citizen-initiated amendments enacted from 2000–2014. On one hand, constitutional initiatives have regularly enacted structural reforms resisted by self-interested legislators and occasionally adopted policies in the face of unresponsive legislatures. At the same time, constitutional initiatives have imposed undue constraints on policy flexibility in notable ways and led to passage of measures opposed by minority groups on an occasional basis.

In considering how constitutional initiative processes can be designed to promote the potential benefits and minimize the possible harms associated with use of these processes, it becomes possible to identify several proposals that are better tailored than others to achieving this goal. On one hand, making it more difficult to place constitutional initiatives on the ballot or for voters to approve them would be as likely to sacrifice the benefits as to reduce the harms of the process. On the other hand,

requiring voter approval of citizen-initiated amendments in consecutive elections, permitting legislatures to craft alternatives to citizen-initiated amendments, and instituting and providing greater protection for statutory initiatives are all capable, in certain circumstances, of reducing the harms while preserving the main benefits of the process. Finally, the design option that is best tailored to achieving this goal is limiting the subject matter of constitutional initiatives in various ways.

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New Directions for Empirical Studies of Direct Democracy

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INTRODUCTION

The American Constitution and the documents and arguments that spurred it reveal a very real fear about the potential of unfettered public opinion to do harm to society. The central purpose of checks and balances and the separation of powers is to disallow any single individual or like-minded faction from governing. Despite this fact, direct democracy has played a much larger role in American society than the framers of the Constitution envisioned. Today, the ballot initiative, a process which allows citizens of states to write and propose laws, is available in twenty-four of the fifty states. In forty-nine of fifty states, voter approval is needed to change state constitutions.¹ Additionally, about three-quarters of localities allow some form of direct democracy to make decisions. It has been about one hundred years since this experiment began. Today, it is quite common to ask the public to express an opinion on many of the most pressing public concerns.

To be sure, direct democracy does not occur in a vacuum. Instead, courts are often called upon to exercise judicial review of the decisions made at the ballot box. However, the imprint of policy changes left by the ballot initiative is indelible. The ballot initiative has been used to define marriage, alter affirmative action, define citizenship, change the processes of voting and redistricting, impose term limits, and affect every part of a state and local budget from school funding to tax rates/bases to a variety of bonded projects, to name just a few examples. It has also been used to consider questions of personhood for unborn fetuses, to decide on siting of casinos, to ban certain types of traps used in hunting, and to determine the legitimacy of cockfighting.² Citizens of places with a vibrant initiative culture

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¹ Frederick J. Boehmke & Joshua J. Dyck, *Initiative and Referendum*, in *GUIDE TO STATE POLITICS AND POLICY* 75, 75 (Richard G. Niemi & Joshua J. Dyck eds., 2014).

² A complete catalog of this history of ballot initiatives, popular referendums and

also experience a completely different kind of campaign. Well-funded initiative campaigns can capture the majority of airwaves in the time leading up to a statewide election; ballots can run pages deep.³

As ballot initiatives increased in usage in the late 1970s, so too did scholarship examining the impacts of ballot initiatives. The debate over direct democracy reforms in the United States was filled with a great deal of hyperbole, as reform movements are prone to attract.⁴ Proponents of the initiative and referendum, the Progressives, decried that direct democracy was the cure to the ills of corruption in government, the vehicle for engaging and informing disinterested and disaffected voters, and the pathway to a better relationship between the public and government.⁵ Opponents of initiatives worried of the potential for popular voting to quickly degenerate into mob rule, deny rights to minorities, expropriate property, create irresponsible budgets, and be overrun by outside money.⁶ After decades of empirical research that evaluated many of the claims of initiative proponents and opponents, it is safe to say that neither the greatest hopes of progressive reformers, nor the worst fears of its critics have entirely materialized.

The purpose of this Article is to serve as a guidepost to those interested in empirically-based scholarship about direct democracy, citizens, policy, and the legal process. What have we learned about how the initiative impacts policy? How does direct democracy find its way into the American form of government? What impact does the initiative have on citizens, interest groups, and political parties? And finally, does the possibility of direct democracy increase threats to minorities? Underlying all of this is a general theme that, in addition to testing empirical claims, studies should do more to theorize thoughtfully about the impact

legislatively referred statutes, and constitutional amendments is available through the National Conference of State Legislatures. *Ballot Measures Database*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/ballot-measures-data-base.aspx> (last visited Aug. 28, 2015).

³ In Colorado in 2008, for instance, there were eighteen measures placed on the ballot. Colorado voters also faced a great deal of attention from the presidential campaign, along with competitive Senate and gubernatorial races. *Colorado 2008 Ballot Measures*, BALLOTPEdia, http://ballotpedia.org/Colorado_2008_ballot_measures [http://perma.cc/2EZ6-T4DB].

⁴ See ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 10 (1956).

⁵ See generally THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL (1989); DANIEL A. SMITH & CAROLINE J. TOLBERT, EDUCATED BY INITIATIVE: THE EFFECTS OF DIRECT DEMOCRACY ON CITIZENS AND POLITICAL ORGANIZATIONS IN THE AMERICAN STATES (2004).

⁶ See DAVID S. BRODER, DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY (2000); RICHARD J. ELLIS, DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA (2002).

of the initiative process and rely less and less on political movements to provide testable hypotheses. Political movements, no matter how successful or well intentioned, are political movements; their arguments are, at least in part, designed to persuade. Well-crafted social science theories, on the contrary, are meant to serve as plausible stories of the way the world works, so that one can examine the observable implications of them and test them. It turns out that the Progressives were wrong about a lot of things, and we narrow our focus by examining direct democracy through a lens that focuses on a checklist of what they were right and wrong about. Because of that, research on the secondary effects of direct democracy remains ripe for theoretical and empirical development. I turn first to the primary or policy effects of direct democracy, as a means to motivate the import of the study of secondary effects.

I. POLICY IMPACTS

A general question, which has widely interested scholars, theorists, and citizens alike, is *how does having the ballot initiative change which policies states adopt?* In reviewing some of the existing literature and developing this idea, I will focus on two broad themes:

- A. Ballot-initiative entrepreneurs are not representative of the mass public, nor are they particularly representative of elected officials. The ballot initiative process incentivizes extremism.
- B. The courts and bureaucrats play a central role in limiting policy impacts via the ballot initiative; initiatives get “stolen” all the time and, therefore, measuring policy impacts can be challenging.⁷

A. Extremism

In an argument best articulated by Besley and Coate, in theory, the ballot initiative process has the ability to unbundle policy issues.⁸ Unbundling means that each citizen gets to express his or her policy positions on individual issues, rather than having to choose a candidate who best approximates his or her views on a basket of issues. Choosing a candidate is a rather poor metric of preference realization for an individual. A voter

⁷ See generally Elisabeth R. Gerber et al., *Stealing the Initiative: How State Government Responds to Direct Democracy* (2001).

⁸ Timothy Besley & Stephen Coate, *Issue Unbundling Via Citizens' Initiatives* (Nat'l Bureau of Econ. Research, Working Paper No. 8036, 2000), <http://www.nber.org/papers/w8036.pdf> [<http://perma.cc/FB3M-SC2Q>].

may privilege a single issue position or a small set of issue positions that a candidate holds over others in making a vote determination. Or, more likely, individual voters may have given scant thought to the policy issues at stake and simply vote with the party with which they identify.⁹ Regardless, the opportunity to select issues one at a time *should*, in theory, moderate politics away from the political poles if voters are more moderate than legislators. Legislators have grown increasingly polarized in the last few decades,¹⁰ and citizens are not nearly as policy-oriented, ideological, or extreme as legislators.¹¹ An example of this process at work might be that a tax-cut conservative would be free to vote in favor of same-sex marriage, or an ardently devout Catholic may be able to support social welfare programs from the left and also support restricting access to abortions.

The problem with unbundling is that it misses key components of the way that ballot initiative campaigns actually unfold and how voters think. First, it does not consider the incentive structure of who initiative entrepreneurs are and why they would choose the ballot initiative as a means to attempt to pursue their political goals. Second, it misunderstands a simple reality of public opinion in America—while there are many policies on which people will express opinions, the depth of opinion holding on policy issues is thin and fragile. Furthermore, precisely as people become more informed, they become more ideologically consistent; those with enough knowledge and awareness have a tendency to support policy sets that cohere with those of their party.

1. Initiative Entrepreneurs

Pushing a policy agenda by direct democracy is time consuming and costly. The incidence of grassroots-based initiatives that are not backed by a wealthy individual or established interest groups is quite low, if not nonexistent.¹² Scholars have used the “setter model” to explain how initiatives come into existence—if we assume that agenda setters (or those who would propose initiatives) are rational and self-interested,

⁹ See generally ANGUS CAMPBELL ET AL., *THE AMERICAN VOTER* (1960); DONALD P. GREEN ET AL., *PARTISAN HEARTS AND MINDS: POLITICAL PARTIES AND THE SOCIAL IDENTITIES OF VOTERS* (2002).

¹⁰ See, e.g., NOLAN MCCARTY ET AL., *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* (2006); see also Boris Shor & Nolan McCarty, *The Ideological Mapping of American Legislatures*, 105 AM. POL. SCI. REV. 530, 546 (2011).

¹¹ See KAREN M. KAUFMANN ET AL., *UNCONVENTIONAL WISDOM: FACTS AND MYTHS ABOUT AMERICAN VOTERS* 49 (2008). See generally MORRIS P. FIORINA ET AL., *CULTURE WAR?: THE MYTH OF A POLARIZED AMERICA* (2005).

¹² See ELLIS, *supra* note 6, at 54–55.

then they will propose measures that are as close to their own personal preferences, but which are still likely to be approved by the median voter.¹³ To be sure, historically, 60% of initiatives fail, which indicates that initiative entrepreneurs frequently have imperfect information about the preferences of the median voter, mistakenly think their argument will carry the day with voters, or simply do not care if the measure will meet defeat because the campaign and issues are “too important” not to be heard.

One of the most important recent insights from this literature came from Boehmke and Patty, who argue that initiative entrepreneurs are likely to be those without means to seek agenda status through conventional means.¹⁴ This occurs because the time, money, and low probability of success of the initiative process are generally going to be attractive to individuals with a lot of money who do not feel represented through the traditional legislative process. This will promote extremism. Indeed it is not all that difficult to identify some of the most famous initiative entrepreneurs. For example, Howard Jarvis famously spearheaded the Proposition 13 campaign in California that is said to have started the tax revolt.¹⁵ Tim Eyman is a household name to Washington state voters; he has written more than twenty conservative initiatives in the Evergreen State since the late 1990s.¹⁶

There are additional groups that may be slightly different than the lone, extreme ideological-initiative entrepreneur. Members of a consistent minority party in a one-sided state legislature may turn to the initiative process to try to push policies which are never put on the agenda by the majority party.¹⁷ Additionally, in times of divided government, direct democracy has been used as a means to attempt to break legislative impasse. This was the strategy employed by Governor

¹³ Arthur Lupia, *Busy Voters, Agenda Control, and the Power of Information*, 86 AM. POL. SCI. REV. 390, 391 (1992); Thomas Romer & Howard Rosenthal, *Political Resource Allocation, Controlled Agendas, and the Status Quo*, 33 PUB. CHOICE 27, 29 (1978).

¹⁴ Frederick J. Boehmke & John W. Patty, *The Selection of Policies for Ballot Initiatives: What Voters can Learn from Legislative Inaction*, 19 ECON. & POL. 97, 121 (2007).

¹⁵ *Howard Jarvis Taxpayers Ass'n*, BALLOTPEdia, http://ballotpedia.org/Howard_Jarvis_Taxpayers_Association [<http://perma.cc/M3K7-RW8S>].

¹⁶ *Tim Eyman*, BALLOTPEdia, http://ballotpedia.org/Tim_Eyman [<http://perma.cc/9P5L-NE5L>].

¹⁷ For instance, while in control of the New York State Senate, in efforts spearheaded by Senator Joseph Robach (R-56th District), Republicans have continually attempted to pass direct democracy reforms in the belief that implementation of these institutions would lead to a citizen tax revolt in the Empire State. The Assembly, which has long been controlled by Democrats, has repeatedly stalled these efforts at reform. *New York Initiative and Referendum Amendment (2013)*, BALLOTPEdia, [http://ballotpedia.org/New_York_Initiative_and_Referendum_Amendment_\(2013\)](http://ballotpedia.org/New_York_Initiative_and_Referendum_Amendment_(2013)) [<http://perma.cc/H2G7-KXCV>].

Arnold Schwarzenegger in 2005. After becoming Governor of California in 2003, via an unprecedented recall election, he turned to the ballot initiative in an attempt to pass his reform agenda when he reached an impasse with the legislature; his proposals included curbing teacher tenure, restricting the use of union dues for political purposes, limiting state spending, and reforming redistricting. His policy agenda was resoundingly rejected by voters.¹⁸

Schwarzenegger's experience is a cautionary tale. In lieu of working to forge a compromise, he was rebuffed and forced to abandon all the key elements of his campaign. Because of the dichotomous nature of the choice (i.e., "yes" or "no"), there are a number of incentives for policy entrepreneurs to *not* participate in the ballot initiative process where a lot is risked on a single up or down vote from the public, whose preferences and propensity to participate may be unknown. On the other hand, those who are likely to risk their time, money, and energy on qualifying an initiative and contesting a campaign are those who care deeply about the issue at hand, have been stymied by the legislative process, and have resources to both qualify and campaign in favor of an initiative. The incentives for individuals to attempt to push for policies from the extremities of the political process are stronger than the incentives for individuals to push from the center. Despite the seeming logic of unbundling leading to a moderated set of policy issues, this conventional wisdom about which measures will qualify for the ballot fails to consider how initiatives are written and who has the incentive to write them.

There are two caveats to this perspective that should be noted. First, there have been successful reform movements in states which, at face value, can be argued are not particularly ideological—two obvious instances of this are term limits and redistricting. However, even non-partisan measures can be viewed through partisan lenses. On redistricting measures, for instance, partisan support for a measure is typically much stronger among citizens who are members of the out-party in government.¹⁹ Likewise, support for direct democracy institutions tends to be strongest among members of the out-party. Therefore, even baseline institutional support cannot escape the long and

¹⁸ Joshua J. Dyck & Mark Baldassare, *Process Preferences and Voting in Direct Democratic Elections*, 73 PUB. OPINION Q. 551, 554 (2009) [hereinafter Dyck & Baldassare, *Process Preferences*]; Joshua J. Dyck & Mark Baldassare, *The Limits of Citizen Support for Direct Democracy*, 4 CAL. J. POL. & POL'Y 1, 2 (2012).

¹⁹ Caroline J. Tolbert et al., *Strategic Voting and Legislative Redistricting Reform: District and Statewide Representational Winners and Losers*, 62 POL. RES. Q. 92, 95 (2009).

influential arm of political parties in American society. Even if we grant that these reform movements are an exception to the rule, the typical initiative entrepreneur is not promoting center-driven reform proposals, due to the general lack incentives to do so.

2. Ideology and Political Awareness

The picture of all of this becomes clearer when considering the present state of research on public opinion, ideology, and awareness. Put quite simply, the average American is not particularly ideological, at least in the sense that they do not hold consistently extreme views associated with an underlying belief structure like American “conservatism” or “liberalism.” Curiously, despite the fact that belief systems are poorly defined, about nine in ten Americans have an attachment to a political party that predicts fairly consistent voting patterns.²⁰ The question that remains is what happens in a campaign environment where apoplectic initiative entrepreneurs present their cases to a largely apathetic public. The result should not be surprising, but looks nothing like the policy unbundling perspective.

First and foremost, initiative elections are surprisingly bound by cue-taking²¹ and party-line voting, despite the absence of explicit partisan cues on the ballot and the opportunity for an individual to engage in nuanced preference revelation.²² This means that, absent fully developed policy preferences on a host of issues, voters go to the polls and look for cues from trusted elites and parties—they find these cues and they vote in a manner consistent with them.

Some scholars have suggested that ballot initiatives are truly to be understood as checks on the government where the public rights the ship.²³ Matsusaka, for instance, argues that the ballot initiative acted as a corrective to over-taxing and state spending; he notes that, at other points in time, the initiative has been used to fuel the expansion of government.²⁴

20 See BRUCE E. KEITH ET AL., *THE MYTH OF THE INDEPENDENT VOTER* (1992).

21 Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63, 65 (1994).

22 Regina P. Branton, *Examining Individual-Level Voting Behavior on State Ballot Propositions*, 56 POL. RES. Q. 367, 367 (2003); Joshua J. Dyck, *Political Distrust and Conservative Voting in Ballot Measure Elections*, 63 POL. RES. Q. 612, 613 (2010).

23 See generally ELISABETH R. GERBER, *THE POPULIST PARADOX: INTEREST GROUP INFLUENCE AND THE PROMISE OF DIRECT LEGISLATION* (1999).

24 JOHN G. MATSUSAKA, *FOR THE MANY OR THE FEW: THE INITIATIVE, PUBLIC POLICY, AND AMERICAN DEMOCRACY* 79 (2004).

Yet, there are obvious problems with the proposition that initiatives are “for the many” and not “for the few,” or that we should consider the outcome of all public votes as a pure reflection of voter preferences. First, the outcome of any initiative election is a function of what the electorate looks like relative to the voting-eligible population. There are numerous exogenous factors that influence turnout, including national conditions, the presence of competitive elections, the presence of a presidential election, and resources spent by campaigns and parties on voter mobilization and targeting.²⁵ As the distribution of the public changes, results can change. Second, voting decisions are often determined by the level of trust and confidence that individuals express in government; repeated use of the initiative can lead to a deterioration of trust, leading to outcomes consistent with Matsusaka’s data that are not driven by ideological thinking.²⁶ Finally, this perspective negates the importance and influence of initiative entrepreneurs in the election process. In other words, the “for the many” perspective negates the influence of lopsided money and spending in elections. It argues that *the side that was preferred won*, when it is quite clear that influence has been monetized in modern elections and the *side that won may have had more resources*.²⁷ When we marry this finding with the reality that voters are not particularly well informed, it becomes a difficult argument to substantiate.

B. Initiative Theft

With the decisions in three cases, two in 2013 and one in 2015, the U.S. Supreme Court fully legalized same-sex marriage, and, in so doing, invalidated laws passed in forty states, thirty-three of which were approved by a majority of voters.²⁸ While much is being written and talked about surrounding the legal reasoning and shifting public opinion, less considered is the Court’s role in acting as arbiter of the initiative process.

²⁵ James E. Campbell, *The Revised Theory of Surge and Decline*, 31 AM. J. POL. SCI. 965, 977 (1987).

²⁶ Dyck, *supra* note 22, at 621.

²⁷ There is a conflict regarding the role of money in elections. Surveys demonstrate that voters are likely to view money as a problem in initiative elections. Dyck & Baldassare, *Process Preferences*, *supra* note 18, at 562. Yet, others have argued that money is more effective at generating “no” votes rather than “yes” votes. See generally Elisabeth R. Gerber, *Legislative Response to the Threat of Popular Initiatives*, 40 AM. J. POL. SCI. 99 (1996). This means that money helps to preserve the status quo over time in initiative elections, which has been described as a good thing. MATSUSAKA, *supra* note 24, at 12.

²⁸ A good timeline on same-sex marriage and marriage bans is available from Pew Research Center. *Same-Sex Marriage, State by State*, PEW RES. CTR., <http://www.pewforum.org/2015/06/26/same-sex-marriage-state-by-state> (last updated June 26, 2015).

Interestingly, in the same Term, the same majority that declared a constitutional right to marry in *Obergefell v. Hodges*²⁹ also declared a constitutional equivalence of the ballot initiative with legislative measures in *Arizona State Legislature v. Arizona Independent Redistricting Commission*.³⁰ The core of this decision was about whether the definition of “legislature” in the Elections Clause of the U.S. Constitution puts ballot initiatives on equal footing with legislative decisions. The clause states, “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations”³¹ The Court held, with Justice Ginsberg writing for a five-to-four majority, that ballot initiative decisions are equivalent to those made by the legislature, if the state constitution so defines it (as does the Arizona Constitution). Therefore, the U.S. Constitution does not narrowly confine decisions about the conduct of elections to state legislatures; in states with the ballot initiative, elections can be regulated and administered by non-legislative entities, like the Arizona Independent Redistricting Commission.

There is a certain irony that in a single Term, the Supreme Court affirmed the value and import of the ballot initiative process, while at the same time curbing one of the most widespread and successful cross-state initiative campaigns in the last hundred years. This contradiction highlights the interesting role that ballot initiatives play in the constitutional structure of American government. On the one hand, ballot initiatives can change laws; however, the laws that are changed are often controversial and *may* be subject to judicial review.

The Guarantee Clause of the Constitution *guarantees* that each state will have a “republican” form of government.³² In practice this means that every state was required to adopt a reasonable facsimile of the national model with three branches of government that includes an independent executive, legislature, and judiciary, and is marked by checks and balances, separation of powers, and judicial review. The twenty-four states that use the ballot initiative decided to place an extra-legislative institution into this framework; Garrett appropriately terms this “hybrid democracy.”³³ But, direct democracy institutions do not

29 *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

30 *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015).

31 U.S. CONST. art. I, § 4, cl. 1.

32 *Id.* art. IV, § 4.

33 See generally Elizabeth Garrett, *Hybrid Democracy*, 73 GEO. WASH. L. REV. 1096 (2005).

negate or replace the other institutions; they are meant as an additional check. Likewise, direct legislation is also checked.

Initiative entrepreneurs are, therefore, presented with an additional challenge. They must not only qualify measures for the ballot by collecting petition signatures and run a campaign to get a majority of voters to approve of their initiative, they must also make sure that passed laws are not rolled back through legislative means, poorly implemented by the bureaucracy, or ruled constitutionally invalid by the courts. Gerber and others present a model and several examples of when and how initiatives are “stolen,” arguing that indeed it is very difficult to take a proposed measure from inception to agenda status to passage to implementation.³⁴ The frequency with which passed initiatives are stolen could be better understood—although several important contributions have been made in this regard in recent years.³⁵

The import of this fact for scholars—that many initiatives are not implemented—is that studying the primary effects of the ballot initiative can be problematic. What are the net policy impacts of thirty-three passed measures between 1998 and 2014 with regards to same-sex marriage when, in the end, the courts invalidated all of these measures? The fact is that the policy implications are difficult to detect. This highlights the need to properly understand the effect this type of electoral environment has on citizens. Is democracy harmed or hurt by frequent popular votes, even when the most controversial ones are litigated? What is the impact on society of subjecting our most controversial debates to a series of elections in the states? The answer that I offer is that scholarship can connect the primary (policy) effects of direct democracy to the secondary (spillover) effects of direct democracy.

II. SECONDARY EFFECTS

The Progressives promised renewed politics via the ballot initiative. To be sure, the central goal of Progressive reformers was not to invigorate democracy by promoting meaningful participation, *per se*, but rather to check the power of parties, and, particularly, of the stranglehold the railroad “robber barons”

³⁴ See generally GERBER ET AL., *supra* note 7.

³⁵ See generally KENNETH P. MILLER, *DIRECT DEMOCRACY AND THE COURTS* (2009) (discussing the courts’ ability to strike down an approved initiative and the intensifying conflict between direct democracy and judicial review); HENRY S. NOYES, *THE LAW OF DIRECT DEMOCRACY* 333–83 (2014) (describing the obstacles that may prevent the implementation of an approved ballot initiative).

had put on the political process.³⁶ The cocktail of reforms that they proposed included both pro-democracy reforms like the ballot initiative and referendum, but also less democratic reforms that included insulating bureaucrats from the democratic process by replacing a spoils system with a meritocracy.³⁷ Despite the fact that democracy in and of itself was not a primary ethos of Progressives, it did not stop the claims that ballot initiatives would enhance the democratic experience for voters.³⁸ That is, in addition to any alteration of politics, the process of voting on individual laws, it was thought, would engage voters to become more involved (and hence more informed, interested, efficacious, and positively oriented towards government and politics).³⁹

Two trends in academia helped to renew interest in studying the plausible spillover effects of voter initiatives. The first was a renewed interest on the part of scholars in studying civic engagement due in large part to well-cited studies on declining social capital in the United States and elsewhere.⁴⁰ The second was that direct democracy fit squarely into an emerging participatory democracy framework, which argued that expanding opportunities for individuals to participate enriches democratic citizens' views of their own capabilities and of democracy more generally.⁴¹

In what follows, I develop an argument in an attempt to recast the debate on the secondary effects of the ballot initiative and encourage new scholarship. While there has been a great deal of empirical research that has focused on secondary effects, much of it has produced null or contradictory findings. This problem, I contend, stems from the fact that theory has leaned too heavily on the participatory democracy framework which has been discredited by the empirics. In large part, this means that scholarship has focused on civic engagement as the dependent variable in studies of secondary effects. The failure of

³⁶ See HOWARD ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES* 253–96 (2010).

³⁷ See AMY BRIDGES, *MORNING GLORIES: MUNICIPAL REFORM IN THE SOUTHWEST* 3–30 (1997).

³⁸ Wisconsin, for instance, seen as the center of the Progressive movement, rejected adoption of the Initiative and Referendum, with 64% of the voting public opposing a proposed constitutional amendment in 1914. Univ. of S. Cal., *Wisconsin, INITIATIVE & REFERENDUM INST.*, <http://www.iandrinstitute.org/Wisconsin.htm> [<http://perma.cc/MH7M-529P>]. For a good review of Wisconsin progressivism, see *A Third of a Century of La Folletteism*, MILWAUKEE J. (Oct. 21, 1930), <http://www.wisconsinhistory.org/Content.aspx?dsNav=N:4294963828-4294963788&dsRecordDetails=R:BA14305> (emphasizing “that government can correct ills”).

³⁹ See SMITH & TOLBERT, *supra* note 5, at 85–86.

⁴⁰ See Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, J. DEMOCRACY, Jan. 1995, at 65, 67–68.

⁴¹ The strongest articulation of this argument is BENJAMIN BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* 117–20 (1984).

participatory theory, as it regards the ballot initiative, however, does not mean that studies of secondary effects should be abandoned. Rather, given that the primary effects of the ballot initiative are so frequently litigated or face difficulty in implementation, the secondary effects of the ballot initiative should be of particular interest and are of central importance. They are just not well understood theoretically or empirically.

A. Participatory Democratic Theory: Null and Negative Results

The basic idea behind participatory democratic theory is that voters will feel more connected to, and invested in, their democracy if they are given more responsibility. Thinking of the earlier discussion of policy unbundling, the theory is that, given the opportunity to express nuance in political opinions, citizens will develop them. There is a sort of backward induction of participatory democratic theory which suggests that people are apathetic and uninvolved because their participation lacks depth and meaning. In this sense, voter apathy occurs when the political process fails to actively engage citizens; if that were to change, citizens would actually *want* to be more involved.⁴² Many articles have been written looking at the plausible secondary effects of direct democracy and, by and large, most of them make overtures to some form of participatory theory and/or the Progressive movement. Bowler and Donovan write:

Institutions of direct democracy thus provide a political context where many citizens must consider and decide upon public issues and policies — at least relatively more so than in a standard electoral context. Where initiatives appear frequently on state ballots, it is more likely that active campaigns or media coverage might focus public attention on a major public issue or set of issues. In such an environment, citizens may feel more competent about their political skills as they receive more policy-relevant information than would have otherwise been the case . . .⁴³

Going even further, Frey claims that: “[A] successful way to maintain and enhance civic virtue are [sic] extensive constitutional rights of direct citizen participation via popular referenda and initiatives.”⁴⁴

A great deal of recent research, however, poses problems for the participatory democracy framework. First, the literature on voting and mobilization has argued that the marginal decision to

⁴² See *id.* at 117–18; SMITH & TOLBERT, *supra* note 5, at 50–52.

⁴³ Shaun Bowler & Todd Donovan, *Democracy, Institutions and Attitudes About Citizen Influence on Government*, 32 BRIT. J. POL. SCI. 371, 377 (2002).

⁴⁴ Bruno S. Frey, *A Constitution for Knaves Crowds Out Civic Virtues*, 107 ECON. J. 1043, 1052 (1997).

turn out is strongly influenced by effective campaigns that personalize messages to individuals and provide encouragement, resources,⁴⁵ and pressure⁴⁶ to turn out. Empirically, the link between the elements of participatory democratic capital—trust and efficacy—and turnout is not especially strong.⁴⁷

Perhaps even more problematic to the line of research which places secondary effects in the framework of *how to solve declining civic engagement* is the fact that the much-lamented declining civic engagement in America (the motivation of many studies) is an apparition.⁴⁸ That is, when turnout rates are adjusted to account for prison populations and non-citizens, voter turnout is not in decline, but rather, has actually increased markedly in the last twenty years.⁴⁹ The 2004, 2008, and 2012 presidential elections saw turnout levels rivaling turnout in the 1950s, and this is after an infusion of voters into the electorate with the Voting Rights Act of 1965 and the extension of the franchise to eighteen to twenty-one year olds in the Twenty-sixth Amendment to the Constitution. One might argue that some of the turnout increases experienced in the last three presidential election cycles are due to increased usage of the ballot initiative. However, ballot initiatives were most prominent in the 1990s and have tailed off in the last few cycles.⁵⁰

Finally, research by John Hibbing and Elizabeth Theiss-Morse on citizen attitudes towards democracy throws a dose of cold water onto participatory democratic theory by offering a comprehensive theory and empirical evidence of citizens' conflicted attitudes towards greater engagement.⁵¹ They argue that individuals view greater involvement in society as a necessary evil, precipitated by untrustworthy politicians. Greater opportunities for participation are viewed in a negative light, as

⁴⁵ See SIDNEY VERBA ET AL., *VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS* 16 (1995).

⁴⁶ See Alan S. Gerber & Donald P. Green, *The Effects of Canvassing, Telephone Calls, and Direct Mail on Voter Turnout: A Field Experiment*, 94 AM. POL. SCI. REV. 653, 653–55 (2000); Alan S. Gerber et al., *Social Pressure and Voter Turnout: Evidence from a Large-Scale Field Experiment*, 102 AM. POL. SCI. REV. 33, 33–34 (2008).

⁴⁷ See STEVEN ROSENSTONE & JOHN MARK HANSEN, *MOBILIZATION, PARTICIPATION, AND DEMOCRACY IN AMERICA* 143–45, 150 (1993).

⁴⁸ See Robert D. Putnam, *Tuning in, Tuning out: The Strange Disappearance of Social Capital in America*, 28 POL. SCI. & POL. 664, 664–66 (1995).

⁴⁹ See Michael P. McDonald & Samuel L. Popkin, *The Myth of the Vanishing Voter*, 95 AM. POL. SCI. REV. 963, 963–66 (2001). For updated data, see Michael McDonald, U.S. ELECTION PROJECT, <http://www.electproject.org/> [<https://perma.cc/QPS2-2YTL>] (follow “Voter Turnout Data” hyperlink; then follow “spreadsheet for this entire series” hyperlink).

⁵⁰ See Joshua J. Dyck & Edward L. Lascher Jr., *Direct Democracy and Political Efficacy Reconsidered*, 31 POL. BEHAV. 401, 408–09 (2009).

⁵¹ See JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *STEALTH DEMOCRACY: AMERICANS' BELIEFS ABOUT HOW GOVERNMENT SHOULD WORK* *passim* (2003).

if citizens resent that they have to do the job of legislators. In an ideal world, citizens would prefer to be governed by benevolent public officials. One of the most critical parts of this perspective is that dishonesty, inaction, and corruption are viewed as the primary evils of politics; the public is willing to tolerate an ideologue who they view as genuine, over greater opportunities to participate.

The expectations of participatory theory, then, face some significant challenges from what is known about voter turnout and voter psychology. Participation is not in decline and so the engagement potential of direct democracy may be addressing a social ill that is not real. Changes in turnout are not really driven by trust and efficacy, but rather, by express mobilization efforts that usually originate with political parties or ideological groups. And, finally, citizens are not especially enthusiastic to take on a larger role in decision making.

Participatory theory fares no better in much of the empirical work on the spillover effects of direct democracy. The most consistent finding appears to be that ballot initiatives increase voter turnout. The effect is argued as a general effect: more initiatives lead to greater turnout, with the effects appearing strongest in midterm elections when there are more peripheral voters to mobilize.⁵² More recently, however, this effect has been further clarified; ballot initiatives tend to increase turnout only when the election is competitive⁵³ and when the issue on the ballot tends to deal with moral issues.⁵⁴ Taxation issues, by contrast, according to Biggers, do not lead to turnout gains.⁵⁵ In addition, mobilized voters in ballot initiative elections tend to be partisans.⁵⁶ None of this suggests that ballot measures are engaging citizens by giving them a greater stake in their democracy or that they are being mobilized because of a greater ability to express nuanced preferences. Instead, this is a story of money, parties, and groups working to activate and mobilize citizens.

⁵² See SMITH & TOLBERT, *supra* note 5, at 68–70; Caroline J. Tolbert & Daniel A. Smith, *The Educative Effects of Ballot Initiatives on Voter Turnout*, 33 AM. POL. RES. 283, 284–85 (2005).

⁵³ See Matt Childers & Mike Binder, *Engaged by Initiative? How the Use of Citizen Initiatives Increases Voter Turnout*, 65 POL. RES. Q. 93, 93–94 (2012).

⁵⁴ See DANIEL R. BIGGERS, *MORALITY AT THE BALLOT: DIRECT DEMOCRACY AND POLITICAL ENGAGEMENT IN THE UNITED STATES* 47–49 (2014).

⁵⁵ *Id.* at 70.

⁵⁶ See generally Joshua J. Dyck & Nicholas R. Seabrook, *Mobilized by Direct Democracy: Short-Term Versus Long-Term Effects and the Geography of Turnout in Ballot Measure Elections*, 91 SOC. SCI. Q. 188 (2010).

Studies of the effect of direct democracy on political awareness/knowledge, external efficacy, internal efficacy, and interest do not portray the same level of consistency in results. Take, for instance, the sum of the claims made by Smith and Tolbert in their well-cited contemporary classic work, *Educated by Initiative*.⁵⁷ In their book, several of the findings do not support the strong conclusion that ballot initiatives enhance civic engagement. For instance, the effect of ballot initiatives on political interest falls just short of general academic standards for statistical significance in 1996, 1998, and 2000; on political knowledge/awareness, it is only significant in one of three years of data;⁵⁸ and on political discussion, it is only significant in one of three years of data. The strongest finding appears to be on political efficacy. However, this finding has since been disputed in two replications.⁵⁹

B. Which Secondary Effects?

To briefly review, I have argued thus far that it is difficult to study the primary/policy effects of the ballot initiative because many of the most controversial approved initiatives are litigated, invalidated, defunded, or face implementation challenges. This should put a spotlight on how the initiative affects the democratic process and citizens. In other words, secondary effects *should* be the focus of our studies of the ballot initiative because checks still exist and are frequently used to challenge policy outcomes. But the present state of empirical research shows that the participatory democracy/civic engagement frame by which most of these studies are motivated has relatively weak empirical support.

Given that ballot measures are a tool used by out-parties and interest groups who lack internal strategies to pass legislation through legislatures, having these measures in the political environment clearly changes the state of democratic discourse. More issues are put on the agenda, and on average, even the most controversial policy items that might not gain agenda status through regular legislative means are given a potential forum for open debate and a vote once they qualify for the ballot. What I present here falls short of a comprehensive theory.

⁵⁷ SMITH & TOLBERT, *supra* note 5, at 61–66.

⁵⁸ See Nicholas R. Seabrook et al., *Do Ballot Initiatives Increase General Political Knowledge?*, 37 POL. BEHAV. 279, 285 (2014) (disputing the claim that ballot initiatives appeared to increase political knowledge in 1996, but not in 1998 or 2000).

⁵⁹ Dyck & Lascher, *supra* note 50, at 408–09. See generally Daniel Schlozman & Ian Yohai, *How Initiatives Don't Always Make Citizens: Ballot Initiatives in the American States, 1978–2004*, 30 POL. BEHAV. 469 (2008).

Instead, I seek to highlight research that takes seriously the idea that ballot initiatives affect citizens, without relying on participatory democratic theory.

1. Trust

Elsewhere, I have written about the ballot initiative and its effect on both political⁶⁰ and social⁶¹ trust. Political trust is the trust that we espouse in government; whether or not we trust those who run the government to do what is right or, at the very least, what they think is right. The opposite of *doing what is right*, when it comes to governmental trust, is *acting in a way that primarily benefits the self*. This characterization of government is widely held and trust-in-government rates tend to be quite low.⁶² Another kind of trust is social trust, which is the trust that we espouse in others, especially strangers.⁶³

Frequent ballot initiatives tend to erode political trust by doing exactly the opposite of what some participatory democrats have argued. In this case, empowerment by giving citizens more decision-making authority on policy only serves to remind people that government is not to be trusted. The ballot initiative can be interpreted as a usurpation of legislative authority; the institution, by its existence, actually then promotes distrust in government. And, indeed, citizens in states with the ballot initiative tend to be less trusting of government.⁶⁴

On social trust, the story is more nuanced. While ballot initiatives appear to have a modest positive impact on social trust, the effect is mitigated by higher levels of diversity. Diversity has been a central concern for the social capital framework; Putnam even discusses the difference between bridging and bonding capital.⁶⁵ This, according to Hero, is centrally important, as individuals tend to be more trusting when they are insulated in homogenous communities—which calls into question the value of a dependent variable which is activated by increasing segregation.⁶⁶ In the above-cited study,

⁶⁰ See generally Joshua J. Dyck, *Initiated Distrust: Direct Democracy and Trust in Government*, 37 AM. POL. RES. 539 (2009).

⁶¹ See generally Joshua J. Dyck, *Racial Threat, Direct Legislation, and Social Trust: Taking Tyranny Seriously in Studies of the Ballot Initiative*, 65 POL. RES. Q. 615 (2012).

⁶² See *Public Trust in Government: 1958–2014*, PEW RES. CTR. (Nov. 13, 2014), <http://www.people-press.org/2014/11/13/public-trust-in-government/> [<http://perma.cc/U7WG-7EAM>] (tracking declining public trust in government over time).

⁶³ See ERIC M. USLANER, *THE MORAL FOUNDATIONS OF TRUST* 2–5, 14–17 (2002).

⁶⁴ Dyck, *supra* note 60, at 540.

⁶⁵ Putnam, *supra* note 48, at 665.

⁶⁶ See RODNEY E. HERO, *RACIAL AND DIVERSITY AND SOCIAL CAPITAL: EQUALITY AND COMMUNITY IN AMERICA* (2007).

the model showed that the most trusting state was Oregon, a state with low levels of racial and ethnic diversity and frequent ballot initiatives, while the least trusting state was California, a state with high levels of racial and ethnic diversity, but equally high levels of ballot initiative usage.

What, therefore, can be said about the impact of ballot initiatives on trust? On the issue of political trust, more direct democracy seems to breed more distrust. On social trust, the story is less clear. While the example of Oregon may go some lengths to explain why some have argued that direct democracy as practiced in Switzerland at the cantonal level creates happier citizens,⁶⁷ the California case highlights the difficulties of using a blunt instrument like the ballot initiative to craft policy in a society of varied interests and perspectives. The latter concern should be of particular interest to scholars interested in the secondary effects of direct democracy. Is majority tyranny really a secondary effect?

2. Majority Tyranny

The U.S. Constitution was crafted with concerns about majority tyranny as a central issue. Therefore, any institution that would purport to directly involve citizens in decision-making must grapple with the question that simple majorities might make simple decisions that violate the civil rights or liberties of the individual.⁶⁸ Much of the literature on majority tyranny has become intertwined in the morass of trying to parse out which measures constitute majority tyranny, a decidedly amorphous concept. One particularly important argument in this thread of research argues that by most metrics, most people are on the winning side of ballot initiative campaigns, most of the time. Therefore, we cannot really classify any specific sub-group as consistent direct democracy losers, which suggests limited, if any, instances of tyranny of the majority.⁶⁹ There are two problems with this approach, one more obvious than the other. The first is a problem with defining the minimum sufficient conditions for majority tyranny. We can imagine a situation where every year there are ninety-nine initiatives which have nothing to do with minority rights and one that specifically attacks a minority group. Even if every one of those minority tyranny initiatives passed, we might say that *only 1% of direct democracy measures*

⁶⁷ See BRUNO S. FREY & ALOIS STUTZER, HAPPINESS & ECONOMICS: HOW THE ECONOMY AND INSTITUTIONS AFFECT HUMAN WELL-BEING 11, 142–43 (2002).

⁶⁸ This was a central concern in THE FEDERALIST NO. 10 (James Madison).

⁶⁹ See Zoltan L. Hajnal et al., *Minorities and Direct Legislation: Evidence from California Ballot Proposition Elections*, 64 J. POL. 154, 156 (2002).

potentially violate the rights of minority groups. But, how many does it take to cross the threshold? And, what are the issues that constitute majority tyranny in a polarized political climate where both proponents and opponents of a measure—for instance, to end affirmative action in government hiring and education—portray their supporters as victims?

The second problem goes back, once again, to the issue of court challenges and judicial review. More than thirty statewide votes in a row, between 1998 and 2006, went against same-sex marriage. The Supreme Court's recent validation of full marriage rights for same-sex couples again poses a difficult question: did the politics during this time period represent direct democracy majority tyranny or is same-sex marriage a case study of how, when ballot measures overstep their bounds, courts can correct them?

The difficulty in answering this latter question is why thinking about majority tyranny concerns as secondary effects can be useful. Because whether or not controversial measures pass at the ballot box, or are invalidated by courts, they put arguments and campaigns about these issues onto the public policy agenda and into the media. To think that there will not be effects on citizens and democratic discourse from having the public subject to caustic debates about same-sex marriage over the last twenty years is naïve. As I noted above, one impact appears to be an erosion of social trust when states are sufficiently diverse. There are likely others.

CONCLUSION

One of the cornerstones of American democracy is federalism, a constitutional feature that grants states the authority to experiment with their own laws and their own political institutions. While federalism has a number of drawbacks, one of the most practical benefits is that when states engage in experimentation, scholars are afforded the opportunity to examine differences between states that adopt innovations and those that do not. Direct democracy reforms, which have arisen in about half of the states, are now over one hundred years old. This experiment has allowed scholars and concerned citizens to learn much about what types of policies pass via direct democracy and how this affects the average citizen's experience with democracy.

A great deal of research has attempted to understand these concepts, but a new generation of scholarship is still needed. I have argued that direct democracy scholarship has, by and large, failed to take seriously concerns that the ballot initiative, in

particular, will act to tyrannize and target minority groups at the ballot box.⁷⁰ In particular, scholarship has not sufficiently advanced to address the psychological harm and harm to social capital that has occurred because of efforts that targeted minority groups, but were later ruled unconstitutional. In large part, this failure also exists because scholars of spillover or secondary effects of the ballot initiative have nearly exclusively used participatory democratic theory as the framework to study the secondary effects of the ballot initiative. When we unburden ourselves from using the hypotheses generated by Progressive thinkers and participatory democrats, we may uncover a great deal more about the impact that voting on ballot measures has on its citizens.

⁷⁰ For a notable exception, see DANIEL C. LEWIS, *DIRECT DEMOCRACY AND MINORITY RIGHTS: A CRITICAL ASSESSMENT OF THE TYRANNY OF THE MAJORITY IN THE AMERICAN STATES* (2013).

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Augmenting Transparency in the Ballot Initiative Process: Impacts of the 2014 Reforms on the 2016 Election Cycle

Chris Chambers Goodman*

INTRODUCTION

The State of California recently revised its Elections Code to update and improve the ballot initiative process.¹ This Article discusses the recent changes in the laws governing initiative measures in California under the Ballot Initiative Transparency Act of 2014 (“BITA”). It begins with a description of the reforms and the purposes behind them. The next section analyzes the benefits to direct democracy, including enhancing voter information and providing a more detailed record of voter intent, as well as the potential burdens, such as a chilling effect on initiative proponents, and diminishing voter interest. The final section discusses the impact that BITA is having thus far on ballot initiatives in the current election cycle.

I. THE BALLOT INITIATIVE TRANSPARENCY ACT OF 2014

In a 2010 article, this author analyzed the factors that impact voter support for initiative measures, and suggested reforms.² Some of the issues included the impact of financial contributions on initiative campaigns,³ the voters’ lack of substantial knowledge about initiative measures, their confusion with ballot language, the impact of competing ballot measures,⁴

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1 S.B. 1253, 2013–2014 Leg., Reg. Sess. (Cal. 2014).

2 See Chris Chambers Goodman, *(M)Admen: Using Persuasion Factors in Media Advertisements to Prevent Tyranny of the Majority on Ballot Propositions*, 32 HASTINGS COMM. & ENT. L.J. 247, 247–302 (2010) (examining the use of direct democracy to restrict the rights of political minorities, enumerating the persuasion factors in media designed to sway voting on bills, and proposing possible reforms to the direct democracy process to prevent political majorities from restricting the rights of political minorities).

3 *Id.* at 255.

4 *Id.* at 256–59.

the volume of initiatives placed on ballots,⁵ and the influence of special interests.⁶ The proposed reforms suggested in the article included simplifying the language in both the ballot initiatives and the legislative analyst summaries;⁷ providing additional information on supporters and opponents, including their financial contributions;⁸ and providing advanced judicial review of proposed ballot measures.⁹ Introduced as Senate Bill 1253, BITA addressed a number of the suggestions made in the 2010 article in the areas of voter clarity, voter information, initiative donor transparency, and modifications to initiative language.¹⁰ BITA was signed into law in the fall of 2014, updating the more than century-old initiative process.¹¹ The legislative intent behind BITA is expressly stated as: (1) “[p]roviding voters with more useful information so that they are able to make an informed decision about an initiative measure”; (2) “[p]roviding a voter-friendly explanation of each initiative measure”; and (3) “[i]dentifying and correcting flaws in an initiative measure before it appears on the ballot.”¹² These purposes are illustrated in several major modifications to existing law, described below.

A. Providing More Useful Voter Information

1. Plain Language

BITA requires the Secretary of State to give one-stop access to information about the initiative measures through an Internet website.¹³ The website must include a plain language, short, and understandable summary of the measure, including the identities of individuals and groups supporting and opposing it.¹⁴

⁵ *Id.* at 259–60.

⁶ *Id.* at 262.

⁷ *Id.* at 299–300.

⁸ *Id.* at 296–97.

⁹ *Id.* at 301.

¹⁰ S.B. 1253, 2013–2014 Leg., Reg. Sess. (Cal. 2014).

¹¹ *Id.* § 2(b) (Cal. 2014) (“It is the intent of the Legislature in enacting this act to update the initiative process, which is more than 100 years old”); *Governor Brown Signs Ballot Reform Measure*, OFF. OF GOVERNOR EDMUND G. BROWN JR., (Sept. 27, 2014), <https://www.gov.ca.gov/news.php?id=18735> [<https://perma.cc/25N6-P7CQ>].

¹² S.B. 1253, 2013–2014 Leg., Reg. Sess. § 2(b)(1)–(3) (Cal. 2014).

¹³ Compare CAL. ELEC. CODE § 9082.7(b)(1) (West 2015) (requiring the California Secretary of State to post a summary of the ballot measures), with CAL. ELEC. CODE § 9082.7 (West 2013), amended by S.B. 1253, 2013–2014 Leg., Reg. Sess. § 14 (Cal. 2014) (requiring the Secretary of State to disseminate the complete state election ballot over the Internet without any specific provisions for additional content).

¹⁴ Compare CAL. ELEC. CODE § 9082.7(b)(2) (West 2015) (requiring summary of ballot measures to include the total amount of reported contribution in support and in opposition of the measure), with CAL. ELEC. CODE § 9082.7 (West 2013), amended by S.B. 1253, 2013–2014 Leg., Reg. Sess. § 14 (Cal. 2014) (requiring the Secretary of State to disseminate the complete state election ballot over the Internet without any specific provisions for additional content).

To enhance voter friendliness, the legislation requires the Attorney General to consider public comments when drafting the ballot titles and summaries.¹⁵

2. Enhancing Financial Disclosures

Financial information is another important component of voter information, and the website must give voters easy access to information about how an initiative measure is being financed, including the total amount of contributions¹⁶ and the top ten contributors on each side.¹⁷ To further enhance voter accessibility, the website must consolidate the summary and financial information in an easy to find, and easy to understand, manner.¹⁸

3. Earlier Public Hearings

Requiring public hearings on the subject of the proposed ballot initiative earlier in the process is another significant modification. Prior law required the Secretary of State to give the initiative information to the Legislature *after* the measure was certified, while the new legislation requires this transmission to occur *prior to* certification.¹⁹ The Legislature must assign the measure to the appropriate committees and hold joint public hearings on the subject of the ballot measure.²⁰ BITA requires this transmission from the Secretary of State much earlier in the process, namely after the initiative proponents have certified that they have collected 25% of the number of signatures needed

¹⁵ Compare CAL. ELEC. CODE § 9051(d) (West 2015) (requiring the Attorney General to “invite and consider public comment in preparing each ballot title and summary”), with CAL. ELEC. CODE § 9051 (West 2013), *amended by* S.B. 1253, 2013–2014 Leg., Reg. Sess. § 13(d) (Cal. 2014) (having no requirement for public comments to be considered).

¹⁶ CAL. ELEC. CODE § 9082.7(b)(2)(A) (West 2015).

¹⁷ *Id.* § 9082.7(b)(3).

¹⁸ Compare *id.* § 9082.7(b)(1)–(4) (requiring summary of ballot measures to include the total amount of reported contribution in support and in opposition of the measure and a list of committees that support or oppose the measure along with links to access information about those committees), with CAL. ELEC. CODE § 9082.7 (West 2013), *amended by* S.B. 1253, 2013–2014 Leg., Reg. Sess. § 14 (Cal. 2014) (requiring the Secretary of State to disseminate the complete state election ballot over the Internet without any specific provisions for financing for support or opposition of ballot initiatives).

¹⁹ In section 9034 of the current California Elections Code, the proponents of a measure are required to submit a signed certification to the Secretary of State immediately upon collecting 25% of the required signatures. The Secretary of State must then send the initiative measures, title, and summary to the Legislature. The Legislature must hold committee hearings no later than 131 days before the election in which the measure will be voted on. The pre-BITA section 9034 required the Secretary of State to submit a ballot measure to the Legislature after it was certified. The Legislature was required to then hold joint public hearings no later than thirty days prior to the date of the election. Compare CAL. ELEC. CODE § 9034 (West 2015), with CAL. ELEC. CODE § 9034 (West 2013), *amended by* S.B. 1253, 2013–2014 Leg., Reg. Sess. § 12 (Cal. 2014).

²⁰ CAL. ELEC. CODE § 9034 (West 2015).

to qualify the initiative for the ballot.²¹ In addition, the Legislature is now required to hold its joint public hearing on the subject no later than 131 days prior to the date of election,²² which is the same date by which the Secretary of State must issue the certificate of qualification for the ballot.²³ Thus, the hearings will be completed on or before the date of certification (which is more than four months prior to the election).

B. Addressing Initiative Flaws Prior to the Election

In an effort to correct initiative flaws prior to the printing of the ballots, BITA implements a new thirty-day public review process with an opportunity for proponents to incorporate the public comments and amend the initiative language during this period.²⁴ The Attorney General's office initiates the public comment period when it posts the text of the initiative on the Attorney General's website, with a link for the public to provide comments about the proposed initiative.²⁵ Comments are sent to the initiative proponents periodically, who then have an opportunity to amend the language, unless the initiative does not effect a substantive change in the law.²⁶ The required public comment period is designed to help satisfy the third purpose: to "address perceived errors in the drafting of, or perceived unintended consequence of, the proposed initiative measure."²⁷

To make the most effective use of any public comments received, proponents are permitted to amend the language of the ballot initiative during the comment period.²⁸ Once the comment

²¹ *Id.* § 9034(a); *see also* S.B. 1253, 2013–2014 Leg., Reg. Sess. § 12 (Cal. 2014).

²² *Compare* CAL. ELEC. CODE § 9034 (West 2015) (requiring the Legislature to hold committee hearings no later than 131 days before the election where the measure will be voted on), *with* CAL. ELEC. CODE § 9034 (West 2013), *amended by* S.B. 1253, 2014 Leg., Reg. Sess. § 12 (Cal. 2014) (requiring the Legislature to hold joint public hearings no later than thirty days prior to the date of the election).

²³ CAL. ELEC. CODE § 9034(b) (West 2015); *Id.* § 9033(b)(2).

²⁴ *Compare* CAL. ELEC. CODE § 9002(a)–(b) (West 2015) (providing for a thirty day public review period), *with* CAL. ELEC. CODE § 9002 (West 2013), *amended by* S.B. 1253, 2014 Leg., Reg. Sess. § 5 (Cal. 2014) (having no provision for public review); *see also* CAL. ELEC. CODE § 9004 (West 2013), *amended by* S.B. 1253, 2013–2014 Leg., Reg. Sess. § 6 (Cal. 2014) (requiring only for the Attorney General to give the proposed initiative a title and summary and submit it to the Secretary of State within fifteen days of receiving either: the final version of the initiative, any amendments on the initiative, or a fiscal estimate or opinion).

²⁵ CAL. ELEC. CODE § 9002(a)(1)–(2) (West 2015). We have contacted the Attorney General's office to obtain additional information about how often comments are forwarded, but have not yet received any response.

²⁶ *Id.* § 9002(a)(2)–(b).

²⁷ S.B. 1253, 2013–2014 Leg., Reg. Sess. § 2(b)(3) (Cal. 2014).

²⁸ CAL. ELEC. CODE § 9002(b) (West 2015) (“[P]roponents of the proposed initiative measure may submit amendments to the measure that are reasonably germane to the theme, purpose, or subject of the initiative measure as originally proposed,” and the amendments must also “effect a substantive change in law.”).

period closes, the proponents have five days to consider the rest of the comments received and submit any further amendments.²⁹ The scope of the permissible amendments is limited to those “reasonably germane to the theme, purpose, or subject of the initiative measure as originally proposed.”³⁰ All amendments must be signed and jointly submitted by all proponents of the ballot initiative.³¹ In some cases, for instance when comments reveal that an initiative suffers from fatal constitutional flaws, the most effective use of comments may be to withdraw the initiative before obtaining a Summary and Ballot Title, and before circulating petitions.

BITA also helps to address potential flaws by extending the time for proponents to withdraw the initiative. Former law allowed withdrawal up until the time that the completed signature petitions were filed seeking certification of the measure, but current law extends the withdrawal period to any time before the measure is certified as qualifying for the ballot.³² The earlier legislative hearings may reveal significant flaws in an initiative. The hearings may also prompt the Legislature to enact its own statutes, which may render an initiative moot. Thus, this extended deadline to withdraw serves the public interest in avoiding wasting election official resources, voter time, and space on the ballot.

C. Increasing the Length of Time from Filing to Ballot Certification

BITA also lengthens the period of time between when an initiative measure is submitted and the time it is certified for the ballot in two ways. First, the legislation adds twenty-five days to the final date upon which the fiscal report is due to the Attorney General.³³ The second extension adds thirty days to the time for filing the completed signature petitions with the county elections officials.³⁴

²⁹ *Id.* § 9002(b)(4).

³⁰ *Id.* § 9002(b).

³¹ *Id.* § 9002(b)(1).

³² *Id.* § 9604(b).

³³ Compare CAL. ELEC. CODE § 9005(c) (West 2015) (requiring a fiscal impact report from the Legislative Analyst’s Office to be prepared within fifty days of receipt of the final version of an initiative from the Attorney General, or an opinion on net fiscal impact if the report cannot be made within fifty days), with CAL. ELEC. CODE § 9005(c) (West 2013), amended by S.B. 1253, 2013–2014 Leg., Reg. Sess. § 7 (Cal. 2014) (requiring the fiscal impact report to be made within twenty-five days).

³⁴ CAL. ELEC. CODE § 9014(b) (West 2015) (increasing the signature-gathering deadline from 150 days after the official summary date to 180 days after).

The additional twenty-five days may help alleviate the workload in the offices of the Legislative Analyst and Department of Finance, if they wait until after the expiration of the thirty-day comment period to review the measure. The extra time will give them the opportunity to incorporate those comments or any amendments and responses into their consideration of the fiscal estimate. It also will avoid duplication of work that might result if the measure was amended after the Attorney General had received the fiscal report.

The Attorney General must submit a Summary and Ballot Title to the Secretary of State within fifteen days after receiving the fiscal report.³⁵ Once the Summary and Ballot Title have been sent to the initiative proponents, the signature-gathering phase can begin.³⁶ The additional month for signature gathering may allow proponents to spend more time engaging and educating the public about the initiative.

Once the completed signature petitions are filed, the signature verification process begins.³⁷ When adequate signatures have been verified, the Secretary of State must notify counties and cities that they may suspend verification of signatures once the threshold of qualified voters has been reached.³⁸ If the signature verification threshold has been met, the Secretary of State must issue a certificate of qualification of that ballot measure for the next election no later than 131 days prior to the election.³⁹

From this point forward, until the election, the proponents may not withdraw the initiative from the ballot.⁴⁰ In most cases, more than six months will have elapsed since the petition was first posted on the Attorney General's website for public comment.

While BITA made other substantive changes, those described above are germane to this Article.⁴¹ As more empirical information becomes available, other revisions may become significant as well.

³⁵ *Id.* § 9004(b).

³⁶ *See id.* § 9004(c).

³⁷ *Id.* § 9030(d).

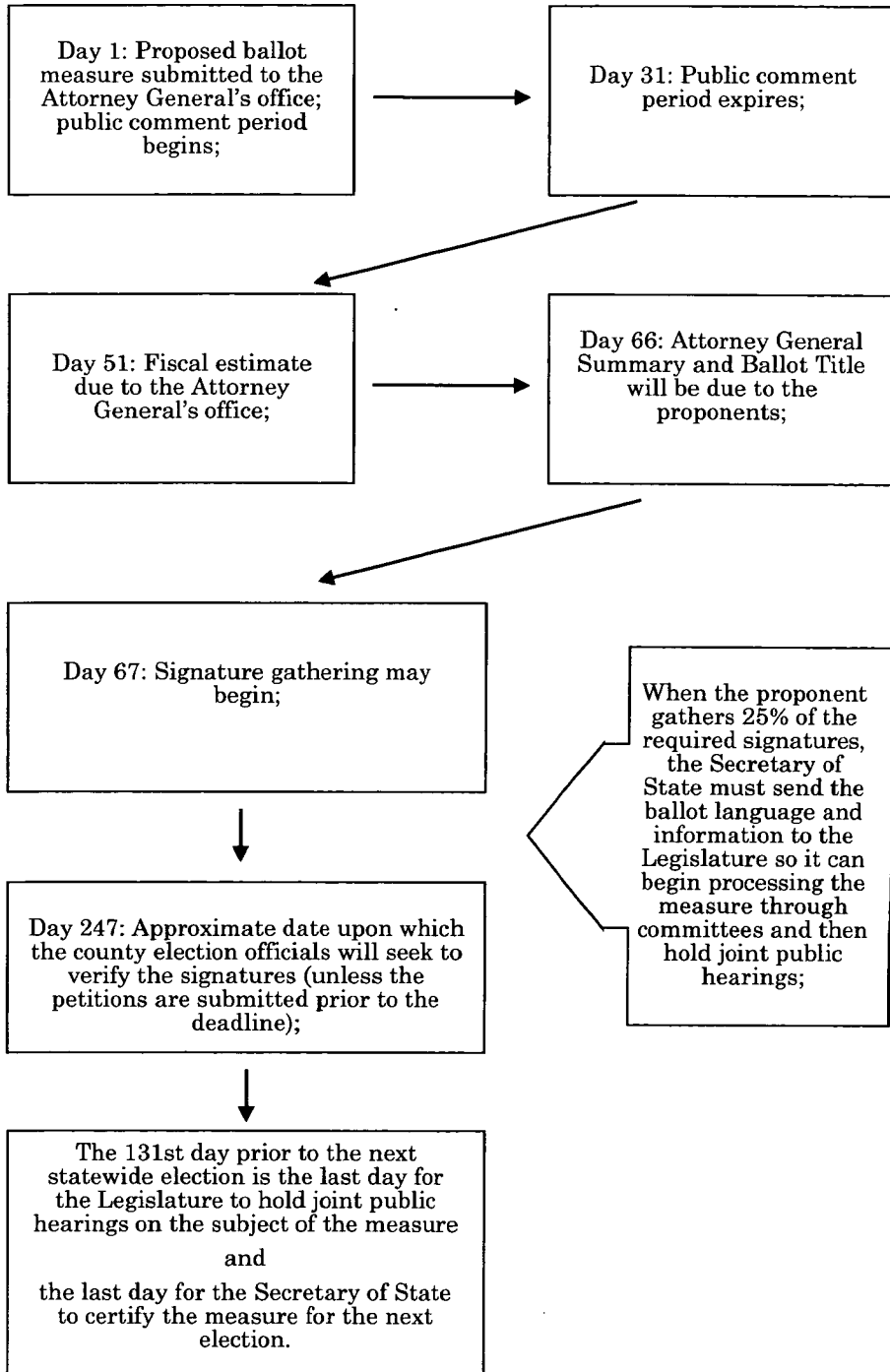
³⁸ *Id.* § 9031(c)(1) (requiring elections officials or voter registrars to prepare reports for the Secretary of State detailing how many signatures are verified by the date of the report); *see also id.* § 9033(a) (requiring the Secretary of State to "notify the proponents and immediately transmit to the elections official or registrar of voters of every county or city and county in the state a notice directing that signature verification be terminated" once the Secretary receives one or more petitions from voter registrars or county elections officials).

³⁹ *Id.* § 9033(b)(2); *see also Qualified Statewide Ballot Measures*, CAL. SECRETARY ST. ALEX PADILLA, <http://www.sos.ca.gov/elections/ballot-measures/qualified-ballot-measures/> [<http://perma.cc/F7K2-ZL4D>].

⁴⁰ CAL. ELEC. CODE § 9604(b) (West 2015).

⁴¹ *See generally* S.B. 1253, 2013–2014 Leg., Reg. Sess. (Cal. 2014).

The following timeline puts this process into context:



II. ANALYZING BITA

A. The Thirty-Day Review

The thirty-day public comment period was designed in large part to provide an opportunity to address perceived errors in the drafting of proposed initiative measures, as well as to flesh out potential unintended consequences of the measures. The public comment period assists not only the proponents, but also the public at large in three ways.

First, the comment period provides a valuable opportunity for feedback so that ambiguous language can be explained or changed. Several initiatives have been amended during the public comment period this election cycle.⁴² Second, consequences and potential effects of the measure can be identified earlier in the process, thus reducing the chance of unintended, unpalatable, or unacceptable consequences. Third, and perhaps most importantly, by providing a record of issues that were raised by opponents, proponents, and the general public, it gives a basis for analyzing and understanding the proponents or voters' intent behind the proposed initiative if it is later challenged, as the example of Proposition 209 shows.⁴³

By permitting proponents to amend the measure after receiving some comments, BITA provides a good opportunity for them to take into account public reactions. However, the comment period may have the effect of chilling some initiative proponents and perhaps even of encouraging them to withdraw their petitions. This thirty-day period also provides a greater opportunity for media exposure about the measure and the time for public sentiment to influence the process. Consider the ballot initiative filed earlier this year entitled "The Sodomite Suppression Act" (hereinafter "SSA").⁴⁴ The Attorney General sought a court order permitting her to decline to prepare a summary of the proposed ballot initiative.⁴⁵ During the initial

⁴² *Initiatives - Active Measures*, ST. CAL. DEPT JUST. OFF. ATT'Y GEN., <https://oag.ca.gov/initiatives/active-measures> [https://perma.cc/K474-HXQC].

⁴³ See Chris Chambers Goodman, *Examining "Voter Intent" Behind Proposition 209: Why Recruitment, Retention and Scholarship Privileges Should be Permissible Under Article I, Section 31*, 27 CHICANO-LATINO L. REV. 59, 63-71 (2008) (ascertaining voter intent on a ballot initiative post-election).

⁴⁴ Sodomite Suppression Act, Initiative 15-0008 (Cal. 2015), http://oag.ca.gov/system/files/initiatives/pdfs/15-0008%20%28Sodomy%29_0.pdf? [http://perma.cc/38RE-5SM3]. See generally Hailey Branson-Potts, *Judge Strikes Down Proposed "Sodomite Suppression Act" Calling for Killing of Gays*, L.A. TIMES (June 23, 2015, 4:21 PM), <http://www.latimes.com/local/lanow/la-me-ln-antigay-sodomite-suppression-act-struck-down-20150623-story.html> [http://perma.cc/CZJ4-QXUJ].

⁴⁵ Complaint for Declaratory Relief at 5, *Harris v. McLaughlin*, No. 34-2015-00176996 (Cal. Super. Ct. June 22, 2015), 2015 WL 3877283. California Attorney General

days of the public comment period, over 125 comments were logged onto the website.⁴⁶ The initiative proponents did not challenge the Attorney General's court filing and the judge ruled that there was no need for her to prepare a Summary and Ballot Title because the proposition was obviously unconstitutional.⁴⁷

Anyone with an email address can input comments on the Attorney General's website;⁴⁸ the comments are then forwarded to the proponent. The comments will be public records available for inspection, upon request, and "shall not be displayed to the public on the Attorney General's Internet Web site during the public review period."⁴⁹ This language does not address whether the written comments would or could be displayed at some other point—such as during the election cycle, once the measure has been placed on the ballot⁵⁰—nor did the legislative hearing address this point.⁵¹

It may turn out that positive comments are made public by the proponents and negative comments are not revealed at all. The proponent has copies of the comments and may have an incentive to make the positive comments public in press releases, blogs, and other media as the initiative goes through the signature-gathering process. There is no requirement that the Attorney General simultaneously transmit the comments to any opponents of the proposed initiative, so the initiative opponents would not have the negative comments to publicize during the signature-gathering phase unless they submitted a Freedom of Information Act ("FOIA") request, which can take some time and requires paying a fee. Opponents and the media may wait until the initiative is certified for the ballot before making the FOIA

Kamala D. Harris filed for declaratory relief with the Sacramento County Superior Court on March 25, 2015, to relieve her of the duty to give the Sodomite Suppression Act an official title and summary, claiming the measure was unconstitutional and against public policy. *Id.*

⁴⁶ Christopher Cadelago, *California Proposal to Legalize Killing Gays Hard to Stop*, SACRAMENTO BEE (Mar. 19, 2015, 3:19 PM), <http://www.sacbee.com/news/politics-government/capitol-alert/article15394181.html> [<https://perma.cc/XML5-H2XT>].

⁴⁷ Default Judgment by Court in Favor of Plaintiff, *Harris v. McLaughlin*, No. 34-2015-00176996 (Cal. Super. Ct. June 22, 2015), 2015 WL 3877283 (calling the measure "patently unconstitutional on its face"); *Sacramento Judge Agrees to Dismiss Kill-Gays Ballot Measure*, ORANGE COUNTY REG. (June 23, 2015, 4:38 PM), <http://www.ocregister.com/articles/judge-668136-attorney-ballot.html> [<https://perma.cc/Z8UR-VJ4D>].

⁴⁸ *Initiatives - Active Measures*, *supra* note 42.

⁴⁹ CAL. ELEC. CODE § 9002(a)(2) (West 2015).

⁵⁰ S.B. 1253, 2014 Leg., Reg. Sess. § 5 (Cal. 2014). The May 27, 2014 amendments to Senate Bill 1253 added language to section 9002(a)(2) of the California Elections Code making all public comments on ballot measures available as public records. *Id.*

⁵¹ *Senate Elections and Constitutional Amendments Committee - Part 1*, Apr. 22, 2014, CAL. ST. SENATE, http://senate.ca.gov/vod/20140422_1330_Elections_DVD1 [<http://perma.cc/8LEP-NF2W>].

request, and if so, the members of the public who are considering signing the petition would not have realistic access to negative comments about the measure. If opponents wait until certification to file a FOIA request, it is not clear whether they would obtain the documents in a timely manner to be usefully disseminated prior to the election.⁵² Efforts to obtain public comments from initiative proponents directly have been largely unsuccessful, with only two responding, one who received no public comments, and another who reports receiving “about ten.”⁵³ Thus, the “public comment” period may not yet be enhancing “transparency” in any significant way.

B. The Amendment Opportunity

Permitting proponents the opportunity to amend at any time during the comment period, and presumably in response to the comments, is a useful modification. Amendments can result in refinements of the proposed initiative that would make it less subject to litigation or confusion later. Only a few amendments have been submitted during the 2016 election cycle, as noted above.⁵⁴ On the other hand, crafty proponents could use the

⁵² STATE OF CAL. OFFICE OF THE ATTORNEY GEN., CALIFORNIA DEPARTMENT OF JUSTICE GUIDELINES FOR ACCESS TO PUBLIC RECORDS (Mar. 2012), http://oag.ca.gov/sites/all/files/agweb/pdfs/consumers/prg_guidelines.pdf [<http://perma.cc/4FL8-AKVB>]. The Attorney General's office designated a Public Records Coordinator to process public records requests. Members of the public who want to inspect or obtain copies of records can submit requests electronically on the Attorney General's website or through the mail. Members of the public may also make requests over the phone; however, records “maintained by the Department [of Justice] for the purpose of immediate public inspection” must be requested in writing. *Id.*

Public records are generally available for inspection any time during the Department of Justice's normal business hours. However, if a request requires “retrieval, review or redaction of records,” then a mutually agreeable time to inspect the records must be set up with the Department of Justice. *Id.*

Requests for copies of records can take up to twenty-four days to process, depending on the records requested and the amount of work needed for the Department of Justice to comply with the request. If immediate disclosure of records is not possible, the Department of Justice will provide an estimated date when the records will be available, which must be “within a reasonable period of time.” Copies of paper records will require the requester to pay a “direct cost of duplication” at ten cents per page. Copies of electronic records or data may require the requester to pay the full costs of duplication, including “the staff person's time in researching, retrieving, redacting and mailing the record.” *Id.*

⁵³ Charlotte Laws, the proponent of Initiative 15-0014, stated that she received around ten comments. Of the ten comments, she received “a handful of positive responses,” while “one or two people . . . said that they did not like my initiative because it infringed on free speech.” In the end, she stated that the comments did not lead to any amendments of Initiative 15-0014. E-mail from Charlotte Laws, proponent of Initiative 15-0014, to Chris Chambers Goodman (Aug. 8, 2015, 10:08 AM) (on file with author). Ben Davis, the proponent of Initiatives 15-0001 and 15-0002, received no comments on either of his propositions. E-mail from Ben Davis, proponent of Initiatives 15-0001 and 15-0002, to Chris Chambers Goodman (Aug. 11, 2015, 1:39 PM) (on file with author).

⁵⁴ See *Initiatives - Active Measures*, *supra* note 42.

comments to amend the proposition in a way that will enhance signature-gathering efforts, without necessarily making the legislation substantively better.

The short deadlines for submitting amendments could present problems where the comments are numerous, detailed, and require more time to assess properly.⁵⁵ The language of the legislation suggests that the preferred method would be to propose a new initiative, with the revised language, at a later period.⁵⁶ At least one proponent has submitted four slightly different versions of the same basic proposition on abortion access.⁵⁷ The second was submitted two days after the first, so it may be that the comments were not even up yet. The third was submitted about four months later, so it may be that it is a reaction to the comment periods on the other two and the proponent missed the five-day deadline. All are still listed as active. Because the proponent has not responded to our requests for information about the comments, it is unclear whether the comments impacted his decision to file modified versions of the same proposition.⁵⁸

C. Extending the Time Period for Signature Gathering

The impact of the extension of time for gathering signatures is not yet known. At this stage in the 2016 election cycle, the public comment period has expired for a number of initiatives.⁵⁹ The first circulation deadline was set for August 17, 2015, with two others before the end of that month.⁶⁰ Approximately five additional initiatives have circulation deadlines in September, one in October, eight in November, ten in December and thus far, six in January of 2016.⁶¹

⁵⁵ CAL. ELEC. CODE § 9002(b)(4) (West 2015) (“An amendment shall not be accepted more than five days after the public review period is concluded.”).

⁵⁶ *Id.* (“However, a proponent shall not be prohibited from proposing a new initiative measure and requesting that a circulating title and summary be prepared for that measure pursuant to Section 9001.”).

⁵⁷ See *infra* Part III.

⁵⁸ See *infra* note 107 and accompanying text. In the first footnote for the abortion access laws below, one sentence was added in the final version of the law. It is possible this was in response to the amendment period passing. However, because the latest version was submitted four months after the previous version (Initiative 15-0025 received a title June 29, 2015 while Initiative 14-0014 received a title on February 24, 2015), we can assume the proponent missed the deadline. The latest version, four, was filed on August 12, 2015, and makes no changes.

⁵⁹ *Initiatives - Active Measures*, *supra* note 42.

⁶⁰ *Initiatives and Referenda Cleared for Circulation*, CAL. SECRETARY ST. ALEX PADILLA, <http://www.sos.ca.gov/elections/ballot-measures/initiative-and-referendum-status/initiatives-referenda-cleared-circulation/> [<http://perma.cc/HF2H-9GMN>].

⁶¹ *Id.*

Until the signature verification process is well underway, there is no evidence about the effect of the additional circulation time.⁶² It may turn out that more signatures are collected, but until they are actually verified, the effect of this additional time will be unclear. It is likely that some people may sign a petition for a particular initiative more than once, forgetting that they had already signed it, resulting in an overabundance of duplicate signatures. Diminishing voter interest is another potential negative consequence of the extended time.

Another impact of the additional time for the gathering of signatures may be that it causes the Legislature to delay assigning the proposition to a committee and conducting any legislative hearings until the signature verification process is well under way. However, waiting could lead to a substantial time crunch because the Legislature can no longer wait until after a measure is certified to hold its hearings.⁶³ Recall that the Attorney General is not required to issue the certificate of qualification until 131 days prior to the election,⁶⁴ which is the same last day for the Senate and Assembly to hold joint public hearings on the subject of the measure.⁶⁵ Therefore, in many cases, the Legislature would have to schedule the hearing prior to certification, unless the Secretary of State certifies the measure earlier than required. While the Secretary of State does not need to wait until the last day (and in fact has already certified several measures from 2014 for the 2016 ballot as of this writing),⁶⁶ BITA gives the Secretary of State an incentive to wait until that last day to allow initiative proponents the maximum amount of time to withdraw their initiatives, which they can now do at any time prior to that certification.

D. The Earlier Pre-election Deadline for Joint Legislative Hearings

The statute requires the public hearings be held at some point prior to that 131st day. One benefit of having this earlier deadline is that the Legislature may choose to act in a way that makes the initiative no longer necessary. While the legislation

⁶² A recent attempt by Washington state to increase the signature-gathering time frame was defeated, and no other states have made such a change in recent years. *Proposed Initiatives to the Legislature 2012*, SECRETARY ST.: ELECTIONS & VOTING, <http://www.sos.wa.gov/elections/initiatives/Initiatives.aspx?y=2012&t=1> [<http://perma.cc/A3LQ-FK5A>].

⁶³ CAL. ELEC. CODE § 9034 (West 2015).

⁶⁴ *Id.* § 9031(c).

⁶⁵ *Id.* § 9034(b).

⁶⁶ *Initiatives - Qualified for Ballot*, ST. CAL. DEP'T JUST. OFF. ATT'Y GEN., <https://oag.ca.gov/initiatives/qualified-for-ballot> [<http://perma.cc/5E7J-V4B4>].

specifically states that it is not to be construed as granting authority for “the Legislature to alter the initiative measure or prevent it from appearing on the ballot,”⁶⁷ as a practical matter, the Legislature can choose to enact a statute that has the same effect as the proposed initiative, thus rendering the initiative unnecessary in terms of modifying existing law. While it is too early to tell how this requirement will play out in this election cycle, the Legislature will be required to hold hearings on anything that reaches the 25% threshold. Several measures for the 2016 election cycle have already reached that threshold, but no legislative hearings have yet been scheduled. Proponents of legislative action may applaud this requirement as an opportunity for a more reasoned debate and a deeper investigation into the policies behind the proposed initiative measure.

It will be interesting to see whether legislative resources become overly burdened by this change in the law. The pre-certification hearing requirement could result in a hijacking of the legislative process in June, the fifth month prior to the election, potentially impacting the timing of the July recess of the Legislature if a significant number of initiatives attain a mere 25% of signatures.⁶⁸ Measures that may not ever obtain the necessary signatures may still be set for public hearings because the 131-day pre-election deadline will have to be met.⁶⁹ For those measures that do meet the signature threshold numerically, the Legislature will have to spend time on committee review and a joint hearing, while awaiting news of whether or not sufficient signatures are verified. In effect, BITA now requires the Legislature to consider issues and propositions in which they may have little or no interest whenever the 25% threshold is met, including those that are patently unconstitutional.

III. APPLYING BITA TO SOME 2015 PROPOSED INITIATIVE MEASURES

There are a significant number of potential initiative measures being presented during the current 2016 election cycle. Taking a sampling of some of these measures, this Article next provides an illustration of the burdens and benefits of BITA in

⁶⁷ CAL. ELEC. CODE § 9034(c) (West 2015).

⁶⁸ The July 2016 recess is currently set for July 17, if the budget is timely approved. *2015 Tentative Legislative Schedule*, OFF. SECRETARY SENATE, (Jan. 26, 2015), http://senate.ca.gov/sites/senate.ca.gov/files/agreedcalendar2015_0.pdf [<http://perma.cc/3V6X-7CDG>]; see also *Legislative Deadlines*, CAL. ST. ASSEMBLY (Oct. 7, 2015), <http://assembly.ca.gov/legislativedeadlines> [<http://perma.cc/W6RS-XMXE>].

⁶⁹ See *infra* Part III.

action by evaluating the little information we have thus far about the impact of the public comments period, the potential impacts of the increased time for signature gathering, and the earlier legislative hearing requirements.

A. The Sodomite Suppression Act and Related Initiatives

The SSA sought to criminalize two actions: touching a person of the same gender “for the purpose of sexual gratification” and distributing so-called “sodomistic propaganda” to people under the age of eighteen.⁷⁰ Sodomistic propaganda is defined in the initiative as “anything aimed at creating an interest in or acceptance of human sexual relations other than between a man and woman.”⁷¹ The measure opens with an appeal to religious morals to suppress a “monstrous evil,” then states the penalties as follows: “the People of California wisely command, in the fear of God, that any person who willingly touches another person of the same gender for purposes of sexual gratification be put to death by bullets to the head or by any other convenient method.”⁷² The penalty for distribution is less harsh: a prison term of up to ten years and fines of up to one million dollars.⁷³

Further, it denies public benefit, public office, and public employment to people who violate the provisions of the initiative.⁷⁴ It gives the Attorney General an affirmative duty to defend the measure, and if the Attorney General does not act in a timely manner, the general public will be deputized to defend the measure.⁷⁵ In addition, it contains a provision that the law cannot be invalidated until heard by a quorum of California Supreme Court justices who are not eligible to be disqualified under the terms of the proposition.⁷⁶

The public comment period as discussed above, produced over 125 comments and significant public backlash. The Attorney General sought court relief to avoid having to give the measure a Summary and Ballot Title. This measure was inactivated after a

⁷⁰ Sodomite Suppression Act, Initiative 15-0008, § 39(b)–(c) (Cal. 2015), http://oag.ca.gov/system/files/initiatives/pdfs/15-0008%20%28Sodomy%29_0.pdf [http://perma.cc/38RE-5SM3].

⁷¹ *Id.* § 39(c).

⁷² *Id.* § 39(b).

⁷³ *Id.* § 39(c).

⁷⁴ *Id.* § 39(d).

⁷⁵ *Id.* § 39(f). This type of clause is a reaction to the Attorney General's refusal to defend Proposition 8 a few years ago, which amended the California Constitution to define marriage as between one man and one woman. Pete Williams, *Prop 8 Backers Refuse to Give Up*, NBC NEWS (July 23, 2013, 10:52 PM), <http://www.nbcnews.com/news/other/prop-8-backers-refuse-give-f6C10727461> [http://perma.cc/PML7-BLGH].

⁷⁶ Sodomite Suppression Act § 39(e).

court ruling,⁷⁷ but not before motivating several other proposed ballot initiatives which remain active and have entered the signature-gathering phase.⁷⁸ If the “Intolerant Jackass Act” and/or the “Shellfish Suppression Act” reach the 25% threshold, then the Legislature will need to schedule joint public hearings on those topics.

The Intolerant Jackass Act (hereinafter “IJA”) was filed in reaction to the SSA, and follows a similar format of declaring an evil and proposing a significant penalty.⁷⁹ It requires attendance in bi-monthly sensitivity training for one year and a donation of \$5000 to a pro-gay or pro-lesbian organization for anyone who brings forward a ballot measure that “suggests the killing of gays and lesbians.”⁸⁰ It also contains a provision that the state has “an affirmative duty to defend and enforce this law as written.”⁸¹ The Legislative Analyst’s report notes a negligible fiscal effect and that some provisions could violate the First Amendment.⁸²

The author of the IJA, Charlotte Laws, told the Los Angeles Times that “[the Intolerant Jackass Act] was done as a statement to make fun of [the proponent of the SSA].”⁸³ Laws received a “handful of positive comments” and a “few negative comments

⁷⁷ Branson-Potts, *supra* note 44. California Attorney General Kamala D. Harris filed for declaratory relief with the Sacramento County Superior Court on March 25, 2015, to relieve her of the duty to give Initiative 15-0008 an official title and summary. Complaint for Declaratory Relief, *Harris v. McLaughlin*, No. 34-2015-00176996 (Cal. Super. Ct. June 22, 2015), 2015 WL 3877283. Judge Raymond Cadei granted declaratory relief in favor of California Attorney General Kamala D. Harris on June 22, 2015, stopping the “Sodomite Suppression Act” from ever reaching the signature phase of the ballot initiative process, because the initiative was “patently unconstitutional on its face” and “would be inappropriate, waste public resources, generate unnecessary divisions among the public and tend to mislead the electorate.” Default Judgment by Court in Favor of Plaintiff at 2, *Harris v. McLaughlin*, No. 34-2015-00176996 (Cal. Super. Ct. June 22, 2015), 2015 WL 3877283. Judge Cadei’s granting of declaratory relief came several days before the United States Supreme Court decision in *Obergefell v. Hodges* allowed same-sex couples to marry and have marriages recognized in all states. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

⁷⁸ See generally Hailey Branson-Potts, “Intolerant Jackass Act” Author May Collect Signatures for Ballot Proposal, L.A. TIMES (June 3, 2015, 3:40 PM), <http://www.latimes.com/local/lanow/la-me-ln-intolerant-jackass-act-20150603-story.html> [<http://perma.cc/2SYH-42KC>]. Several individuals contacted the proponent of the “Intolerant Jackass Act” indicating that they wished to collect signatures. The proponent stated that, while she would not personally pursue signature gathering, she would not stop others who wanted to collect signatures. *Id.*

⁷⁹ Hailey Branson-Potts, “Intolerant Jackass Act” Proposed as Response to Anti-gay Initiative, L.A. TIMES, (Apr. 20, 2015, 2:43 PM), <http://www.latimes.com/local/lanow/la-me-ln-intolerant-jackass-proposal-20150420-story.html> [<http://perma.cc/9XHU-FQZX>].

⁸⁰ Intolerant Jackass Act, Initiative 15-0014, § (c) (Cal. 2015), [https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0014%20\(Intolerant%20Jackass\).pdf](https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0014%20(Intolerant%20Jackass).pdf) [<https://perma.cc/37X8-669W>].

⁸¹ *Id.* § (e).

⁸² Letter from Mac Taylor, Legislative Analyst, Cal. Legislative Analyst’s Office, to Kamala D. Harris, Attorney Gen., Cal. Attorney Gen.’s Office (May 14, 2015) (on file with Cal. Attorney Gen.’s Office).

⁸³ Branson-Potts, *supra* note 79.

and letters,”⁸⁴ and she stated that she does not intend to move forward to the signature phase of the initiative process, admitting that the Intolerant Jackass Act “isn’t constitutional either.”⁸⁵ If others pursue the signature gathering for her, the measure could proceed.

The Shellfish Suppression Act also appears to have been modeled after the SSA and follows the same format.⁸⁶ It also begins with an assertion of evil to be eradicated: “Shellfish are a monstrous evil,” that, making an appeal to religion, “Almighty God, giver of freedom and liberty, commands us in Leviticus to suppress.”⁸⁷ It prohibits the sale or consumption of shellfish, broadly defined, categorizing a violation as a “serious felony,”⁸⁸ punishable by a fine of \$666,000 per occurrence, and/or up to six years, six months, and six days in prison.⁸⁹

While the Legislature might not wish to waste its time and resources taking either of the above initiative seriously, even if the 25% threshold is met, the next two initiatives could provide a better forum for testing the efficacy of the earlier joint legislative hearing deadline to flesh out the issues between personal privacy and gender identity in public restroom and locker facilities, and safer sex in the adult film industry.

B. The Personal Privacy Protection Act

The Personal Privacy Protection Act would amend the Health and Safety Code to require people to use facilities in accordance “with their biological sex in all government buildings.”⁹⁰ It provides a simple civil claim for violation of privacy against the government entity or person who willfully

⁸⁴ E-mail from Charlotte Laws to Chris Chambers Goodman, *supra* note 53.

⁸⁵ Branson-Potts, *supra* note 79.

⁸⁶ Shellfish Suppression Act, Initiative 15-0016 (Cal. 2015), [https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0016%20\(Shellfish\).pdf](https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0016%20(Shellfish).pdf) [<https://perma.cc/HA9J-UQ7G>].

⁸⁷ *Id.* § (a). See generally Jennifer Wadsworth, *Broken Initiative System Attracts Lunatics, Pranksters and Reform*, SAN JOSE INSIDE (Apr. 15, 2015), <http://www.sanjoinside.com/2015/04/15/broken-initiative-system-attracts-lunatics-pranksters-and-reform> [<http://perma.cc/DDL2-C5N3>] (describing the Shellfish Suppression Act as a satirical spin-off of the Sodomite Suppression Act).

⁸⁸ Shellfish Suppression Act § (d).

⁸⁹ *Id.* § (c).

⁹⁰ Personal Privacy Protection Act, Initiative 15-0019, § (a) (Cal. 2015), [https://oag.ca.gov/system/files/initiatives/pdfs/15-0019%20\(Privacy\)_0.pdf](https://oag.ca.gov/system/files/initiatives/pdfs/15-0019%20(Privacy)_0.pdf) [<https://perma.cc/83RR-8KP3>]. See generally Hailey Branson-Potts, *California Initiative Would Bar Transgender People from Bathrooms*, L.A. TIMES (Apr. 21, 2015, 6:17 AM), <http://www.latimes.com/local/lanow/la-me-ln-transgender-bathrooms-20150420-story.html> [<http://perma.cc/5X7Y-LRG6>]. Gina Gleason, a proponent for the measure stated: “We have great compassion for any person that is uncomfortable in traditional, sex-separated facilities But we also want to protect the privacy that most of us expect when we are in public restrooms, showers and dressing areas.” *Id.*

violates this section.⁹¹ Only those people whose privacy was actually violated while using the facilities, or who refrain from using the facilities, would be eligible for equitable relief and damages.⁹² The initiative specifically exempts business establishments from any criminal, civil, or administrative sanctions or lawsuits when they require “employees, patrons, students, or other people to use facilities” that match their biological sex.⁹³

The proposed initiative defines biological sex as follows: “the biological condition of being male or female as determined at or near the time of birth or through medical examination or as modified by” the Health and Safety Code provisions permitting transgender people to apply for a revised birth certificate if certain conditions are met.⁹⁴ Facilities are defined as “restrooms, showers, dressing rooms, and locker rooms.”⁹⁵ The general definition for government entity and government buildings applies. The exceptions to the proposed act are for single use facilities, family restrooms, and where the assistance of another is required.⁹⁶ The initiative also has an enforceability provision, granting the initiative proponents the right to defend the initiative against legal challenge if the Attorney General fails to do so, or to appoint a special Attorney General to do so.⁹⁷

The Legislative Analyst’s Office report notes that state law prohibits discrimination based on gender identity and gender expression, and that students in public schools currently are “permitted to use facilities consistent with their gender identity, regardless of what sex is listed on the student’s record.”⁹⁸ The report concludes that the fiscal effect “could vary considerably depending on (1) how it is interpreted by the courts, (2) how state and local governments implement the measure, and (3) how the federal government responds to the measure’s implementation.”⁹⁹ For instance, informing the public and employees about a policy change in restroom facility use could be relatively inexpensive,

⁹¹ Personal Privacy Protection Act § (b).

⁹² *Id.*

⁹³ *Id.* § (c).

⁹⁴ *Id.* § (d)(1); CAL. HEALTH & SAFETY CODE § 103425(a) (West 2015) (“Whenever a person has undergone clinically appropriate treatment for the purpose of gender transition, the person may file a petition with the superior court in any county seeking a judgment recognizing the change of gender.”).

⁹⁵ Personal Privacy Protection Act § (d)(3).

⁹⁶ *Id.* § (e).

⁹⁷ *Id.* § (f).

⁹⁸ MAC TAYLOR, LEGISLATIVE ANALYST’S OFFICE, FISCAL IMPACT ESTIMATE REPORT ON AG 15-0019, at 2 (2015), [https://oag.ca.gov/system/files/initiatives/pdfs/fiscal-impact-estimate-report\(15-0019\).pdf](https://oag.ca.gov/system/files/initiatives/pdfs/fiscal-impact-estimate-report(15-0019).pdf) [<https://perma.cc/CM3J-J5NU>].

⁹⁹ *Id.* at 3.

but renovating existing facilities into single individual facilities would be very expensive.¹⁰⁰ In addition, some federal funds could be lost to the extent that the measure conflicts with the July 2014 executive order prohibiting contractors and subcontractors from discriminating based on gender identity.¹⁰¹

C. The California Safer Sex in the Adult Film Industry Act

The California Safer Sex in the Adult Film Industry Act would codify existing workplace safety regulations into state statutes to require adult film performers to wear condoms.¹⁰² It was amended under the provisions of BITA, presumably in response to public comments during the public comment period.

This initiative was the second to reach the 25% signature threshold during the 2016 election cycle that can trigger legislative hearings on the measure, and since then, several others have met that threshold.¹⁰³ Under BITA, the legislative hearings must be held no later than 131 days prior to the date of the election, or approximately June 30, 2016. These hearings can provide more information to the public and provide an opportunity to explore the success of a similar successful proposal in Los Angeles County.

D. Abortion Access Act(s)

There are four almost identical ballot initiatives designed to constrict access to abortions for unemancipated minors.¹⁰⁴ Ballot

¹⁰⁰ See *id.*

¹⁰¹ Exec. Order No. 13672, 79 Fed. Reg. 42,971 (July 23, 2014), *amending* Exec. Order No. 11246 § 202(1) (adding “sexual orientation, gender identity,” to the list of factors that federal contractors on contracts over \$10,000 may not discriminate against in hiring practices).

¹⁰² The California Safer Sex in the Adult Film Industry Act, Initiative 15-0004 (Cal. 2015), [https://oag.ca.gov/system/files/initiatives/pdfs/15-0004%20\(Safer%20Sex\)_8.pdf](https://oag.ca.gov/system/files/initiatives/pdfs/15-0004%20(Safer%20Sex)_8.pdf) [<https://perma.cc/GE3L-5X9V>].

¹⁰³ *Initiatives and Referenda Cleared for Circulation*, *supra* note 60. Initiative 15-0009, the State Prescription Drug Purchases, Pricing Standards, Initiative Statute, met the 25% mark on June 25, 2015. The measure prohibits California agencies from paying a higher price for drugs than the U.S. Department of Veterans Affairs. *Id.*

¹⁰⁴ Few differences exist between the first three bills and no difference at all between the third and fourth. Initiative 14-0013 defines “Physician” as “any person authorized under the statutes and regulations of the State of California to perform an abortion upon an unemancipated minor.” Initiatives 14-0014 and 15-0025 changed the definition of “Physician” to “any person who has a valid, unrevoked, and unsuspended license to practice as a physician and surgeon under the statutes and regulations of the State of California.” Initiative 15-0025 also added “and shall ensure that it is brought to the attention of the appropriate law enforcement or public child protective agency” at the end of section (e). Initiative 15-0047 appears to be completely identical to the 15-0025, with no changes or amendments at all. See Abortion Access Restriction. Parental Notification and Waiting Period for Females Under 18. Initiative Constitutional Amendment, Attorney General Ballot Proposition 14-0013 (2014); Sexual Orientation Prejudice. Initiative Statute, Attorney General Ballot Proposition 14-0014 (2014). See *generally* Abortion

initiative 15-0047 is the most recent of these initiatives.¹⁰⁵ The initiatives are written to add a new section, section thirty-two, to Article I of the California Constitution, including new provisions that make it mandatory for unmarried females under the age of eighteen to provide notice to their parents before getting an abortion.¹⁰⁶

The initiative would make it illegal for anyone other than a physician to perform an abortion on an unemancipated minor.¹⁰⁷ A physician must wait “until at least forty-eight (48) hours has elapsed after the physician or the physician’s agent has delivered written notice . . . or has received a copy of a waiver of notification from the court.”¹⁰⁸ The written notice must either be personally delivered “by the physician or the physician’s agent to the parent,” or be delivered by certified mail with an additional copy sent by first class mail.¹⁰⁹ A parent may waive the notification requirement, and the initiative requires the California Department of Public Health to create a waiver form.¹¹⁰

There are a few exceptions to the requirement for notification. Notice is not required if “the unemancipated minor is the victim of physical or sexual abuse committed by one or both of the minor’s parents,” and the abuse must be documented by a relative of the minor who is over twenty-one years old, or by a law enforcement officer or agent of a public child protective agency.¹¹¹ Notice is not required if the physician, in “good-faith clinical judgment,” decides that the abortion is necessary because of a medical emergency.¹¹² Finally, an unemancipated minor may petition the juvenile court to waive the notice requirement.¹¹³ The minor must personally appear before the court, though she

Access Restriction. Parental Notification and Waiting Period for Females Under 18, Attorney General Ballot Proposition 15-0025 (2015); Parental Notification, Child and Teen Safety, and Stop Sexual Predators and Sex Traffickers Act, Attorney General Ballot Proposition 15-0047 (2015).

¹⁰⁵ Parental Notification, Child and Teen Safety, and Stop Sexual Predators and Sex Traffickers Act, Initiative 15-0047 (Cal. 2015).

¹⁰⁶ Abortion Access Restriction. Parental Notification and Waiting Period for Females under 18, Attorney General Ballot Proposition 15-0025; *see also* CAL. CONST. art. I, § 31.

¹⁰⁷ *See* Parental Notification, Child and Teen Safety, and Stop Sexual Predators and Sex Traffickers Act, Initiative 15-0025, § 32(a)(2) (Cal. 2015) The initiative defines “unemancipated minor” as “a female under the age of 18 years who has not entered into a valid marriage and is not on active duty with the armed services of the United States and has not received a declaration of emancipation under state law. For the purposes of this Section, pregnancy does not emancipate a female under the age of 18 years.” *Id.*

¹⁰⁸ *See id.* § 32(b).

¹⁰⁹ *Id.* § 32(c).

¹¹⁰ *Id.* § 32(d).

¹¹¹ *Id.* § 32(e).

¹¹² *Id.* § 32(f).

¹¹³ *Id.* § 32(g).

may elect to have legal counsel with her.¹¹⁴ If a judge finds "by clear and convincing evidence" that the minor is (1) "both sufficiently mature and well-informed to decide whether to have an abortion" or (2) "that notice to a parent is not in the best interests of the unemancipated minor," then the judge may waive the notification requirement.¹¹⁵ The notice requirement is also waived if a judge fails to rule within two days after the petition is filed and the minor did not file a request for an extension.¹¹⁶ If the minor is denied a waiver, she may appeal the judgment of the juvenile court.¹¹⁷

The initiative also requires the California Department of Public Health to create a reporting form for physicians to document all abortions performed on unemancipated minors.¹¹⁸ The physician must file a report within one month after performing an abortion on an unemancipated minor.¹¹⁹ The data on these forms will be used by the Department of Public Health to compile an annual report based on the statistical information required in the initiative.¹²⁰

Failure by any person to abide by this law will render that individual "liable for damages in a civil action brought by the unemancipated minor, her legal representative, or by a parent wrongfully denied notification."¹²¹ While performing the abortion carries a civil penalty, anyone, including an unemancipated minor or her treating physician, who "knowingly provides false information to a physician"—to make the physician believe that notice was given to the minor's parent, or that notice was waived—"is guilty of a misdemeanor punishable by a fine up to \$10,000."¹²²

The Legislative Analyst's Office estimates that the cost of this initiative would be relatively low, with administrative costs of "at least \$1 million, and potentially several million dollars,

¹¹⁴ See *id.*

¹¹⁵ See *id.* § 32(h)(1)-(2).

¹¹⁶ *Id.* § 32(i).

¹¹⁷ *Id.* § 32(j) (stating that the hearing must be within three court days of the filing, but allowing the Judicial Council to define the procedure for appeal).

¹¹⁸ *Id.* § 32(l) ("The forms shall include the date of the procedure and the unemancipated minor's month and year of birth, the duration of the pregnancy, the type of abortion procedure, the numbers of the unemancipated minor's previous 6 abortions and deliveries if known, and the facility where the abortion was performed. The forms shall also indicate whether the abortion was performed pursuant to subdivision (c); or (d); or (e); or (f); or (h), (i), or (j).").

¹¹⁹ *Id.* § 32(m) ("The identity of the physician shall be kept confidential and shall not be subject to disclosure under the California Public Records Act.").

¹²⁰ *Id.* § 32(o).

¹²¹ *Id.* § 32(p).

¹²² *Id.* § 32(q).

annually.”¹²³ The Office reports that “nurse practitioners, certified nurse-midwives, and physician assistants, who under current law may perform an aspiration abortion during the first trimester of a pregnancy, would no longer be able to perform this procedure on an unemancipated minor.”¹²⁴

The public comment process may have led to some of the minor changes in the various versions of the measure as noted above. The impact of the additional signature-gathering time is not yet clear. A joint legislative hearing process may also be useful to reconcile the minor differences in the various versions and to flesh out the potential costs and benefits of the measure.

CONCLUSION

BITA made some notable modifications to the initiative process in the State of California. It has codified a public comment period, which can provide useful information to inform the Attorney General’s ballot title and summary, as well as to inform the initiative proponents about ambiguities and errors that can be fixed before the signature petitions begin. While numerous measures have been subject to public comments, those comments have not actually been made public, and continuing efforts are needed to determine the impact of the public comment period on the various initiatives. Several measures have been amended, and others have been submitted with modifications, suggesting that the comment period had some effect.

Other effects of BITA are not yet manifest. For instance, only a few signature-gathering deadlines have passed, and it will take some time to determine whether the additional month for gathering signatures has helped those initiative proponents. Several petitions have also met the 25% threshold to trigger legislative hearings. Once some of those hearings are held, we will have more information to assess the usefulness, or not, of the pre-certification hearing requirement. Also, as financial contribution reporting deadlines approach, we will be able to examine the impact of the BITA provisions requiring more accessible public information about supporters and opponents of the initiatives.

¹²³ MAC TAYLOR, LEGISLATIVE ANALYST’S OFFICE, FISCAL IMPACT ESTIMATE REPORT ON AG 15-0025, at 5 (2015), [https://oag.ca.gov/system/files/initiatives/pdfs/fiscal-impact-estimate-report\(15-0025\).pdf](https://oag.ca.gov/system/files/initiatives/pdfs/fiscal-impact-estimate-report(15-0025).pdf) [<https://perma.cc/D5A5-Q4W8>].

¹²⁴ *See id.* at 3.

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The California Supreme Court and the Popular Will

Kenneth P. Miller*

INTRODUCTION

Over the past half century, California has been a battleground for conflicts over the nature, scope, and limits of rights. While Americans have always clashed over rights, the modern rights revolution has expanded the conflict throughout the country, and nowhere more than in California. These struggles have been hard fought, because rights have power. Once an interest is converted into a right, it can trump competing interests that lack the status of right. The ability to recognize, create, or limit rights is consequential, indeed.¹

California's prominence in these conflicts can be traced to several factors. First, the state has deep ideological divides. California is home to progressive social movements that have sought to establish new rights in areas including abortion, capital punishment, criminal procedure, school funding, gay rights, aid-in-dying, and more—and home, as well, to highly motivated conservative groups that have resisted many of these changes. Second, California exists within a federal system that allows states to innovate in the area of rights. State constitutional rights operate semi-independently of the U.S. Constitution—that is, states may define state constitutional rights more expansively than the Federal Constitution requires. An assertive state supreme court, through state constitutional interpretation, can establish new rights. The California Supreme Court, more than any other state court, has expanded state constitutional rights beyond federal minimums.² Third, citizens of California have extraordinary power to counter their state supreme court, through state constitutional amendment or

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¹ See MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF PUBLIC DISCOURSE 16 (1991); Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 RUTGERS L.J. 871, 892 (2001).

² Kenneth P. Miller, *Defining Rights in the States: Judicial Activism and Popular Response*, 76 ALBANY L. REV. 2061, 2065–67 (2013).

judicial election, when it issues decisions they oppose. California's court-constraining powers are particularly robust because citizens have the ability to adopt state constitutional amendments directly through the initiative process.³

A state with an ambitious, rights-creating court and an energized electorate that holds competing views and wields institutional counter-powers is poised for clashes over rights.⁴ In the 1970s, such conflicts emerged in California. A progressive majority on the California Supreme Court sought national leadership of a movement called "the new judicial federalism"—an effort to expand rights at the state level—but faced the constraint of the state's powerful system of majoritarian democracy.⁵

This Article examines the efforts of the California Supreme Court to advance the rights revolution at the state level and the popular response to those decisions. This exchange between the court and the people now spans more than four decades, from the early 1970s through the relatively recent struggle over the definition of marriage. During this period, the California Supreme Court expanded a broad range of state constitutional rights, many of which remain intact today. Yet, the people countered the court when it expanded rights in ways that conflicted with their strongly held values. These controversies showed that, under California's constitution, the people, not the courts, have the last word on the state definition of rights—so long, of course, as their decisions do not contravene federal law.

The record indicates that Californians have exercised this power selectively, overturning some new state-level rights, but accepting many others. The system has imposed accountability on the court when it strays too far from the popular will, but also has conferred greater legitimacy on the expansion of rights above federal minimums when the people accept what they can, through a vote, reject.

3 On the use of court-constraining amendments in California and other states, see generally John Dinan, *Foreword: Court-Constraining Amendments and the State Constitutional Tradition*, 38 RUTGERS L.J. 983 (2007).

4 See Reed, *supra* note 1, at 874–75.

5 For a discussion of the California Supreme Court's early leadership of the new judicial federalism, see Ronald K.L. Collins, Peter J. Galie & John Kincaid, *State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey*, 13 HAST. CONST. L.Q. 599, 603 (1986); and see Robert F. Williams, *Introduction: The Third Stage of the New Judicial Federalism*, 59 N.Y.U. ANN. SURV. AM. L. 211, 211–17 (2003).

I. THE NEW JUDICIAL FEDERALISM IN CALIFORNIA, 1970–1986

The movement known as the new judicial federalism emerged in the early 1970s as progressive lawyers and judges sought to extend the rights revolution in constitutional law following the denouement of the Warren Court.⁶ The strategy was straightforward: if Warren-era liberal justices were being replaced by more conservative Nixon nominees and the U.S. Supreme Court was moving to the Right, progressive state courts needed to assume greater responsibility for the rights revolution—that is, they needed to abandon their reliance on the Supreme Court to expand federal constitutional rights, and instead, start expanding rights at the state level through new, expansive interpretations of state constitutions. In this view, for example, as the U.S. Supreme Court chose to interpret the warrant requirements of the Fourth Amendment narrowly, in a way that favored law enforcement, a progressive state supreme court should chart an independent course by interpreting its state constitution's comparable warrant requirements more expansively, in a way that favored criminal defendants.⁷

The California Supreme Court was well positioned to pursue this goal. Through the leadership of the legendary justice Roger J. Traynor (1940–1970), the court had developed a reputation as the nation's most innovative state court, and was especially influential in transforming American common law to align with the values of modern liberalism.⁸ Working under the shadow of the U.S. Supreme Court during the Warren era (1953–1969), the California Supreme Court, like its progressive counterparts in other states, had only rarely chosen to expand state constitutional rights. But as the Warren era came to a close, it was poised to move into that arena.

⁶ Reed, *supra* note 1, at 889.

⁷ See ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 113–15 (2009). See generally William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

⁸ See generally BEN FIELD, *ACTIVISM IN PURSUIT OF THE PUBLIC INTEREST: THE JURISPRUDENCE OF CHIEF JUSTICE ROGER J. TRAYNOR* (2003). During Traynor's tenure, the California Supreme Court became the nation's most influential state court, as measured by, among other factors, citations by other state courts. See, e.g., Gregory A. Caldeira, *On the Reputation of State Supreme Courts*, 5 POL. BEHAV. 83 (1983); Jake Dear & Edward W. Jessen, *"Followed Rates" and Leading State Cases, 1940–2005*, 41 U.C. DAVIS L. REV. 683 (2007); Robert A. Kagan, Bliss Cartwright, Lawrence M. Friedman & Stanton Wheeler, *The Business of State Supreme Courts, 1870–1970*, 30 STAN. L. REV. 121 (1977).

A. The Composition of the California Supreme Court, 1970–1986

In 1970, the California Supreme Court was a progressive body consisting of six justices appointed by former two-term Democratic Governor Edmund G. “Pat” Brown—Chief Justice Traynor (Chief Justice 1964–1970) and Associate Justices Raymond E. Peters (1959–1973), Mathew O. Tobriner (1962–1982), Stanley Mosk (1964–2001), Louis H. Burke (1964–1974), and Raymond L. Sullivan (1966–1977).⁹ The court had one conservative holdover, Justice Marshall F. McComb (1956–1977), but was solidly liberal overall.¹⁰

Brown’s successor as Governor, Ronald Reagan (1967–1975), believed the court was too liberal and wanted to nominate new, conservative justices who would exercise “judicial restraint.”¹¹ Reagan got his first opportunity to try to redirect the court in 1970, when Chief Justice Traynor announced his retirement. Reagan turned to an appellate judge, Donald R. Wright, to fill the vacancy. Before his nomination, Wright was viewed as a reliable conservative. Soon after assuming the role of chief justice, however, Wright surprised Reagan and other conservatives by firmly aligning with the court’s progressive majority.¹² Indeed, it was during Donald Wright’s tenure as chief justice (1970–1977), and with his full participation, that the court began aggressively expanding state constitutional rights. Governor Reagan’s other two nominees, William P. Clark, Jr. (1973–1981) (later Deputy Secretary of State, National Security Advisor, and Interior Secretary under President Reagan) and Frank K. Richardson (1974–1983), were solid conservatives, but generally unable to curb the court’s progressive majority. When Democrat Edmund G. “Jerry” Brown, Jr. succeeded Reagan in 1975, he gave the court a new infusion of liberal justices. During his first two terms as governor (1975–1983), Brown nominated seven progressives to the court—Wiley W. Manuel (1977–1981), Rose Elizabeth Bird (1977–1987), Frank C. Newman (1977–1982), Otto M. Kaus (1981–1985), Allen E. Broussard (1981–1991), Cruz Reynoso (1982–1987), and Joseph R. Grodin (1982–1987).¹³

⁹ Democratic Governor Culbert Olsen appointed Traynor to the court in 1940 as an associate justice; Governor Pat Brown elevated him to Chief in 1964. *California Supreme Court Justices*, CAL. SUP. CT. HIST. SOC’Y, <http://www.cschs.org/history/california-supreme-court-justices/> [http://perma.cc/V6R6-QG2C].

¹⁰ *Id.*

¹¹ LOU CANNON, *GOVERNOR REAGAN: HIS RISE TO POWER* 222–23 (2003).

¹² JACQUELINE R. BRAITMAN & GERALD F. UELMEN, *JUSTICE STANLEY MOSK: A LIFE AT THE CENTER OF CALIFORNIA POLITICS AND JUSTICE* 150–51 (2013).

¹³ *California Supreme Court Justices*, *supra* note 9.

Only four Democrats served as Governor of California during the twentieth century, but three of them, Culbert Olson (1939–1943), Pat Brown (1959–1967), and Jerry Brown (1975–1983), had an outsized influence on the court, together nominating nineteen justices (including Traynor twice), nearly all of whom can be described as liberal or progressive.¹⁴ These appointments, combined with Republican governors' inconsistency in nominating conservatives, made the California Supreme Court one of the nation's most liberal courts from mid-century through 1986. In that year, as discussed further below, voters removed three liberal justices (Bird, Reynoso, and Grodin) through a judicial retention election, and Republican Governor George Deukmejian replaced them with conservatives, thereby shifting the court's balance to the Right.¹⁵

B. The Court's Expansion of Rights, 1970–1986

Looking back, the span from 1970 to the election of 1986 (that is, the Wright-Bird era) can be seen as the height of the new judicial federalism in California. During those years, the court actively expanded state constitutional rights in several areas of law, including:

1. capital punishment
2. criminal procedure
3. equal protection (gender equality, sexual orientation equality in employment, equality in public school financing, desegregation of public schools, and racial non-discrimination in jury selection)
4. abortion (basic right to abortion and right to publicly funded abortion)
5. free speech (expansion of free speech and petition rights on private property)
6. non-establishment of religion

Table 1 sets forth these new state constitutional rights, and the court decisions establishing them, in more detail.

¹⁴ Olson nominated three justices, Pat Brown nine, and Jerry Brown seven (during his first two terms from 1975–1983). These figures separately count both nominations of Traynor.

¹⁵ See *infra* Section III.D.

**Table 1: New Court-Established California State
Constitutional Rights, 1970–1986**

Category	New State Constitutional Rights	Cases Establishing Rights
Criminal Justice (capital punishment)	Right against execution / abolition of capital punishment	<i>People v. Anderson</i> (1972) ¹⁶
Criminal Justice (procedure)	Procedural rights of criminal defendants, including those related to admissions, confessions, searches, exclusionary rule, ¹⁷ vicarious exclusionary rule ¹⁸	<i>People v. Krivda</i> (1971) ¹⁹ (searches); <i>Mozetti v. Superior Court</i> (1971) ²⁰ (searches); <i>People v. Superior Court (Hawkins)</i> (1972) ²¹ (blood tests); <i>Burrows v. Superior Court</i> (1974) ²² (warrants); <i>People v. Longwill</i> (1975) ²³ (searches); <i>People v. Brisendine</i> (1975) ²⁴ (searches); <i>People v. Disbrow</i> (1976) ²⁵ (admissions); <i>People v. Jimenez</i> (1978) ²⁶ (confessions); <i>People v. Pettingill</i> (1978) ²⁷ (interrogations); <i>In re Tony C.</i> (1978) ²⁸ (stop and frisk); <i>People v. Wheeler</i> (1978) ²⁹ (jury selection)
Criminal Justice (procedure)	Procedural rights of criminal defendants, including those related to reciprocal discovery; hearsay at preliminary hearing; post-indictment preliminary hearing	<i>Reynolds v. Superior Court</i> (1974) (restrictions on prosecutorial discovery); ³⁰ <i>Allen v. Superior Court</i> (1976) (restrictions on prosecutorial discovery); ³¹ <i>In re Misener</i> (1985) ³² (restrictions on prosecutorial discovery); <i>Mills v. Superior Court</i> (1986) ³³ (confrontation of accusers)

16 *People v. Anderson*, 493 P.2d 880 (Cal. 1972).

17 *People v. Cahan*, 282 P.2d 905 (Cal. 1955).

18 *People v. Martin*, 85 P.2d 880 (Cal. 1955).

19 *People v. Krivda*, 486 P.2d 1262 (Cal. 1971).

20 *Mozetti v. Superior Court*, 484 P.2d 84 (Cal. 1971).

21 *People v. Superior Court*, 493 P.2d 1145 (Cal. 1972).

22 *Burrows v. Superior Court*, 529 P.2d 590 (Cal. 1974).

23 *People v. Longwill*, 538 P.2d 753 (Cal. 1975).

24 *People v. Brisendine*, 531 P.2d 1099 (Cal. 1975).

25 *People v. Disbrow*, 545 P.2d 272 (Cal. 1976).

26 *People v. Jimenez*, 580 P.2d 672 (Cal. 1978).

27 *People v. Pettingill*, 578 P.2d 108 (Cal. 1978).

28 *In re Tony C.*, 582 P.2d 957 (Cal. 1978).

29 *People v. Wheeler*, 583 P.2d 748 (Cal. 1978).

30 *Reynolds v. Superior Court*, 528 P.2d 45 (Cal. 1974).

31 *Allen v. Superior Court*, 557 P.2d 65 (1976).

32 *In re Misener*, 698 P.2d 637 (Cal. 1985).

33 *Mills v. Superior Court*, 728 P.2d 211 (Cal. 1986).

Category	New State Constitutional Rights	Cases Establishing Rights
		at preliminary hearing); <i>Hawkins v. Superior Court</i> (1978) ³⁴ (right to post-indictment preliminary hearing)
Equal Protection (gender)	Strict scrutiny for laws that classify on basis of gender	<i>Sail'er Inn, Inc. v. Kirby</i> (1971) ³⁵
Equal Protection (race)	Right to desegregation of public schools regardless of cause of segregation	<i>Crawford v. Board of Education of Los Angeles</i> (1976), ³⁶ re-affirming dictum in <i>Jackson v. Pasadena City School District</i> (1963) ³⁷
Equal Protection (sexual orientation)	Right to non-discrimination based on sexual orientation in employment	<i>Gay Law Students Association v. Pacific Telephone & Telegraph Co.</i> (1979) ³⁸
Equal Protection (education)	Right to equalized public school funding	<i>Serrano v. Priest II</i> (1976) ³⁹
Abortion	Right to abortion	<i>People v. Belous</i> (1969); ⁴⁰ <i>People v. Barksdale</i> (1972) ⁴¹
Abortion	Right to publicly funded abortion	<i>Committee to Defend Reproductive Rights v. Myers</i> (1981) ⁴²
Free speech	Right to free speech on private property	<i>Robins v. Pruneyard Shopping Center</i> (1979) ⁴³
Religion (non-establishment)	Prohibition on religious displays on public property	<i>Fox v. City of Los Angeles</i> (1978) ⁴⁴
Religion (non-establishment)	Prohibition on state-loaned textbooks to parochial schools	<i>California Teachers Association v. Riles</i> (1981) ⁴⁵

34 *Hawkins v. Superior Court*, 586 P.2d 916 (Cal. 1978).

35 *Sail'er Inn, Inc. v. Kirby*, 485 P.2d 529 (Cal. 1971).

36 *Crawford v. Bd. of Educ. of L.A.*, 551 P.2d 28 (Cal. 1976).

37 *Jackson v. Pasadena City Sch. Dist.*, 382 P.2d 878 (Cal. 1963).

38 *Gay Law Students Ass'n v. Pac. Tel. & Tel. Co.*, 595 P.2d 592 (Cal. 1979).

39 *Serrano v. Priest II*, 557 P.2d 929 (Cal. 1976).

40 *People v. Belous*, 458 P.2d 194 (Cal. 1969).

41 *People v. Barksdale*, 503 P.2d 257 (Cal. 1972).

42 *Comm. to Defend Reproductive Rights v. Myers*, 625 P.2d 779 (Cal. 1981).

43 *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341 (Cal. 1979).

44 *Fox v. City of Los Angeles*, 587 P.2d 663 (Cal. 1978).

45 *California Teachers Ass'n v. Riles*, 632 P. 2d 953 (Cal. 1981).

C. The Court's Primary Focus: Criminal Justice

As Table 1 indicates, during this period the California Supreme Court expanded state constitutional rights most actively in the area of criminal justice. This ordering is logical, considering that a large share of a state supreme court's constitutional jurisprudence arises in criminal cases, and because the Burger Court was retreating from the Warren Court's expansive interpretation of the rights of criminal defendants.⁴⁶ At the urging of Justice Stanley Mosk, the California Supreme Court made the deliberate choice to distance itself from U.S. Supreme Court's definitions of the rights of defendants and start charting its own, independent, more progressive course.⁴⁷

1. Capital Punishment

Perhaps the most influential case in establishing the new judicial federalism was *People v. Anderson* (1972),⁴⁸ a state constitutional challenge to California's death penalty. As state constitutional law scholar Robert F. Williams has noted, the California Supreme Court's decision in the case stimulated "the initial recognition that state courts could evade decisions of the United States Supreme Court by relying on their own state constitutions."⁴⁹ At the time, the U.S. Supreme Court had granted review in *Furman v. Georgia* (1972)⁵⁰ on the question of whether capital punishment violated the Eighth Amendment. The California Supreme Court's progressive majority distrusted the Burger Court on this question and accelerated proceedings in *People v. Anderson*.⁵¹ Before the U.S. Supreme Court could issue its decision in *Furman*, the California Supreme Court, in an opinion by Chief Justice Wright, held that capital punishment violated the California Constitution's prohibition on cruel or unusual punishments. By basing the *Anderson* ruling on independent state grounds rather than on the Federal Constitution, the court showed other state supreme courts how to establish new rights in a way that insulated the decision from federal court review.⁵²

46 See ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 125 (2009). Williams notes: "The field of criminal procedure has, in many ways, provided the driving force behind the NJF. It is in this area that state courts first realized they could reach results different from those reached by the U.S. Supreme Court, or at least consider doing so." *Id.*; see also G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* 178 (1998).

47 BRAITMAN & UELMEN, *supra* note 12, at 152-54.

48 *People v. Anderson*, 493 P.2d 880 (Cal. 1972).

49 Williams, *supra* note 5, at 213.

50 *Furman v. Georgia*, 408 U.S. 238 (1972).

51 RONALD M. GEORGE, *CHIEF: THE QUEST FOR JUSTICE IN CALIFORNIA* 76-77 (2013).

52 WILLIAMS, *supra* note 46, at 120; see also Scott H. Bice, *Anderson and the*

2. Criminal Procedure

From 1970 forward, the California Supreme Court's criminal procedure rulings formed an expansive web of state-level protections greater than those offered by the Federal Constitution's Fourth, Fifth, and Sixth Amendments, as interpreted by the U.S. Supreme Court. This outpouring of new state constitutional rights related to admissions, confessions, searches, "stop-and-frisk," jury selection, and other elements of criminal procedure shifted the balance of state constitutional interpretation in California markedly in favor of defendants at a time when the U.S. Supreme Court was shifting the federal constitutional balance in favor of police and prosecutors.⁵³

D. Other Decisions: Advancing the Progressive Agenda of the 1970s and 1980s

Beyond criminal justice, the California Supreme Court's rights-expanding decisions during this era spanned a range of topics. The rulings corresponded with the progressive agenda of the 1970s and 1980s in areas including: racial, gender, and sexual orientation equality; abortion rights; equalization of education; free speech; and secularization of the public square. Each case, by definition, involved the discovery of a gap between the rights provisions of California Constitution and the U.S. Constitution, as interpreted, respectively, by the state and federal supreme courts.⁵⁴

1. Racial Equality

In the 1970s and 1980s, equal protection jurisprudence related to race became increasingly complex as the U.S. Supreme Court wrestled with the scope of remedies for racial inequality. During this period, the California Supreme Court expanded state constitutional rights beyond federal minimums in a highly controversial area: desegregation of public schools.

In the 1970s, the U.S. Supreme Court placed limits on court-ordered busing to achieve desegregation. Perhaps most importantly, the Court held in *Milliken v. Bradley* (1974) that if school districts had not imposed de jure segregation, that is, had not intentionally segregated students on the basis of race, the

Adequate State Ground, 45 S. CAL. L. REV. 750 (1972).

⁵³ For an overview of the expansion of state constitutional rights of criminal defendants during this era, see generally BARRY LATZER, *STATE CONSTITUTIONS AND CRIMINAL JUSTICE* (1991).

⁵⁴ Joseph R. Grodin, *Liberty and Equality Under the California Constitution*, 7 CAL. LEGAL HIST. 167, *passim* (2012).

Equal Protection Clause generally did not require such remedial measures.⁵⁵ Several districts in California, including Los Angeles Unified School District, had significant racial imbalances between schools, but it was a contested question whether school officials had intentionally segregated schools on the basis of race.⁵⁶ The California Supreme Court was unwilling to accept the limitations of the *Milliken* standard, and in *Crawford v. Board of Education of Los Angeles* (1976),⁵⁷ the court invoked the state constitution's equal protection guarantee to require desegregation regardless of the reasons for racial imbalances.⁵⁸ The decision paved the way for court-ordered busing in Los Angeles and elsewhere in the state.⁵⁹

The court again expanded equality principles beyond federal minimums when it held in *People v. Wheeler* (1978) that, during jury selection in criminal trials, attorneys could not "[use] preemptory challenges to remove prospective jurors on the sole ground of group bias."⁶⁰ The preemptory challenge historically allows attorneys to excuse potential witnesses without any explanation, but could be abused to exclude potential jurors based solely on their race, ethnicity, religion, or other group

⁵⁵ *Milliken v. Bradley*, 418 U.S. 717 (1974).

⁵⁶ A 1970 L.A. Superior Court decision found that the L.A. Unified School District had established de jure segregation, but, later, the state court of appeals reversed, concluding that there was insufficient evidence for such a finding. See *Crawford v. Bd. of Educ. of L.A.*, 170 Cal. Rptr. 495 (Ct. App. 1981).

⁵⁷ *Crawford v. Bd. of Educ. of L.A.*, 551 P.2d 28 (Cal. 1976).

⁵⁸ Syliva Yau, *School Board's Affirmative Duty to Alleviate Segregation Regardless of Race*, 65 CAL. L. REV. 319-29 (1977).

⁵⁹ During this period, the California Supreme Court departed from progressive ideology on race in one important case, *Bakke v. Regents of University of California*, 553 P.2d 1152 (Cal. 1976). This famous case involved a constitutional challenge to the admissions policies at the University of California at Davis medical school. Under those policies, the medical school set aside 16 of its 100 seats each year for a separate "special admissions program" that admitted only racial minorities. In a decision authored by Justice Mosk, the court held that this quota program violated the Federal Constitution. Many on the left attacked the court, and especially, Justice Mosk, for the decision. Mosk decided to base the *Bakke* decision not on the California Constitution, but rather on the Federal Constitution's Equal Protection Clause. As a consequence, the constitutional limitation on affirmative action was subject to U.S. Supreme Court review. The high court granted certiorari in the case and agreed with the California Supreme Court's judgment that the U.C. Davis medical school's admissions quota system violated the Fourteenth Amendment. In a letter to Hans Linde, Mosk noted: "I calculatingly relied on federal constitutional grounds for my *Bakke* opinion. Some of us are hopeful the United States Supreme Court will grapple with the issue so impropvidently avoided in *De Funis*. Had I employed state constitutional provisions, our brethren in Washington would have had good reason to avoid certiorari. They now must consider the inevitable certiorari application on its merits. This is a rare exception to our normal desire to hasten finality of litigation." BRAITMAN & UELMEN, *supra* note 12, at 172.

⁶⁰ *People v. Wheeler*, 583 P.2d 748 (Cal. 1978). The court based its ruling on California Constitution article I, section 16, which guarantees the right to a trial by a jury drawn from a representative cross-section of the community.

characteristics. In the absence of a U.S. Supreme Court ruling addressing the problem, the California Supreme Court acted, establishing the right to challenge such bias in the jury selection process. Nearly a decade later, in *Batson v. Kentucky* (1986),⁶¹ the U.S. Supreme Court established a federal constitutional protection against this type of bias in jury selection, following the principles the California Supreme Court established in *Wheeler*.⁶²

2. Gender Equality

The birth of the new judicial federalism corresponded with the rise of second wave feminism, an era of heightened activism in support of gender equality. Proponents of women's rights used both political activism and legal mobilization to advance their goals. As proponents of a Federal Equal Rights Amendment struggled to win ratification, litigants attempted to persuade the U.S. Supreme Court to employ the Fourteenth Amendment's Equal Protection Clause to strike down laws that made distinctions on the basis of gender. The Court moved in that direction, but with some ambivalence. In *Reed v. Reed* (1971),⁶³ the Court invoked the Fourteenth Amendment to strike down a law that discriminated against women in the administration of estates, but did so using rational basis analysis rather than heightened judicial scrutiny. Two years later, in *Frontiero v. Richardson* (1973),⁶⁴ the Court struck down gender distinctions in benefits to military personnel, but fell one vote short of declaring gender a suspect classification subject to strict judicial scrutiny. Finally, in *Craig v. Boren* (1976),⁶⁵ a case invalidating gender distinctions in the state's drinking age, the Court decided to treat gender as a "semi-suspect" classification, subject to intermediate judicial scrutiny. The California Supreme Court moved further and faster. In 1971, in *Sail'er Inn, Inc. v. Kirby*,⁶⁶ the court invalidated a state law banning women from serving as bartenders. The court declared that gender classifications should be treated as suspect and should be subjected to strict judicial scrutiny—that is, gender should be treated like race.⁶⁷ The court based its *Sail'er Inn* decision on the equal protection provisions of

⁶¹ *Batson v. Kentucky*, 476 U.S. 79 (1986).

⁶² The U.S. Supreme Court based its *Batson* ruling on the Federal Equal Protection Clause. *Id.* at 89.

⁶³ *Reed v. Reed*, 404 U.S. 71 (1971).

⁶⁴ *Frontiero v. Richardson*, 411 U.S. 677 (1973).

⁶⁵ *Craig v. Boren*, 429 U.S. 190 (1976).

⁶⁶ *Sail'er Inn v. Kirby*, 485 P.2d 529 (Cal. 1971).

⁶⁷ Through *Sail'er Inn*, the California Supreme Court became the nation's first state supreme court to treat gender as a suspect classification. John D. Johnston, Jr. & Charles L. Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. REV. 675, 690–91 (1971).

both the federal and state constitutions. When the U.S. Supreme Court rejected the strict scrutiny rule for gender classifications in *Reed v. Reed*, the *Sail'er Inn* doctrine remained a state constitutional principle—again demonstrating how state supreme courts can establish rights beyond federal constitutional minimums.

3. Sexual Orientation Equality

During this period, the gay rights movement was also gaining strength in California and in other parts of the country. Among other goals, the movement sought to protect gay and lesbian persons as a class from discrimination based on sexual orientation, in the workplace and elsewhere. Well before the U.S. Supreme Court issued its decision in *Romer v. Evans* (1996),⁶⁸ interpreting the Federal Equal Protection Clause to protect gay and lesbian persons, the California Supreme Court established this principle under the California Constitution. In *Gay Law Students v. Pacific Telephone and Telegraph Co.* (1979), the court held that the equal protection provisions of California Constitution article I, section 7(a) prohibit public employers (in this case, a publicly regulated private utility company) from discriminating against persons based on their sexual orientation.⁶⁹ Through this decision, the California Supreme Court again advanced the rights revolution into an area where other courts would later follow.

4. Abortion

Meanwhile, the movement for personal autonomy in matters of procreation generated another contested question of constitutional rights—that is, whether a woman has a constitutional right to terminate her pregnancy. In 1973, the U.S. Supreme Court issued its sweeping decision in *Roe v. Wade*,⁷⁰ but again it was trailing the California Supreme Court. In *People v. Belous* (1969),⁷¹ the California Supreme Court invalidated a statute that criminalized abortion except when “necessary to preserve the life” of the pregnant woman, on the grounds that the law was unconstitutionally vague—the nation’s first judicial decision declaring an abortion statute unconstitutional.⁷² In

68 *Romer v. Evans*, 517 U.S. 620 (1996).

69 *Gay Law Students Ass’n v. Pac. Tel. & Tel. Co.*, 595 P.2d 592 (Cal. 1979).

70 *Roe v. Wade*, 410 U.S. 113 (1973).

71 *People v. Belous*, 458 P.2d 194 (Cal. 1969).

72 *See id.* at 203–08 (overturning the conviction of a physician prosecuted under the statute); *see also* S.B. 462, 1967–1968 Legis. Sess., Reg. Sess. (Cal. 1967) (before the Court issued its decision in *Belous*, the California Legislature adopted the Therapeutic Abortion Act of 1967, a statute that liberalized abortion policy in the state).

People v. Barksdale (1972),⁷³ the California Supreme Court struck down under both the California and Federal Constitutions the next iteration of the state's abortion law, which had allowed abortion only in cases where "there is a substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother," or in cases of rape or incest—again on the grounds that this criminal statute was unconstitutionally vague.⁷⁴ The California Supreme Court's constitutional analysis of abortion restrictions influenced courts in other states, as well as the U.S. Supreme Court in *Roe*.⁷⁵

In the post-*Roe* era, the California Supreme Court expanded abortion rights beyond where the U.S. Supreme Court was prepared to go. For example, when the U.S. Supreme Court rejected a federal constitutional right to federally funded abortion in *Harris v. McRae* (1980),⁷⁶ the California Supreme Court, in *Committee to Defend Reproductive Rights v. Myers* (1981),⁷⁷ established a state constitutional right to state-funded abortion. And, as further discussed below, after the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992)⁷⁸ allowed states to impose certain restrictions on abortion rights, including parental consent rules, the California Supreme Court determined that California's parental consent rule violated the state constitution.⁷⁹

5. Educational Equality

In the 1970s, a gap emerged between the California Supreme Court and the U.S. Supreme Court on the question of whether there is a constitutional right to equalized funding of public education. In *Serrano v. Priest I* (1971),⁸⁰ the California Supreme Court held that the state's school funding policies involved both a suspect classification—because tying school funding to the property values in a local school district created a classification based on wealth—and a fundamental interest, education. Based

⁷³ *People v. Barksdale*, 503 P.2d 257, 267 (Cal. 1972).

⁷⁴ *Id.* at 260.

⁷⁵ Arthur G. Scotland, *The Landmark Abortion Decisions: Justifiable Termination or Miscarriage of Justice?—Proposals for Legislative Response*, 4 PAC. L.J. 821, 823–27 (1973).

⁷⁶ *Harris v. McRae*, 448 U.S. 297, 309–16 (1980).

⁷⁷ *Comm. to Defend Reprod. Rights v. Myers*, 625 P.2d 779, 806 (Cal. 1981).

⁷⁸ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 872 (1992).

⁷⁹ *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 818–19 (Cal. 1997). California's parental consent law was enacted in 1987 through Assembly Bill 2274, which became 1987 Cal. Stat. 1237 (amending California Civil Code section 34.5 and adding California Health and Safety Code section 25958). The law was challenged immediately after its adoption and its enforcement was stayed pending the outcome of the litigation. It was never enforced.

⁸⁰ *Serrano v. Priest I*, 487 P.2d 1241, 1249, 1264–65 (Cal. 1971).

on these determinations, the court applied strict scrutiny to state's system for school funding and invalidated the system.⁸¹ When the U.S. Supreme Court addressed these same issues in *San Antonio Independent School District v. Rodriguez* (1973),⁸² however, it reached the opposite result, rejecting the view that wealth is a suspect classification and that education is a protected right under the Federal Constitution. The California Supreme Court was unwilling to accept that outcome. In *Serrano v. Priest II* (1976),⁸³ the court invoked the state constitution alone, requiring equalization of public school funding.

6. Free Speech

In *Robins v. Pruneyard Shopping Center* (1979),⁸⁴ the California Supreme Court expanded the constitutional protection of free speech to include speech and political solicitation activities in shopping centers, even when the property is privately owned. The decision expanded California's free speech rights beyond federal constitutional standards, which protect speech against abridgement by government actors, not private entities. When the mall challenged the ruling in the U.S. Supreme Court, the Court narrowly affirmed in *Pruneyard Shopping Center v. Robins* (1980), noting that California has the "right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."⁸⁵ This is true so long as the state court's ruling did not violate any provision of the Federal Constitution. Here, the Court held that the California rule requiring a private shopping mall to protect free speech on its property did not rise to the level of an unconstitutional taking. The California Supreme Court's *Pruneyard* decision remains an anomaly in state constitutional jurisprudence, almost universally rejected by other states.⁸⁶ Nevertheless, it again highlights how a state supreme court can establish new constitutional rights when the right is rejected by the U.S. Supreme Court.

⁸¹ See *id.*; see also Kenneth L. Karst, *Serrano v. Priest: A State Court's Responsibilities and Opportunities in the Development of Federal Constitutional Law*, 60 CAL. L. REV. 720 (1972) (explaining that the California Supreme Court was the nation's first court to declare that a state's education funding system violated the state and federal constitutions); Frank J. Macchiarola & Joseph G. Diaz, *Disorder in the Courts: The Aftermath of San Antonio Independent School District v. Rodriguez in the State Courts*, 30 VAL. U. L. REV. 551, 558 (1996).

⁸² *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 19 (1973).

⁸³ See *Serrano v. Priest II*, 557 P.2d 929 (Cal. 1976).

⁸⁴ *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341, 343 (Cal. 1979). For an analysis of the *Pruneyard* litigation, see Joseph R. Grodin, *Freedom of Expression Under the California Constitution*, 6 CAL. LEGAL HIST. 187, 198–207 (2011).

⁸⁵ *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980).

⁸⁶ Gregory C. Sisk, *Uprooting the Pruneyard*, 38 RUTGERS L.J. 1145, 1151–52 (2007).

7. Non-establishment of Religion

In its Establishment Clause cases, the U.S. Supreme Court has allowed, under some conditions, limited government accommodation and even support of religion, including the display of religious objects on public property⁸⁷ or the provision of textbooks or transportation to students in religious schools.⁸⁸ The California Supreme Court has interpreted the California Constitution to require a stricter separation. Two examples are *Fox v. City of Los Angeles* (1978),⁸⁹ which prohibited religious displays on public property, and *California Teachers Association v. Riles* (1981),⁹⁰ which prohibited loans of state textbooks to religious organizations.

Through these and other cases, the California Supreme Court of the Wright-Bird era established a clear pattern of advancing a more progressive constitutional order in California. Some California Supreme Court decisions from this era helped catalyze the recognition of rights by the U.S. Supreme Court (for example, in *Roe v. Wade*⁹¹ and *Batson v. Kentucky*⁹²) and other state supreme courts. But the Court's innovations also invited controversy at home.

II. THE POLITICAL CONTEXT OF THE WRIGHT-BIRD ERA

The California Supreme Court does not operate in a vacuum, but, rather, in a complex checks-and-balances political system in which the people may override its decisions through constitutional amendment, and may remove justices from the court through retention elections or recall. In the period 1970–1986, the California Supreme Court was a highly ambitious, progressive court operating in a state that had strong progressive elements, but also a broad and deep conservative streak. Accordingly, the court was vulnerable to popular opposition. During these years, the California electorate was ideologically more conservative than it is today and stood clearly to the right of the court on a number of issues. On several occasions, the court's opponents were able to mobilize these more conservative elements of the electorate and use various

⁸⁷ See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 714 (1984) (allowing the presentation of the nativity scene as part of an annual Christmas display by the city of Pawtucket, Rhode Island).

⁸⁸ See, e.g., *Bd. of Educ. v. Allen*, 392 U.S. 236, 252 (1968) (upholding a New York law providing for the lending of textbooks to students in private—including religious—schools).

⁸⁹ *Fox v. City of Los Angeles*, 587 P.2d 663, 682 (Cal. 1978).

⁹⁰ *Cal. Teachers Ass'n v. Riles*, 632 P.2d 953, 963 (Cal. 1981).

⁹¹ *Roe v. Wade*, 410 U.S. 113 (1973).

⁹² *Batson v. Kentucky*, 476 U.S. 79 (1986).

democratic means to overturn and otherwise limit the court's progressive agenda.

A. The Electorate

Although California is now one of the most liberal and solidly Democratic states in the nation, it has not always been so. In the early 1970s, as the California Supreme Court was launching the new judicial federalism, the California electorate was more conservative than it is today. In the late 1960s, in the wake of social unrest in the state, rising crime, and other factors, pollsters reported an increase in the percentage of California voters who identified as politically conservative.⁹³ As late as the 1990s, California remained a highly competitive battleground state in partisan elections as progressive and conservative ideologies vied for dominance. Voters roughly supported Democratic and Republican candidates equally, and often split tickets. Democrats generally controlled the Legislature, while Republicans more often won top-of-the-ticket races for Governor, U.S. Senator, and President of the United States.⁹⁴ For example, between 1966 and 1998, Republicans won six gubernatorial elections—Ronald Reagan (1966, 1970); George Deukmejian (1982, 1986); and Pete Wilson (1990, 1994)—a string interrupted only by Democrat Jerry Brown's two victories in 1974 and 1978. Even more remarkably, in the six presidential elections between 1968 and 1988, California voters supported the Republican candidate for President each time—Richard Nixon (1968, 1972); Gerald Ford (1976); Ronald Reagan (1980, 1984); and George H.W. Bush (1988). Democrats were not able to break Republican dominance in securing California's presidential electors until 1992.⁹⁵ This relatively conservative electorate was not necessarily inclined to embrace the state supreme court's progressive agenda.

B. Mobilization

Before the 1970s, voters had never overturned a rights decision of the California Supreme Court through constitutional

93 MERVIN D. FIELD, THE CALIFORNIA POLL RELEASE #647: DRAMATIC UPSWING IN PROPORTION OF VOTERS WHO SEE THEMSELVES AS POLITICALLY CONSERVATIVE (Sept. 16, 1969); MERVIN D. FIELD, THE CALIFORNIA POLL RELEASE #703: PART I: SELF-STYLED CONSERVATISM THE DOMINANT MOOD OF CALIFORNIA ELECTORATE TODAY (Jan. 19, 1971).

94 See, e.g., MERVIN D. FIELD, THE CALIFORNIA POLL RELEASE #1420: STATE EVENLY DIVIDED BETWEEN DEMOCRATS AND REPUBLICANS (Feb. 1, 1988).

95 For a discussion of political change in California during this period, see Morris P. Fiorina & Samuel J. Abrams, *Is California Really a Blue State?*, in THE NEW POLITICAL GEOGRAPHY OF CALIFORNIA 291–308 (Frédéric Douzet, Thad Kousser & Kenneth P. Miller eds., 2008).

amendment, nor come close to defeating justices through retention elections.⁹⁶ Although the court had issued various controversial decisions during the Traynor era and before, opponents had never successfully persuaded the public to push back. In the 1970s, however, conservative elected officials (mostly Republicans, but also some Democrats), interest groups, and the Republican Party organization made a counter-discovery to the court's experimentation with the new judicial federalism. Just as progressive justices were exploring the possibilities of expanding rights through new interpretations of the state constitution, opponents realized they could mobilize the state's electorate to counter the court, at least on some issues.

C. Institutional Options

The court's critics had several ways to challenge its decisions and institutional power—legislative constitutional amendment, initiative constitutional amendment, and removal of justices, either by judicial retention election or recall.

1. Legislative Constitutional Amendment

The most common form of state constitutional amendment is the legislative constitutional amendment, or LCA. Under the LCA process, the legislature proposes an amendment and refers it to the people for ratification or rejection (the one exception is Delaware, which allows the Legislature to amend the state constitution without voter approval).⁹⁷ Different states have different threshold requirements for legislative and popular approval of amendments. California requires a two-thirds vote of both houses of the Legislature to propose the amendment, and a simple majority popular vote for ratification.⁹⁸ To succeed under these rules, a legislative amendment must enjoy broad support—that is, a supermajority of the Legislature as well as concurrence by the electorate.

2. Initiative Constitutional Amendment

California is one of sixteen states (the others are Arizona, Arkansas, Colorado, Florida, Illinois, Michigan, Missouri,

⁹⁶ See JOSEPH R. GRODIN, IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE 105 (1989). In 1968, critics of Chief Justice Traynor stirred some opposition to his retention, but the effort failed. Traynor had authored the court's controversial decision in *Mulkey v. Reitman*, 413 P.2d 825 (Cal. 1966), striking down Proposition 13 of 1964. That measure had restricted the state's ability to enact fair housing legislation. Despite this controversy, Traynor won retention with 65% of the vote. *Id.*

⁹⁷ John Dinan, *State Constitutional Developments in 2013*, in 46 THE BOOK OF THE STATES 2014, at 12–13 tbl.1.2 (2014) [hereinafter THE BOOK OF THE STATES].

⁹⁸ CAL. CONST. art. XVIII, §§ 1, 4.

Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, and South Dakota) where citizens may invoke the initiative process to amend their state constitution directly, without involvement by the Legislature.⁹⁹ As noted above, California has the nation's most robust system for citizen-initiated constitutional amendment (ICA). The California initiative process gives citizens power to amend the constitution with little restraint. The main limitations on citizen-initiated amendments are that they must address only one subject and may only amend, rather than revise, the constitution.¹⁰⁰ To qualify an amendment for the ballot, proponents must gather signatures equaling 8% of the vote in the last gubernatorial election (compared to only 5% for initiative statutes) in a 150-day period. Once the amendment qualifies for the ballot, it can be adopted by a simple majority vote on the question—without any involvement or limitation by the Legislature or the Governor. Between 1970 and 2015, Californians adopted twenty-nine initiative constitutional amendments, the most of any state during that period.¹⁰¹ As discussed below, several of the approved amendments reversed decisions by the California Supreme Court.

3. Judicial Election

California's system for selection and retention of supreme court justices is unique among the states. As set forth in article VI of the California Constitution, the process gives the Governor broad discretion in nominating justices to fill vacancies on the court (that is, unlike the so-called "merit selection" system used in some states, the Governor is not limited to a pool of candidates selected by a commission); it then places two separate checks on the Governor's choice.¹⁰² The first check is a confirmation vote by the three-member Commission on Judicial Appointments, consisting of the chief justice of the California Supreme Court, the senior presiding justice of the state's courts of appeal, and the

99 THE BOOK OF THE STATES, *supra* note 97, at 14. In two additional states, Massachusetts and Mississippi, citizens can initiate constitutional amendments, but must first submit them to the Legislature, and, in Massachusetts, the Legislature has the power to block the initiative's enactment. *Id.*

100 CAL. CONST. art. XVIII, § 3. For a discussion of the distinctions between constitutional revision and amendment in California, see *Strauss v. Horton*, 207 P.2d 48 (Cal. 2009), and Eugene C. Lee, *The Revision of California's Constitution*, California Policy Seminar Brief 1991 (on file with author).

101 *Map of Initiatives Passed in the USA as of 2013*, MILLER-ROSE INITIATIVE DATABASE, <http://initiatives.roseinstitute.org/> (last visited Feb. 7, 2016); see also *California Ballot Measures*, U.C. HASTINGS C.L., <http://library.uchastings.edu/research/ballots/> (last visited Feb. 7, 2016); *Initiatives by Title and Summary Year*, CAL. SECRETARY ST. ALEX PADILLA, <http://elections.cdn.sos.ca.gov/ballot-measures/pdf/initiatives-by-title-and-summary-year.pdf> [<http://perma.cc/QD6Q-96RZ>].

102 THE BOOK OF THE STATES, *supra* note 97, at 241–42.

Attorney General. If confirmed by this body, the new justice takes a seat on the court and serves until the next gubernatorial election. At that point, the public exercises the second check, by deciding whether to confirm the new justice or remove her from the court. In this vote, only the name of the justice—no opponents—appear on the ballot and the voters cast a “yes” or “no” vote on the question of whether to retain that justice for the balance of the term. The court’s seven seats have staggered twelve-year terms. When a new justice fills a vacancy, she may serve the unexpired years remaining in the term. For example, if a vacancy occurs in the sixth year of a term, the new justice may serve for the remaining six years. At the expiration of the term, a justice seeking to remain on the court must face the voters again in a retention election. The election is again an up-or-down vote and the justice faces no competing candidates. Instead, the voters decide whether to retain the justice or remove the justice and create a new vacancy to be filled through the normal process of nomination by the Governor and confirmation by the commission and voters. If retained, the justice is authorized to serve an additional twelve years.¹⁰³

4. Judicial Recall

The California Constitution allows citizens to circulate petitions demanding the recall of public officials, including judges, prior to the expiration of their normal terms.¹⁰⁴ To force a recall election, proponents must obtain within 160 days signatures equaling 12% of the vote for the office in the last election.¹⁰⁵ Citizens have never qualified a recall petition against a member of the California Supreme Court, but the device provides an additional popular check on the court.¹⁰⁶ Through judicial election and recall, the people have periodic opportunities to remove justices who stray too far from the public will.

III. POPULAR PUSH-BACK AGAINST THE WRIGHT AND BIRD COURTS

The combination of several elements—an activist, progressive court; an electorate that was more conservative than the court on some issues; political actors who could mobilize voters to challenge the court and institutional tools that allowed the people to do so—defined the relationship between the court and

¹⁰³ CAL. CONST. art. VI, §§ 7, 16.

¹⁰⁴ *Id.* art. II; CAL. ELEC. CODE §§ 11001, 11006 (West 2015).

¹⁰⁵ CAL. CONST. art. II, § 14(b); ELEC. § 11221(c).

¹⁰⁶ Recall petitions have been circulated against several members of the court, but none have qualified for the ballot. See *Complete List of Recall Attempts*, CAL. SECRETARY ST. ALEX PADILLA, <http://www.sos.ca.gov/elections/recalls/complete-list-recall-attempts/> [<http://perma.cc/FXD2-R2RC>].

the people throughout the Wright-Bird era. Table 2 summarizes some of that conflict, listing, by category, leading cases establishing new rights and state constitutional amendments designed to override some of those decisions.

Table 2: New Court-Established California State Constitutional Rights, 1970-1986, and Overriding Amendments

Category	New State Constitutional Rights	Cases Establishing Rights	Overriding Amendments	Vote
Criminal Justice (capital punishment)	Right against execution / abolition of capital punishment	<i>People v. Anderson</i> (1972)	Prop. 17 (1972)	Pass (67.5%) ¹⁰⁷
Criminal Justice (procedure)	Procedural rights of criminal defendants, including those related to admissions, confessions, searches, exclusionary rule, ¹⁰⁸ vicarious exclusionary rule ¹⁰⁹	<i>People v. Krivda</i> (1971) (searches); <i>People v. Superior Court (Hawkins)</i> (1972) (blood tests); <i>People v. Longwill</i> (1975) (searches); <i>People v. Brisendine</i> (1975) (searches); <i>People v. Disbrow</i> (1976) (admissions); <i>People v. Jimenez</i> (1978) (confessions); <i>People v. Pettingill</i> (1978) (interrogations)	Prop. 8 (1982)	Pass (56.4%) ¹¹⁰
Criminal Justice (procedure)	Procedural rights of criminal defendants, those related to reciprocal discovery; hearsay at preliminary hearing; post-indictment preliminary hearing	<i>Reynolds v. Superior Court</i> (1974) (restrictions on prosecutorial discovery); <i>Allen v. Superior Court</i> (1976) (restrictions on prosecutorial discovery); <i>In re Misener</i> (1985) (restrictions on prosecutorial discovery); <i>Mills v. Superior Court</i> (confrontation of accusers at preliminary hearing); <i>Hawkins</i>	Prop. 115 (1990)	Pass (57.03%) ¹¹¹

¹⁰⁷ CAL. SEC'Y OF STATE EDMUND G. BROWN, JR., STATEMENT OF VOTE: GENERAL ELECTION NOVEMBER 7, 1972, at 30 (1972).

¹⁰⁸ *People v. Cahan*, 282 P.2d 905 (Cal. 1955).

¹⁰⁹ *People v. Martin*, 85 P.2d 880 (Cal. 1955).

¹¹⁰ CAL. SEC'Y OF STATE MARCH FONG EU, STATEMENT OF VOTE: PRIMARY ELECTION JUNE 8, 1982, at 45 (1982).

¹¹¹ CAL. SEC'Y OF STATE MARCH FONG EU, STATEMENT OF VOTE: JUNE 5, 1990, at 51 (1990).

Category	New State Constitutional Rights	Cases Establishing Rights	Overriding Amendments	Vote
		<i>v. Superior Court</i> (1978) (right to post-indictment preliminary hearing)		
Equal Protection (gender)	Strict scrutiny for laws that classify on basis of gender	<i>Sail'er Inn, Inc. v. Kirby</i> (1971)	No	—
Equal Protection (race)	Right to desegregation of public schools regardless of cause of segregation	<i>Crawford v. Board of Education of Los Angeles</i> (1976)	Prop. 1 (1979) (LCA)	Pass (68.6%) ¹¹²
Equal Protection (race)	Right against racial discrimination in jury selection (peremptory challenges)	<i>People v. Wheeler</i> (1978)	No	—
Equal Protection (sexual orientation)	Right to non-discrimination based on sexual orientation in employment	<i>Gay Law Students Association v. Pacific Telephone & Telegraph Co.</i> (1979)	No	—
Equal Protection (education)	Right to equalized public school funding	<i>Serrano v. Priest II</i> (1976)	No	—
Abortion	Right to abortion	<i>People v. Belous</i> (1969); <i>People v. Barksdale</i> (1972)	No	—
Abortion	Right to publicly funded abortion	<i>Committee to Defend Reproductive Rights v. Myers</i> (1981)	No	—
Free speech	Right to free speech on private property	<i>Robins v. Pruneyard Shopping Center</i> (1979)	No	—
Religion (non-establishment)	Prohibition on religious displays on public property	<i>Fox v. City of Los Angeles</i> (1978)	No	—
Religion (non-establishment)	Prohibition on state-loaned textbooks to parochial schools	<i>California Teachers Association v. Riles</i> (1981)	No	—

¹¹² CAL. SEC'Y OF STATE MARCH FONG EU, STATEMENT OF VOTE: SPECIAL ELECTION NOVEMBER 6, 1979 (1979).

A. Crime

The biggest divide between the court and the people of California during the Wright-Bird era was in the area of criminal justice—in particular, capital punishment and criminal procedure. As the court focused on expanding the rights of criminal defendants, the public was much more concerned with controlling crime and protecting the rights of crime victims. Polling data from the era demonstrates the public’s intense concern about crime policy and its frustration with the court’s perceived leniency.

1. Capital Punishment

At the end of the 1960s, some legal scholars, activists, lawyers, and judges started developing the theory that capital punishment was per se cruel and unusual punishment, and therefore, could be abolished by courts.¹¹³ Before that time, the issue was considered a political question for the people and their representatives to decide. Pollsters regularly surveyed public attitudes on capital punishment. In California, a significant minority of voters favored “doing away with” the death penalty, but was consistently outnumbered by those who wanted to preserve the ultimate sanction. In the fifteen years leading up to *People v. Anderson* (1972),¹¹⁴ the Field Poll surveyed the question seven times. Table 3 summarizes those results, as well as the results of a survey taken after the *Anderson* decision.

Table 3: Public Opinion on Capital Punishment in California, 1956–1972¹¹⁵

Year	Keep Capital Punishment	Do Away With It	No Opinion
1956	49 %	29 %	22 %
1960	55 %	35 %	10 %
1963	56 %	28 %	16 %
1965	51 %	39 %	10 %
1966	54 %	30 %	16 %
1969	65 %	26 %	9 %
1971	58 %	34 %	8 %
Feb. 1972	<i>People v. Anderson</i>		
Sept. 1972	66 %	24 %	10 %

113 An influential article advocating judicial invalidation of capital punishment was Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773 (1970).

114 *People v. Anderson*, 493 P.2d 880 (Cal. 1972).

115 MERVIN D. FIELD, THE CALIFORNIA POLL, RELEASE #726: PUBLIC SUPPORT FOR THE DEATH PENALTY REMAINS AT A RELATIVELY HIGH LEVEL (Sept. 14, 1971) [hereinafter RELEASE #726]; MERVIN D. FIELD, THE CALIFORNIA POLL, RELEASE #761: OVERWHELMING SUPPORT FOR DEATH PENALTY IN CALIFORNIA (Sept. 7, 1972) [hereinafter RELEASE #761].

In reporting the results of the 1971 poll, Field noted that “[s]ome legislators have suggested that this issue be presented to voters on the 1972 ballot, but if a public vote were being held now, there is little question that a substantial majority of California voters would favor keeping the death penalty.”¹¹⁶

When in February 1972 the California Supreme Court issued its decision in *Anderson* declaring that capital punishment per se violated the California Constitution, it was effectively testing that assumption. The state’s system of initiative constitutional amendment made it comparatively easy for opponents of the decision to put the question to voters: should the state constitution be amended to overturn *Anderson*? Law enforcement groups (including district attorneys, police, and sheriffs) and then-State Senator George Deukmejian mobilized and quickly qualified an initiative constitutional amendment for the November 1972 ballot. The amendment stated that the death penalty provided for under state statutes “shall not be deemed to be, or to constitute, infliction of cruel or unusual punishments . . . nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution.”¹¹⁷ A survey taken in September 1972, during the early stages of the public debate on the amendment, indicated that public support for capital punishment had increased after the court’s decision in *Anderson*, from 58% in September 1971 to 66% in September 1972, rising to the highest level recorded by the Field Poll since it began surveying the issue in 1956.¹¹⁸ On Election Day, voters approved the amendment by a decisive 67.5–32.5% margin, thus overriding the court and restoring the validity of capital punishment under the California Constitution.¹¹⁹

2. Criminal Procedure

The California Supreme Court’s early advancement of the new judicial federalism featured many decisions expanding procedural rights of criminal defendants. The court’s agenda aligned with progressive ideas about reforming the criminal justice system, but conflicted with the broader public’s concerns about crime and public safety. Polling data again exposed this gap. In a 1973 poll, respondents listed crime and fear of crime as

¹¹⁶ RELEASE #726, *supra* note 115, at 2.

¹¹⁷ CAL. SEC’Y OF STATE EDMUND G. BROWN, JR., PROPOSED AMENDMENTS TO CONSTITUTION, PROPOSITIONS AND PROPOSED LAWS TOGETHER WITH ARGUMENTS: GENERAL ELECTION TUESDAY, NOVEMBER 7, 1972, at 42 (1972).

¹¹⁸ RELEASE #761, *supra* note 115; *see also* MERVIN D. FIELD, THE CALIFORNIA POLL, RELEASE #766: RESTORATION OF DEATH PENALTY FAVORED BY VOTERS (Oct. 24, 1972).

¹¹⁹ CAL. SEC’Y OF STATE EDMUND G. BROWN, JR., *supra* note 107, at 30.

the most important problem facing the state, and one respondent in three claimed to have been a victim of crime in the past year.¹²⁰ Deep concern about crime persisted from the 1970s through the mid-1990s. In a 1984 survey, for example, respondents ranked crime as their greatest concern—with 73% “extremely concerned” and an additional 23% “somewhat concerned.”¹²¹

In light of these sentiments, the public became increasingly frustrated by the court’s focus on restricting the powers of law enforcement and expanding the state constitutional rights of criminal defendants. The law enforcement community saw an opportunity. It organized an effort to qualify an initiative constitutional amendment that would, in one stroke, overturn existing, pro-defense rulings and constrain future decisions of this type. In 1982, this coalition qualified for the ballot a combined initiative constitutional amendment and initiative statute called the Victims’ Bill of Rights. The measure, which appeared on the ballot as Proposition 8 of 1982, made sweeping changes to the state’s criminal justice system to limit the state constitutional rights of criminal defendants, increase the rights of crime victims, and enhance the powers of police and prosecutors. It embedded in the state constitution the right to restitution, restrictions on bail, limitations on plea bargaining, the right of crime victims to be heard at sentencing, enhanced punishment for recidivist offenders, restrictions on sentencing to the Youth Authority, as well as fundamental changes to the rules of evidence in criminal proceedings.¹²²

Perhaps most consequentially, its “truth in evidence” provision abolished the state’s exclusionary rule, which excluded the admission at trial of otherwise relevant evidence that the state obtained through violation of the defendant’s rights.¹²³ The California Supreme Court had established the state’s exclusionary rule in 1955 (before the U.S. Supreme Court required states to comply with a federal exclusionary rule in *Mapp v. Ohio*) and had expanded it over time to apply more

120 MERVIN D. FIELD, THE CALIFORNIA POLL, RELEASE #779: CRIME AND FEAR OF CRIME NUMBER ONE COMMUNITY PROBLEM IN CALIFORNIA (Mar. 22, 1973); MERVIN D. FIELD, THE CALIFORNIA POLL, RELEASE #780: ONE IN THREE CALIFORNIANS CLAIM TO HAVE BEEN VICTIMIZED BY CRIME DURING PAST YEAR (Mar. 23, 1973).

121 MERVIN D. FIELD, THE CALIFORNIA POLL, RELEASE #1236: HIGH DEGREE OF PUBLIC CONCERN ABOUT TWO STATE ISSUES: CRIME AND LAW ENFORCEMENT; SCHOOLS AND EDUCATION 1 (Feb. 23, 1984).

122 CAL. SEC’Y OF STATE MARCH FONG EU, CALIFORNIA BALLOT PAMPHLET: PRIMARY ELECTION JUNE 8, 1982, at 32–33, 56 (1982).

123 *Id.* at 33.

broadly than the federal rule.¹²⁴ The Victims' Bill of Rights initiative overturned that rule and instead provided that, under state law, all relevant evidence would now be admissible at trial, with exceptions for statutory rules of evidence such as hearsay and privilege. California courts would now enforce only the federal exclusionary rule, and would not be permitted to exclude evidence more broadly under a separate, independent state rule.¹²⁵

George Deukmejian, now California Attorney General, summarized the proponents' arguments in the official California ballot pamphlet:

Crime has increased to an absolutely intolerable level.

While criminals murder, rape, rob and steal, victims must install new locks, bolts, bars and alarm systems in their homes and businesses. Many buy tear gas and guns for self protection. FREE PEOPLE SHOULD NOT HAVE TO LIVE IN FEAR.

Yet, higher courts in this state have created rights for the criminally accused and placed more restrictions on law enforcement officers. This proposition will overcome some of the adverse decisions by our higher courts.¹²⁶

Voters approved the measure by a 56.4–46.6% margin.

The measure was challenged in court shortly after the election, and a closely divided California Supreme Court upheld it. Justice Mosk dissented, lamenting: "The Goddess of Justice is wearing a black arm-band today, as she weeps for the Constitution of California."¹²⁷ The Victims' Bill of Rights initiative was a devastating blow for Mosk, an architect of the new judicial federalism, because it wiped away a large body of case law expanding state constitutional rights in the area of criminal procedure, and restricted the court's ability to innovate in this area in the future.¹²⁸

Eight years later, as crime rates remained high and public concerns about crime persisted, the law enforcement community drafted another initiative constitutional amendment to protect

¹²⁴ See generally *People v. Cahan*, 282 P.2d 905 (Cal. 1955). As an example of its expansive nature, the California exclusionary rule applied vicariously, that is, it granted the defendant standing to object to the admission of evidence obtained in violation of a third person's constitutional rights. See *People v. Martin*, 290 P.2d 855, 857 (Cal. 1955). For the U.S. Supreme Court ruling applying the exclusionary rule to the states, see *Mapp v. Ohio*, 367 U.S. 643 (1961).

¹²⁵ J. Clark Kelso & Brigitte A. Bass, *The Victims' Bill of Rights: Where Did It Come from and How Much Did It Do?*, 23 PAC. L.J. 843, 867–68 (1992).

¹²⁶ CAL. SEC'Y OF STATE MARCH FONG EU, *supra* note 122, at 34.

¹²⁷ *Brosnahan v. Brown*, 651 P.2d 274, 313 (Cal. 1982) (Mosk, J., dissenting).

¹²⁸ JACQUELINE R. BRAITMAN & GERALD F. UELMEN, JUSTICE STANLEY MOSK 155–57 (2013).

crime victims and limit the procedural rights of criminal defendants. This measure, known as the Crime Victims Justice Reform Act, was designated as Proposition 115 on the state ballot. Among other provisions, the measure sought to eliminate or limit the procedural rights of criminal defendants, including the defendant's right against prosecutor's pretrial discovery, the defendant's right to exclude hearsay at preliminary hearings, and the defendant's right to post-indictment preliminary hearings. These provisions, again, would overturn rights established by the California Supreme Court. Moreover, and more radically, Proposition 115 sought to establish a "lock-step" provision that would bar the California Supreme Court from interpreting the California Constitution to recognize state constitutional rights of criminal defendants beyond the requirements of the U.S. Constitution—a direct and total repudiation of the court's new judicial federalism jurisprudence in the area of criminal procedure.¹²⁹ Voters embraced Proposition 115 by a 57–43% margin.¹³⁰ As discussed further below, the California Supreme Court upheld most of Proposition 115's provisions but invalidated its sweeping lock-step rule.¹³¹

B. Busing

The California Supreme Court's decision to expand the constitutional basis for desegregative busing again conflicted with deeply held public views. By declaring that California's constitutional standard for desegregation would be more stringent than the federal standard (that is, that remedies would be required regardless of whether the segregation was

129 California Constitution article I, section 24, reads as follows: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." Proposition 115 sought to add the following amendment:

In criminal cases the rights of a defendant to equal protection of the laws, to due process of law, to the assistance of counsel, to be personally present with counsel, to a speedy and public trial, to compel the attendance of witnesses, to confront the witnesses against him or her, to be free from unreasonable searches and seizures, to privacy, to not be compelled to be a witness against himself or herself, to not be placed twice in jeopardy for the same offense, and to not suffer the imposition of cruel or unusual punishment, shall be construed by the courts of this state in a manner consistent with the Constitution of the United States. This Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States, nor shall it be construed to afford greater rights to minors in juvenile proceedings on criminal causes than those afforded by the Constitution of the United States.

CAL. SEC'Y OF STATE MARCH FONG EU, CALIFORNIA BALLOT PAMPHLET: PRIMARY ELECTION JUNE 5, 1990, at 33 (1990).

130 CAL. SEC'Y OF STATE MARCH FONG EU, *supra* note 111, at 51.

131 *Raven v. Deukmejian*, 801 P.2d 1077, 1089 (Cal. 1990); *see also infra* notes 176, 178.

intentional), the court increased the prospects that many students in the state would be bused in pursuit of racial desegregation.¹³²

Public opinion surveys indicated that California voters overwhelmingly opposed the busing of public school students to achieve racial balance. In a June 1979 Field poll, 79% of respondents said that they were opposed to busing, compared to only 14% who supported it.¹³³ A September 1979 Field Poll further underscored the state's overwhelming opposition to busing. Field noted:

The public itself is quite clear about where it stands on the basic idea of school busing to achieve racial balance. There is a four to one majority against the idea, and very few people are neutral or undecided.

Opposition to busing pervades all areas of the state, all political partisanship groups, all levels of education, and is not affected by whether any family members are in the schools or their propensity to vote.¹³⁴

Both white and Hispanic voters heavily opposed busing, while black voters were evenly divided on the remedy.¹³⁵

Opposition to court-ordered busing was especially intense in the suburban areas of the sprawling Los Angeles Unified School District. Legislators representing that area, including Democrat Alan Robbins, led a bipartisan effort to place a constitutional amendment on the ballot to overturn the court's decision.¹³⁶ The amendment, which became Proposition 1 of 1979, proposed a lengthy amendment to the state constitution's due process and equal protection clauses (article I, section 7(a)), to limit their independent force in the area of desegregation.¹³⁷ The amended clauses would read as follows:

A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that

¹³² See *Crawford v. Board of Education of L.A.*, 551 P.2d 28 (Cal. 1976), which affirmed the court's principles for school desegregation set forth in dicta in *Jackson v. Pasadena City School District*, 382 P.2d 878 (Cal. 1963). For discussion of the *Crawford* context, see PREBLE STOLZ, JUDGING JUDGES: THE INVESTIGATION OF ROSE BIRD AND THE CALIFORNIA SUPREME COURT 34 (1981).

¹³³ MERVIN D. FIELD, THE CALIFORNIA POLL, RELEASE #1031: CALIFORNIANS OVERWHELMINGLY OPPOSED TO SCHOOL BUSING (June 14, 1979).

¹³⁴ MERVIN D. FIELD, THE CALIFORNIA POLL, RELEASE #1043: LARGE MAJORITY OPPOSES SCHOOL BUSING, BUT MOST OF PUBLIC EITHER UNAWARE OF PROP. 1 (ROBBINS AMENDMENT) OR HAVE CONFLICTING VIEWS AS TO ITS EFFECTS 1 (Sept. 21, 1979).

¹³⁵ *Id.*

¹³⁶ STOLZ, *supra* note 132, at 33–37.

¹³⁷ CAL. SEC'Y OF STATE MARCH FONG EU, CALIFORNIA BALLOT PAMPHLET: SPECIAL STATEWIDE ELECTION NOVEMBER 6, 1979, at 6–7 (1979).

nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation. In enforcing this subdivision or any other provision of this Constitution, no court of this State may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution.¹³⁸

The Legislature placed the amendment on the ballot through a bipartisan, supermajority vote of 62–17 in the Assembly and 28–6 in the Senate.¹³⁹ Voters approved the measure by a 68.6–31.4% margin.¹⁴⁰

Progressive opponents of the amendment challenged it on federal constitutional grounds. In *Crawford v. Board of Education of L.A.* (1982),¹⁴¹ the U.S. Supreme Court upheld the people's decision to override the state supreme court. Justice Lewis Powell wrote:

We . . . reject[] the contention that once a State chooses to do "more" than the Fourteenth Amendment requires, it may never recede. We reject an interpretation of the Fourteenth Amendment so destructive of a State's democratic processes and of its ability to experiment. This interpretation has no support in the decisions of this Court. . . .

In short, having gone beyond the requirements of the Federal Constitution, the State was free to return in part to the standard prevailing generally throughout the United States.¹⁴²

C. Other Rights—No Direct Challenges to the Court's Rulings

As noted above, during the early years of the new judicial federalism, the California Supreme Court expanded rights beyond federal minimums in a range of other areas, including abortion, gender equality, sexual orientation equality, equalized education funding, free speech, and non-establishment of religion. Polling information is not available for all of these

¹³⁸ *Id.* at 7.

¹³⁹ *Id.* at 6.

¹⁴⁰ CAL. SEC'Y OF STATE MARCH FONG EU, *supra* note 112.

¹⁴¹ *Crawford v. Bd. of Educ. of L.A.*, 458 U.S. 527, 535, 542 (1982).

¹⁴² *Id.*

issues, but the existing data suggest that decisions generally aligned with public opinion; at the very least, the court's decisions in these cases did not run counter to broad, strongly held opinion.

Polling was most extensive on the question of abortion. During the period that the California Supreme Court led the nation in expanding abortion rights, through *People v. Belous* (1969)¹⁴³ and *People v. Barksdale* (1972),¹⁴⁴ polls indicated that Californians broadly supported liberalizing abortion laws. A May 1967 Field Poll found that 73% of respondents favored changes to the state's long-standing abortion law which allowed abortions only when the pregnant woman's life was at risk.¹⁴⁵ The court's 1969 ruling in *Belous* declared that law unconstitutional. After the Legislature adopted the Therapeutic Abortion Act of 1967, which allowed abortion where the pregnancy could impair the physical or mental health of the mother or where the pregnancy was the result of rape or incest, polls indicated that the public favored even further liberalization.¹⁴⁶ A majority of respondents would allow abortion "if [the] baby might have a serious deformity," but did not fully support abortion on demand.¹⁴⁷ The California electorate was thus substantially pro-choice on abortion prior to *Roe v. Wade*, during the time that the California Supreme Court was establishing a constitutional basis for the pro-choice position.

Later, the abortion controversy turned to public funding for abortion, and in *Committee to Defend Reproductive Rights v. Myers* (1981),¹⁴⁸ the California Supreme Court declared that the state constitution's protection of abortion rights included the right to public funding for abortion. This outcome was opposite of the U.S. Supreme Court's ruling in *Harris v. McRae* (1980), which rejected a claim to a federal constitutional right to public funding for abortion.¹⁴⁹ Shortly after the *McRae* decision, and a year before *Myers*, a poll indicated that Californians continued to support abortion rights generally, and were evenly divided on the question of whether the state should keep funding abortions

143 See *People v. Belous*, 458 P.2d 194, 204–06 (Cal. 1969).

144 See *People v. Barksdale*, 503 P.2d 257, 270 (Cal. 1972).

145 MERVIN D. FIELD, THE CALIFORNIA POLL, RELEASE #556: LIBERALIZING ABORTION LAWS IS FAVORED BY AN OVERWHELMING MAJORITY OF CALIFORNIA VOTERS 1–2 (May 9, 1967).

146 S.B. 462, 1967–1968 Legis. Sess., Reg. Sess. (Cal. 1967).

147 MERVIN D. FIELD, THE CALIFORNIA POLL, RELEASE #633: CALIFORNIA PUBLIC FAVORS SLIGHT LIBERALIZATION OF ABORTION LAWS, BUT NO MORE 2 (May 20, 1969).

148 *Comm. to Defend Reprod. Rights v. Myers*, 625 P.2d 779 (Cal. 1981).

149 *Harris v. McRae*, 448 U.S. 297 (1980).

(48% yes, 48% no, with 4% undecided).¹⁵⁰ Opponents of *Myers* did not organize an effort to overturn it through a state constitutional amendment.

While the Field Poll did not track California public opinion on gender equality at the time of the *Sail'er Inn* decision (1971),¹⁵¹ the Legislature voted to ratify the Federal Equal Rights Amendment in November 1972, shortly after it was referred to the states, and in 1980, nearly two-thirds of respondents (64%) favored the amendment.¹⁵² The *Sail'er Inn* decision faced no organized override effort. Similarly, by the time of the court's decision in *Gay Law Students* (1979),¹⁵³ public opinion in California had moved in favor of non-discrimination on the basis of sexual orientation in the workplace. In 1978 California voters soundly rejected a ballot measure that would have restricted employment of gays and lesbians in the public schools, and did not mobilize opposition to the court's *Gay Law Students* ruling the following year.¹⁵⁴

The public also accepted the court's decisions to expand rights beyond federal minimums in areas including free speech on private property, non-establishment of religion, and equalization of school funding.¹⁵⁵ Each of these cases generated some controversy, but none of them countered strongly held public views in the manner of the court's capital punishment, criminal procedure, and busing decisions.

150 MERVIN D. FIELD, THE CALIFORNIA POLL, RELEASE #1091: CALIFORNIA PUBLIC AGAINST CONSTITUTIONAL BAN ON ABORTIONS. EVENLY DIVIDED ON MEDI-CAL ABORTIONS PAYMENTS 1-2 (Aug. 19, 1980).

151 *Sail'er Inn, Inc. v. Kirby*, 485 P.2d 529 (Cal. 1971).

152 MERVIN D. FIELD, THE CALIFORNIA POLL, RELEASE #1089: STRONG SUPPORT FOR EQUAL RIGHTS AMENDMENT. REAGAN'S FAILURE TO ENDORSE IT MIGHT ADVERSELY AFFECT HIS CHANCES IF PRESIDENTIAL RACE TIGHTENS 1, 3 (Aug. 12, 1980).

153 *Gay Law Students Ass'n v. Pac. Tel. & Tel. Co.*, 595 P.2d 592 (Cal. 1979).

154 For text and analysis of Proposition 6 of 1978 (the "Briggs Initiative"), see CAL. SEC'Y OF STATE MARCH FONG EU, CALIFORNIA VOTERS PAMPHLET: GENERAL ELECTION NOVEMBER 7, 1978, at 28-31 (1978). The measure was defeated 58.4-41.6%. See CAL. SEC'Y OF STATE MARCH FONG EU, STATEMENT OF VOTE: GENERAL ELECTION NOVEMBER 7, 1978 (1978).

155 Some argue that one additional rights-expanding decision from this era, *Serrano v. Priest*, produced indirect pushback from voters. *Serrano* created a state constitutional right to equalized school funding in and de-linked local property taxes from the funding of local public schools. Although citizens did not mobilize to overturn *Serrano*, they did overwhelmingly support Proposition 13 of 1978, which reduced property taxes and placed strict limits on future increases. Some analysts believe that voters supported Proposition 13 at least in part because, as a result of the court's ruling, their property taxes no longer directly supported their local schools. While this theory is plausible, polls do not confirm that the public made this connection and it cannot be said that Proposition 13 "overturned" *Serrano* in the way that, for example, Proposition 17 overturned *People v. Anderson*. See DANIEL A. SMITH, TAX CRUSADERS AND THE POLITICS OF DIRECT DEMOCRACY 60 (1998).

D. Judicial Retention Elections and the Death of the Bird Court

The tensions between the state supreme court and the electorate came to a head in 1986 when six of the court's seven justices faced judicial retention elections. The six justices on the ballot that year were Chief Justice Rose Bird, Justice Cruz Reynoso, Justice Joseph Grodin, Justice Stanley Mosk, Justice Edward Panelli, and Justice Malcolm Lucas.¹⁵⁶ By 1986, Chief Justice Bird had served on the court for nearly a decade, and had been a lightning rod for criticism the entire time.¹⁵⁷ She narrowly won popular confirmation in 1978, receiving 52% of the vote, by far the lowest percentage any California Supreme Court justice had received in a confirmation or retention election since the system was established in 1934.¹⁵⁸ After surviving that election, she remained a target. Opponents organized several efforts to recall her in 1981–1983, but each failed to qualify for the ballot.¹⁵⁹ Thereafter, public opposition to Bird continued to spread, and in mid-1985, opponents, including district attorneys and correctional officers, launched a campaign to defeat her in the 1986 retention election.¹⁶⁰ Between mid-1985 and the fall 1986 election, Field conducted eight separate polls measuring public attitudes toward the chief justice. The polls consistently showed that a substantial majority of voters were determined to remove her from office. When asked why they wanted to remove Chief Justice Bird, respondents mentioned, in order of frequency, that they did not like her opposition to the death penalty; they considered her too lenient and soft on criminals; they believed she let killers go free; they did not like her positions and stands on the issues; they thought she had not upheld the will of the people or enforced the law; they concluded that she had not done a good job; and they considered her too liberal—followed by other criticisms.¹⁶¹

¹⁵⁶ CAL. SEC'Y OF STATE MARCH FONG EU, STATEMENT OF VOTE: GENERAL ELECTION NOVEMBER 4, 1986, at 36–37 (1986). For Justice Grodin's account of the 1986 judicial election, see GRODIN, *supra* note 96, at 169–81.

¹⁵⁷ Barry Latzer, *California's Constitutional Counterrevolution*, in CONSTITUTIONAL POLITICS IN THE STATES 149, 166 (G. Alan Tarr ed., 1996).

¹⁵⁸ CAL. SEC'Y OF STATE MARCH FONG EU, *supra* note 156; GRODIN, *supra* note 96, at 167–68.

¹⁵⁹ See *Complete List of Recall Attempts*, CAL. SECRETARY ST. ALEX PADILLA, <http://www.sos.ca.gov/elections/recalls/complete-list-recall-attempts/> [http://perma.cc/NK3K-LEP5]; see also Richard Bergholz, *Effort to Recall Rose Bird Puts State GOP in a Quandary*, L.A. TIMES, Feb. 26, 1982, at B3.

¹⁶⁰ The Dolphin Group, a political campaign firm, managed the effort. In addition to law enforcement organizations, the campaign received support from business groups, agricultural interests, and the Republican Party. See Frank Clifford & John Balzar, *2 Groups Join Forces in Seeking Bird's Defeat*, L.A. TIMES, Jan. 29, 1986, at A20; see also GRODIN, *supra* note 96, at 169.

¹⁶¹ MERVIN D. FIELD, THE CALIFORNIA POLL, RELEASE #1362: BY A FIVE TO THREE

Voters were angry at the chief justice and, to a lesser degree, other members of the court, for many reasons, but the divide between the people and the court on the issue of capital punishment was the single biggest irritant. Many voters thought they had settled the question of the legitimacy of the death penalty under the California Constitution in 1972, when they had reversed the court's ruling in *Anderson*.¹⁶² But the controversy had persisted. After capital punishment was reinstated in California and juries had sentenced scores of convicted felons to death, the state supreme court had reversed nearly all of the sentences, often on technicalities. Several members of the court's progressive wing had not fully accepted the voters' verdict in overturning *Anderson* and affirming capital punishment. Rose Bird was the most resistant. During her tenure on the court, she participated in the review of sixty-one capital convictions, and voted to overturn the sentence in all sixty-one of them.¹⁶³ Meanwhile, by 1986, voter support for capital punishment had spiked to 83%, with only 14% opposed—a remarkably broad consensus.¹⁶⁴ The chief justice and the public were polarized on this emotional and high-profile issue. As opposition to Bird hardened, it was apparent that voters would remove her; it was less certain whether they would also reject one or more of her progressive colleagues. Veteran liberal justice Stanley Mosk escaped, but two other progressives, Cruz Reynoso and Joseph Grodin, were not so fortunate. On Election Day, voters defeated Bird, Reynoso, and Grodin—and thus, in one stroke, decimated the court's progressive majority.

Table 4: Results of 1986 California Supreme Court Elections¹⁶⁵

Justice	Appointing Governor	Outcome	% Yes Vote
Justice Malcolm Lucas	George Deukmejian (R)	Confirmed	80
Justice Edward Panelli	George Deukmejian (R)	Confirmed	79
Justice Stanley Mosk	Pat Brown (D)	Retained	74
Justice Joseph Grodin	Jerry Brown (D)	Defeated	43
Justice Cruz Reynoso	Jerry Brown (D)	Defeated	40
Chief Justice Rose Bird	Jerry Brown (D)	Defeated	34

MARGIN, VOTERS STILL OPPOSED TO RETAINING ROSE BIRD 2 (Oct. 9, 1986).

¹⁶² Dan Morain, *Both Sides Point to Death Penalty Decision of 1972*, L.A. TIMES, Feb. 18, 1986, at A3.

¹⁶³ Todd S. Purdum, *Rose Bird, Once California's Chief Justice, Is Dead at 63*, N.Y. TIMES, Dec. 6, 1999, at B18.

¹⁶⁴ MERVIN D. FIELD, THE CALIFORNIA POLL, RELEASE #1353: STRONG OPPOSITION TO ROSE BIRD CONTINUES. CONFIRMATION OF ALL OTHER JUSTICES FAVORED 3 (Aug. 12, 1986).

¹⁶⁵ CAL. SEC'Y OF STATE MARCH FONG EU, SUPPLEMENTAL VOTE COUNT STATISTICS CONCERNING THE SUPREME COURT JUSTICES: GENERAL ELECTION NOVEMBER 4, 1986 (1986).

IV. AFTER THE FALL: THE LUCAS COURT

The dismissal of Chief Justice Bird and Justices Reynoso and Grodin, on November 4, 1986, produced three vacancies on the court. George Deukmejian, the long-time critic of the court's jurisprudence, was elected to a second term as Governor the same day, and now had the opportunity to reconstitute the court in line with his vision of the California Constitution and the court's proper role in the state's constitutional design.

George Deukmejian's public career—as a state legislator, Attorney General, and Governor—spanned from 1963 to 1991, a period of intensifying public concern about crime and lenient courts. Of all elected officials in California during these years, he most consistently and effectively supported tough-on-crime measures and opposed the court's progressive orientation, especially on criminal justice issues.¹⁶⁶ While serving as Attorney General, Deukmejian publicly attacked what he considered to be the court's excessive embrace of the new judicial federalism—that is, its frequent use of independent state grounds to expand rights.¹⁶⁷ When he ran for Governor, Deukmejian remarked that he was motivated to seek the office because the Governor, not the Attorney General, is the one who appoints judges.¹⁶⁸ He wanted to appoint what he called “no-nonsense” judges, those who would show deference to the political branches, use self-restraint in exercising the power of judicial review, and not unnecessarily invoke the state constitution to expand rights.¹⁶⁹ During his two terms as Governor (1983–1991), Deukmejian nominated more than 1000 judges, including eight members of the California Supreme Court: Malcolm Lucas (1984–1996, chief justice 1987–1996); Edward A. Panelli (1985–1994); John A. Arguellas (1987–1989); David N. Eagleson (1987–1991); Marcus M. Kaufman (1987–1990); Joyce L. Kennard (1989–2014); Armand Arabian (1990–1996); and Marvin R. Baxter (1991–2015).¹⁷⁰

Governor Deukmejian's nominees to the state's highest court had several common characteristics. First, they were seasoned jurists. All of his nominees had served as lower court judges, and

¹⁶⁶ Kenneth Ofgang, *Personality Profile: George Deukmejian: East Coast Transplant Who Rose to Governorship Looks Back at Life of Service*, METROPOLITAN NEWS-ENTERPRISE 3 (Jan. 17, 2012), <http://www.metnews.com/articles/2012/deuk011712.htm> [perma.cc/4QZF-FFWC].

¹⁶⁷ See, e.g., George Deukmejian & Clifford K. Thompson, Jr., *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975 (1979).

¹⁶⁸ Ofgang, *supra* note 166.

¹⁶⁹ Daniel M. Weintraub & Jennifer Warren, *Benchmarks: Governor Keeps Tight Rein on Who Will Become Judge*, L.A. TIMES, July 10, 1988, at AD1.

¹⁷⁰ *California Supreme Court Justices*, *supra* note 9.

most had "gone through the chairs"—that is, served as both trial court judge and as justice on the state's intermediate court of appeal before being elevated to the state supreme court. Second, they were generally moderate-conservatives; none was a "movement conservative" who would seek to launch an ideological counterrevolution from the right. Third, they were practitioners, not law professors or theoreticians. In short, their backgrounds and jurisprudential orientations made them less likely to embrace the new judicial federalism, and more likely to limit the court's role in expanding new constitutional rights.

Under the leadership of Chief Justice Malcolm Lucas, the court stabilized and repaired its legitimacy. At the same time, the court retained its national influence, as it continued to be highly cited by courts in other states.¹⁷¹ The Lucas years produced no deep conflicts between the court and the people and no organized efforts to remove justices. While the Lucas court was reticent to create new state constitutional rights, it also was generally careful not to overturn prior decisions establishing such rights.¹⁷² The court reversed some progressive precedents in the common law, especially in the area of tort, and upheld death sentences at much increased rates through modification of the harmless error rule.¹⁷³ But the Lucas court did not undo, for example, prior rulings in state constitutional rights cases such as *Serrano v. Priest II* (1976),¹⁷⁴ requiring school funding equalization, or *Committee to Defend Reproductive Rights v. Myers* (1981),¹⁷⁵ requiring public funding for abortion. Moreover, the Lucas court handed down a decision in *Raven v. Deukmejian* (1990) that defended the core principle of the new judicial federalism, namely that state supreme courts should be able to interpret state constitutional rights independently of U.S. Supreme Court interpretation of federal constitutional rights.¹⁷⁶ As discussed above, in 1990 voters approved Proposition 115, the Crime Victims Justice Reform Act. That initiative contained several specific limitations on the rights of criminal defendants, as well as a "lock-step" provision, which provided that the California Constitution "shall not be construed by the courts to afford greater rights to criminal defendants than those afforded

171 Dear & Jessen, *supra* note 8, at 701.

172 John H. Culver, *The Transformation of the California Supreme Court: 1977-1997*, 61 ALB. L. REV. 1461, 1476-77 (1998).

173 J. Clark Kelso, *A Tribute to Retiring Chief Justice Malcolm M. Lucas*, 27 PAC. L.J. 1401 (1996).

174 *Serrano v. Priest II*, 557 P.2d 929 (Cal. 1977).

175 *Comm. to Defend Reprod. Rights v. Myers*, 625 P.2d 779 (Cal. 1981).

176 *Raven v. Deukmejian*, 801 P.2d 1077 (Cal. 1990).

by the Constitution of the United States.”¹⁷⁷ The court upheld the separate restrictions on defendant rights, but struck down the lock-step provision. In the court’s view, the lock-step rule would so restrict the power of the state judicial branch and so “severely limit[] the independent force and effect of the California Constitution” as to be a “revision” of the state constitution rather than an amendment, and therefore impermissible under the limits of the initiative process.¹⁷⁸ The most conservative court in modern California history thus protected the core institutional principle of the new judicial federalism.

V. THE GEORGE COURT: REVIVAL OF THE NEW JUDICIAL
FEDERALISM AND POPULAR PUSH-BACK

In 1990, Republican Pete Wilson won election to replace George Deukmejian as Governor of California. Wilson was known as a moderate Republican, more liberal than Deukmejian on social issues, and prominently pro-choice on abortion. During his two terms as Governor (1991–1999), Wilson nominated four justices to the California Supreme Court: Ronald M. George (1991–2011, chief justice 1996–2011); Kathryn M. Werdegar (1994–present); Ming W. Chin (1996–present); and Janice Rogers Brown (1996–2005).¹⁷⁹ Of the four, Janice Rogers Brown was considered the most conservative—a movement conservative. But the other three were more moderate. Collectively, Wilson’s appointees moved the court to more progressive positions on some issues and revived the court’s expansion of state constitutional rights in the areas of abortion, same-sex marriage, and gay rights beyond marriage.

Table 5: New California State Constitutional Rights, Post-1986,
and Overriding Amendments¹⁸⁰

Category	New State Constitutional Rights	Cases Establishing Rights	Overriding Amendments	Vote
Abortion	Right of minors to abortion without parental notification	<i>American Academy of Pediatrics v. Lungren</i> (1997)	Prop. 73 (2005) Prop. 85 (2006) Prop. 4 (2008)	Fail (47.2–52.8%) Fail (45.8–54.2%) Fail (48.0–52.0%)

177 CAL. SEC’Y OF STATE MARCH FONG EU, *supra* note 129.
178 *Raven*, 801 P.2d at 1086, 1088; *see also* John Dinan, *Court-Constraining Amendments and the State Constitutional Tradition*, 38 RUTGERS L.J. 983, 1015–16 (2007).
179 *California Supreme Court Justices*, *supra* note 9.
180 CAL. SEC’Y OF STATE BRUCE MCPHERSON, STATEMENT OF VOTE: SPECIAL ELECTION NOVEMBER 8, 2005, at 3 (2005); CAL. SEC’Y OF STATE BRUCE MCPHERSON, STATEMENT OF VOTE: GENERAL ELECTION NOVEMBER 7, 2006, at 73 (2006); CAL. SEC’Y OF STATE DEBRA BOWEN, STATEMENT OF VOTE: GENERAL ELECTION NOVEMBER 4, 2008, at 59, 62 (2008).

Category	New State Constitutional Rights	Cases Establishing Rights	Overriding Amendments	Vote
Marriage	Right of same-sex couples to marry	<i>In re Marriage Cases</i> (2008)	Prop. 8 (2008)	Pass (52.2–47.8%)
Equal protection	Strict scrutiny for laws that classify on basis of sexual orientation	<i>In re Marriage Cases</i> (2008)	—	—

A. Abortion Rights

The court signaled a shift in direction on abortion rights in 1996–1997, shortly after Ronald George succeeded Malcolm Lucas as chief justice. The case in question concerned a Deukmejian-era statute requiring a pregnant minor to obtain the consent of her parents (or a judge) before obtaining an abortion. After the U.S. Supreme Court held in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) that such parental consent laws did not violate the U.S. Constitution, opponents of the California law challenged the statute on state constitutional grounds in *American Academy of Pediatrics v. Lungren*.¹⁸¹ When the court first considered the *Lungren* case in 1996, it upheld the statute by a narrow four-to-three decision authored by Justice Mosk.¹⁸² But when Chief Justice Lucas retired, Governor Wilson nominated Ronald George to replace him and Ming Chin to replace George as associate justice. With these changes on the bench, the narrowly divided court reversed the outcome. The court granted rehearing in May 1996 and, in a new decision issued the following year, invalidated the parental consent law.¹⁸³ The new decision, authored by Chief Justice George, held that the California Constitution's right to privacy included the right of a minor to terminate her pregnancy without parental consent—thereby again expanding California's state constitutional abortion rights beyond the federal baseline.¹⁸⁴ Recognizing the potential backlash against the decision, George stated: "I thought it was important to decide the case the way it should be decided. And I assigned it to myself as a sign I would not be intimidated."¹⁸⁵

¹⁸¹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 899 (1992).

¹⁸² *Am. Acad. of Pediatrics v. Lungren*, 912 P.2d 1148 (Cal. 1996), *vacated*, 940 P.2d 797 (Cal. 1997).

¹⁸³ *Lungren*, 940 P.2d at 831. For a discussion of the court's switch in the case, see Edward J. Erler, *The California Supreme Court in the Culture Wars*, in *COURTS AND THE CULTURE WARS* 139, 141–45 (Bradley C.S. Watson ed., 2002).

¹⁸⁴ *Lungren*, 940 P.2d at 809–10, 813–14.

¹⁸⁵ MARK DICAMILLO & MERVIN FIELD, *THE FIELD POLL*, RELEASE #1852: CHIEF JUSTICE RONALD GEORGE'S RULING COULD AFFECT HIS CONFIRMATION CHANCES NEXT

Pro-life activists were outraged by the new *Lungren* decision and resolved to seek to defeat Chief Justice George and Associate Justice Chin in their upcoming confirmation elections, scheduled for November 1998.¹⁸⁶ However, public opinion was much less hostile to the George court’s ruling on this issue than it had been to the court’s criminal justice jurisprudence during the Wright-Bird era. Polls indicated that the California electorate had complex views about abortion (related to the stage and circumstances of the pregnancy) but leaned heavily toward the pro-choice position. Although some polls indicated that the public supported the idea of a parental consent law, others showed that large majorities of Californians consistently favored abortion rights.¹⁸⁷ Accordingly, while it was possible that voters might narrowly approve an initiative constitutional amendment to override the court’s decision in *Lungren*, it was unlikely that the public would mobilize to remove a justice who issued a pro-choice decision. Indeed, the movement to defeat Chief Justice George and Associate Justice Chin (who had tipped the balance in the case) gained little traction. At the 1998 election, voters confirmed Chin by a 69% popular majority, George by more than 75%.

Table 6: Results of 1998 California Supreme Court
Judicial Elections¹⁸⁸

Justice	Appointing Governor	Outcome	% Yes Vote
Justice Janice Rogers Brown	Pete Wilson (R)	Confirmed	75.91
Chief Justice Ron George	Pete Wilson (R)	Confirmed	75.49
Justice Stanley Mosk	Pat Brown (D)	Retained	70.51
Justice Ming Chin	Pete Wilson (R)	Confirmed	69.26

After the challenges to George and Chin foundered, activists turned to the initiative process to try to overturn the court’s *Lungren* decision through state constitutional amendment, not once, or twice, but three times: in 2005 (Proposition 73); 2006 (Proposition 85); and 2008 (Proposition 4). California voters narrowly defeated the measures each time, demonstrating that the court’s decision in *Lungren* was closely enough aligned with the electorate’s views to avoid popular override.

YEAR 4 (Sept. 4, 1997).
186 *Id.* at 1.
187 *Id.* at 4; see also MARK DiCAMILLO & MERVIN FIELD, THE FIELD POLL, RELEASE #1747: LARGE MAJORITY TAKES PRO-CHOICE POSITION ON ABORTION, DECLINE IN SUPPORT FOR MEDI-CAL ABORTION PAYMENTS 1 (Mar. 17, 1995); MARK DiCAMILLO & MERVIN FIELD, THE FIELD POLL, RELEASE #1863: STRONG SUPPORT FOR AND INITIATIVE WHICH WOULD REQUIRE A MINOR OBTAINING PARENTAL CONSENT BEFORE HAVING AN ABORTION (Dec. 12, 1997).
188 CAL. SEC’Y OF STATE BILL JONES, STATE OF VOTE: GENERAL ELECTION NOVEMBER 3, 1998 (1998).

B. Same-Sex Marriage

The George court is best known for its rulings on the contested question of same-sex marriage, especially its landmark decision in *In re Marriage Cases* (2008), establishing a state constitutional right of same-sex couples to marry.¹⁸⁹ At the time the California Supreme Court considered the question, the U.S. Supreme Court had not yet held that same-sex couples had a federal constitutional right to marry. To the contrary, the Court had rejected such a claim in 1972, and had never squarely revisited the question.¹⁹⁰ The Supreme Court had issued other decisions protecting the federal constitutional rights of gay and lesbian persons in decisions such as *Romer v. Evans* (1996)¹⁹¹ and *Lawrence v. Texas* (2003),¹⁹² but strategists for the gay rights movement believed that the Court was not yet prepared to issue a broad decision granting same-sex couples federal constitutional marriage rights, a decision that would require the Court to overturn existing marriage laws across the country.¹⁹³ Instead, the movement pursued a “new judicial federalism strategy”—that is, it turned to state supreme courts in progressive states to declare that their state constitution protected the right of same-sex couples to marry.¹⁹⁴ In the tradition of the new judicial federalism, this approach called upon state courts to expand rights beyond what was, at the time, the federal constitutional standard.

The movement had a breakthrough in Massachusetts in 2003 when the Supreme Judicial Court declared that the Massachusetts Constitution guaranteed the right of same-sex couples to marry. Advocates of same-sex marriage pursued similar rulings in other states, but with little initial success. The supreme courts of New York (2006),¹⁹⁵ Washington (2006),¹⁹⁶ and Maryland (2007)¹⁹⁷ refused to recognize a state constitutional right of same-sex marriage. The New Jersey Supreme Court held that the state’s marriage laws violated the state constitution’s equal protection principles, but narrowly held that civil unions for same-sex partners was a sufficient remedy.¹⁹⁸ As of 2008,

189 *In re Marriage Cases*, 83 P.3d 384 (Cal. 2008).

190 *See Baker v. Nelson*, 409 U.S. 810 (1972).

191 *Romer v. Evans*, 517 U.S. 620 (1996).

192 *Lawrence v. Texas*, 539 U.S. 558 (2003).

193 *See generally* William C. Duncan, *Avoidance Strategy: Same-Sex Marriage Litigation and the Federal Courts*, 29 CAMPBELL L. REV. 29 (2006).

194 *Id.*

195 *Hernandez v. Robles*, 855 N.E.2d 1, 12 (N.Y. 2006).

196 *Andersen v. King Cty.*, 138 P.3d 963, 990 (Wash. 2006).

197 *Conaway v. Deane*, 932 A.2d 571 (Md. 2007).

198 *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006).

Massachusetts remained the only state to recognize same-sex marriages.

The battle then shifted to California. In 2007–2008, the California Supreme Court deliberated on the question through review of a group of six consolidated appeals titled *In re Marriage Cases*.¹⁹⁹ The California litigation proceeded in the midst of shifting public opinion. In 2000, the state's voters had approved a statutory initiative, Proposition 22, establishing that "only marriage between a man and a woman is valid or recognized in California," by a wide 61–39% majority.²⁰⁰ Table 7 demonstrates that over the next eight years public opinion in California moved toward greater acceptance of same-sex marriage, but remained sharply divided on the question. The combination of the state's highly accessible system of initiative constitutional amendment, divided public opinion, and a mobilized conservative opposition to same-sex marriage meant that a decision by the court to establish a new state constitutional right of same-sex couples to marry would likely face a serious challenge. And, indeed, as the court was reviewing the case, conservative defenders of existing marriage laws were preparing an initiative to embed in the state constitution the principle, approved by voters eight years before, that "only marriage between a man and a woman is valid or recognized in California."²⁰¹ The amendment was designed to override the court in the same way that, a generation before, voters had overturned the court's decisions on capital punishment, criminal procedure, and busing.

For nearly four decades, the Field Research Corporation has surveyed California voters' attitudes toward same-sex marriage and has recorded a major shift in public attitudes in favor of marriage rights for same-sex couples.

As Table 7 indicates, in early 2008, the California Supreme Court reasonably could have concluded that public opinion had moved far enough in California that the electorate would accept a landmark ruling granting marriage rights to same-sex couples. When the court issued its decision in *Marriage Cases* on May 15, 2008, it put the question to the test. The proponents of the override measure qualified it for the November 2008 election under the ballot designation "Proposition 8."

199 *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

200 CAL. SEC'Y OF STATE BILL JONES, STATEMENT OF VOTE: PRIMARY ELECTION, MARCH 7, 2000, at 50–53, 153–55 (2000).

201 CAL. SEC'Y OF STATE DEBRA BOWEN, OFFICIAL VOTER INFORMATION GUIDE, CALIFORNIA GENERAL ELECTION TUESDAY, NOVEMBER 4, 2008, at 54 (2008). The amendment would become California Constitution article I, section 7.5.

Table 7: Public Opinion of Same-Sex Marriage in California, 1977–2013²⁰²

Year	% Approve	% Disapprove	% No Opinion
1977	28	59	13
1985	30	62	8
1997	38	56	6
2003	42	50	8
2004	44	50	6
2006	44	50	6
May 2008	<i>In re Marriage Cases</i>		
May 2008	51	42	7
2009	49	44	7
2010	51	42	7
2012	59	34	7
2013	61	32	7

The campaign for and against the amendment was one of the most intense and expensive in state history. Both sides of the issue presented forceful arguments. Opponents of Proposition 8 framed the issue largely in terms of rights and emphasized that the voters should not take away the rights of gay and lesbian couples, while proponents framed the issue in terms of popular sovereignty and argued that the people, not the court, should determine this fundamental social question.²⁰³ In the ballot pamphlet argument, the measure's proponents directly targeted the court:

Proposition 8 is simple and straightforward. It contains the same 14 words that were previously approved in 2000 by over 61% of California voters: "Only marriage between a man and a woman is valid or recognized in California."

Because four activist judges in San Francisco wrongly overturned the people's vote, we need to pass this measure as a constitutional amendment to RESTORE THE DEFINITION OF MARRIAGE as a man and a woman.²⁰⁴

Despite the broad trend in public opinion in California toward acceptance of same-sex marriage the state's voters approved Proposition 8, and thus overturned *In re Marriage Cases*, by a narrow 52–48% margin.²⁰⁵ Passage of the amendment

²⁰² MARK DICAMILLO & MERVIN FIELD, THE FIELD POLL, RELEASE #2443: RECORD MAJORITY OF CALIFORNIA VOTERS APPROVES OF ALLOWING SAME-SEX MARRIAGE 2 (Feb. 28, 2013) [hereinafter RELEASE #2443].

²⁰³ For a discussion of the competing arguments and spending in the Prop. 8 election, see Kenneth P. Miller, *The Democratic Coalition's Religious Divide: Why California Voters Supported Obama, but Not Same-Sex Marriage*, REVUE FRANÇAISE D'ÉTUDES AMÉRICAINES 46–62 (2009).

²⁰⁴ CAL. SEC'Y OF STATE DEBRA BOWEN, *supra* note 201, at 56.

²⁰⁵ CAL. SEC'Y OF STATE DEBRA BOWEN, STATEMENT OF VOTE: GENERAL ELECTION

produced new rounds of litigation in state and federal courts. The first case involved a state constitutional challenge to Proposition 8 titled *Strauss v. Horton* (2009).²⁰⁶ The petitioners argued that it was impermissible to take away a fundamental state constitutional right through the initiative process because such an action amounted to a revision of the state constitution. By a six-to-one majority, however, the California Supreme Court rejected the claim and upheld a central principle of state constitutionalism—namely, that the people have the power to define state constitutional rights and can override the court’s definition of a state-level right.²⁰⁷ Immediately after the *Strauss* ruling, opponents of Proposition 8 filed a challenge in federal court.²⁰⁸ This move finally shifted from state to federal court the question of whether there is a constitutional right to same sex marriage. After extensive litigation, the federal courts struck down Proposition 8 on federal constitutional grounds and, later, all state laws that limited marriage to a union between a man and a woman.²⁰⁹

NOVEMBER 4, 2008, at 7 (2008).

²⁰⁶ *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

²⁰⁷ In *Strauss*, Chief Justice George noted:

Under the California Constitution, the constitutional guarantees afforded to individuals accused of criminal conduct are no less well established or fundamental than the constitutional rights of privacy and due process or the guarantee of equal protection of the laws. As we have seen, in past years a majority of voters has adopted several state constitutional amendments—for example, the measure reinstating the death penalty, and the multitude of constitutional changes contained in the 1982 Proposition 8 and in Proposition 115—that have diminished state constitutional rights of criminal defendants, as those rights had been interpreted in prior decisions of this court. Although a principal purpose of all constitutional provisions establishing individual rights is to serve as a counter-majoritarian check on potential actions that may be taken by the legislative or executive branches, our prior decisions—reviewed at length above—establish that the scope and substance of an existing state constitutional individual right, as interpreted by this court, may be modified and diminished by a change in the state Constitution itself, effectuated through a constitutional amendment approved by a majority of the electors acting pursuant to the initiative power.

Strauss, 207 P.3d at 450 (internal citations omitted).

²⁰⁸ *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff’d sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

²⁰⁹ In *Perry*, a federal district judge declared that Proposition 8 violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the U.S. Constitution. *Id.* The U.S. Supreme Court declined to reach the merits of the appeal on the grounds that the proponents of the initiative lacked Article III standing to defend a citizen initiative where state officials refused to do so. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). After the Supreme Court’s 2013 decision in *Hollingsworth* and, more importantly, in *United States v. Windsor*, federal courts around the country began issuing decisions in cases challenging state marriage laws. *United States v. Windsor*, 133 S. Ct. 2675 (2013). When the issue reached the U.S. Supreme Court in *Obergefell v. Hodges*, the Court recognized a federal constitutional right of same-sex couples to marry, thus

As Table 7 indicates, during this period, public opinion continued to move toward acceptance of same-sex marriage to the point where it was likely that if the issue had been placed on the California ballot as early as 2010, and certainly by 2012, voters would have endorsed the right of same-sex couples to marry through the democratic process. According to an early 2013 Field Poll, California voters supported allowing same-sex couples to marry by a near two-to-one margin (61% to 32%).²¹⁰ Accordingly, the California Supreme Court could have avoided popular override of its judgment if it had stayed its hand and allowed the people to resolve the question by democratic means.²¹¹

C. Gay Rights Beyond Marriage

Proposition 8 left untouched an important feature of *In re Marriage Cases*, namely the court's ruling that, henceforth in California, all classifications based on sexual orientation will be considered suspect and will be subjected to strict judicial scrutiny.²¹² This standard extends the state constitution's equal protection guarantees for gays and lesbians beyond federal constitutional requirements. Although the U.S. Supreme Court has invoked federal equal protection principles to invalidate laws that draw distinctions on the basis of sexual orientation in cases such as *Romer v. Evans*²¹³ and *United States v. Windsor*,²¹⁴ the Court has never held that sexual orientation classifications are subject to strict judicial scrutiny. In *Marriage Cases*, the

foreclosing further state constitutional deliberation on the question. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

²¹⁰ RELEASE #2443, *supra* note 202, at 2.

²¹¹ In his dissenting opinion in *In re Marriage Cases*, Justice Marvin Baxter advanced this argument:

Left to its own devices, the ordinary democratic process might well produce, ere long, a consensus among most Californians that the term 'marriage' should, in civil parlance, include the legal unions of same-sex partners.

But a bare majority of this court, not satisfied with the pace of democratic change, now abruptly forestalls that process and substitutes, by judicial fiat, its own social policy views for those expressed by the People themselves.

In re Marriage Cases, 183 P.3d 384, 457 (Cal. 2008).

²¹² For establishment of the rule, see *id.* at 435–44. In *Strauss*, the court emphasized that the rule remains in place. Writing for the court, Chief Justice George declared:

As we have seen, in the *Marriage Cases* the majority opinion held that sexual orientation constitutes a suspect classification for purposes of analysis under the state equal protection clause and that statutes according differential treatment on the basis of sexual orientation are subject to the strict scrutiny standard of review. These general state equal protection principles established in the *Marriage Cases* are unaffected by the new section added to the California Constitution by Proposition 8.

Strauss, 207 P.3d at 411.

²¹³ *Romer v. Evans*, 517 U.S. 620 (1996).

²¹⁴ *Windsor*, 133 S. Ct. 2675 (2013).

California Supreme Court declared that the California Constitution mandates such scrutiny. Although the people, through Proposition 8, overturned that case's core holding that same-sex couples have a right to marry, they did not disturb the court's broader ruling imposing strict scrutiny for distinctions based on sexual orientation.²¹⁵

The court's decision to apply strict scrutiny to sexual orientation cases parallels its 1971 decision in *Sail'er Inn v. Kirby* to extend strict scrutiny to gender classifications.²¹⁶ And, just as the California electorate broadly supports gender equality, it also generally supports equal rights for gays and lesbians. Setting aside the specific controversy over the definition of marriage, there was no organized opposition to the court's extension of strict scrutiny to classifications based on sexual orientation.

In sum, the George court (1997–2011) can be characterized as relatively centrist in the arena of rights. Although it issued progressive, rights-expanding decisions in the areas of abortion and gay rights (and, thus, was less conservative than the Lucas court), it did not establish new rights with the same frequency as the Wright and Bird courts. The people overturned the George court's rights decisions only once, narrowly, through Proposition 8 of 2008, and never mounted an effective campaign to remove its members from the bench.

VI. THE NEW COURT

A. Transition to a More Progressive Court

When Chief Justice George announced his retirement in 2010, Governor Schwarzenegger nominated as his replacement Tani Cantil-Sakauye, a respected state appellate judge generally considered to be a moderate-conservative.²¹⁷ Upon Chief Justice Cantil-Sakauye's selection, Republican governors had made sixteen of the last seventeen nominations to the court, including two nominations each of Malcolm Lucas and Ronald George. The only exception was Democratic Governor Gray Davis' nomination of Justice Carlos Moreno in 2001. The long stretch of Republican nominees came to an end in 2010, however, with Democrat Jerry Brown's election to a third term.

²¹⁵ *Strauss*, 207 P.3d at 396.

²¹⁶ See *Sail'er Inn v. Kirby*, 485 P.2d 529, 539 (Cal. 1971).

²¹⁷ Maura Dolan, *Gov. Chooses Moderate for Chief Justice*, L.A. TIMES (July 22, 2010), <http://articles.latimes.com/2010/jul/22/local/la-me-0722-chief-justice-20100722> [perma.cc/M6CN-JWLX].

Between 2011 and 2014, Brown nominated three new justices to the court—Goodwin Liu (2011–present), Mariano-Florentino Cuéllar (2015–present), and Leondra Kruger (2015–present).²¹⁸ These new justices are progressive, academically oriented, and—by supreme court standards—young (all three were born in the 1970s). None had prior judicial experience before joining the court. Due to their elite academic credentials and youth some observers believe that each of them has the potential to be nominated to the U.S. Supreme Court.²¹⁹

The new generation of Brown justices does not yet constitute a majority of the court, but in the short term they can be expected to form coalitions with centrist colleagues, especially Justice Werdegarr, on some issues.²²⁰ Moreover, future nominations by Jerry Brown or his successors may soon produce a progressive majority to rival the one that dominated the court in the 1970s and early 1980s.

B. Prospects for a Renewed New Judicial Federalism in California

As the California Supreme Court enters a transition to a new era, the prospects for a revival of a 1970s-style new judicial federalism remains uncertain. Although the court has an opportunity to pursue that goal, it will face obstacles if it chooses to do so.

First, it seems that the opportunity for revival of a progressive, rights-expanding jurisprudence is real. California's ongoing partisan realignment should give Democrats control of the Governor's office for the foreseeable future, and Democratic governors can be expected to create on the court a dominant left-leaning majority. If so, it is possible that the California's high court will become substantially more progressive than the U.S. Supreme Court in its thinking about rights—thus creating the type of gaps between a state supreme court and the U.S. Supreme Court that fuels the new judicial federalism.

Moreover, new theories of rights can be expected to emerge in the near term, creating fresh opportunities for the court to innovate by establishing new rights at the state level. While some potential new rights may now seem implausible or remote, others are knocking at the door.

²¹⁸ *California Supreme Court Justices*, *supra* note 9.

²¹⁹ See, e.g., Oren Kerr, *The State Court Bench as SCOTUS Farm Team*, WASH. POST: THE VOLOKH CONSPIRACY (Dec. 23, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/23/the-state-court-bench-as-a-scotus-farm-team/> [http://perma.cc/R KX8-T49U].

²²⁰ See Gerald F. Uelman & Kyle Graham, *A Shifting Balance on the California Supreme Court?: A Look at the State Supreme Court's Newest Justices*, CAL. LAW., Sept. 2015.

One example is the asserted right to personal autonomy at the end of life. In 1997, the U.S. Supreme Court held in *Washington v. Glucksberg* that the U.S. Constitution does not protect a right to physician-assisted suicide, or physician aid-in-dying.²²¹ In recent years, a national movement has grown to establish that right on a state-by-state basis. California law long treated the aiding of suicide, by a physician or anyone else, as a felony. After a long struggle, in 2015 proponents of “death with dignity” persuaded the California Legislature to adopt, and Governor Brown to sign, A.B. 15, a bill that liberalizes the restrictions on physician aid-in-dying.²²² The new law expands the ability of certainly terminally ill adults to receive physician assistance in terminating their lives, but includes various qualifications and restrictions that limit access and choice. As the movement for greater end-of-life autonomy gains force, advocates may argue that these types of limitations burden constitutional rights. In the same manner that the California Supreme Court held that the Legislature’s early adoption of liberalized abortion laws in the late 1960s failed to satisfy the constitutional requirements, so, too, could a progressive court rule that the state constitution demands greater personal autonomy for persons at the end of life than the Legislature has endorsed.²²³ The issue of aid-in-dying has not yet reached the California Supreme Court, but it may eventually present the court’s progressive justices an opportunity to expand rights in this contested area.

Advocates of other emerging claims in the areas of personal autonomy and equality can be expected to set their sights on California’s high court and encourage it to reassert its leadership in the expansion of the frontiers of rights.

Such opportunities are matched by limiting factors. First is the legacy of the court-constraining amendments California voters enacted in response to Wright and Bird court decisions. While the new court may creatively expand state constitutional rights in some areas, in others, especially criminal law, it is

²²¹ *Washington v. Glucksberg*, 521 U.S. 702 (1997).

²²² A.B. 15, 2015–2016 Leg. Sess., Spec. Sess. (Cal. 2015). For many years, California Penal Code section 401 read: “Every person who deliberately aids, or advises, or encourages another to commit suicide, is guilty of a felony.” CAL. PENAL CODE § 401 (West 2015). In 1992, proponents of physician-assisted suicide qualified Proposition 161, known as the “Aid-in-Dying Act” for the California statewide ballot. The measure failed on a vote of 46% yes to 54% no. *California Proposition 161, the Aid-in-Dying Act (1992)*, BALLOTEDIA, [http://ballotpedia.org/California_Proposition_161,_the_Aid-in-Dying_Act_\(1992\)](http://ballotpedia.org/California_Proposition_161,_the_Aid-in-Dying_Act_(1992)) [http://perma.cc/5NVE-MS4B]. Attempts to pass a similar law through the Legislature also failed until 2015.

²²³ See *People v. Barksdale*, 503 P.2d 257, 276 (Cal. 1972).

constrained by the restrictions the people placed in the state constitution decades ago. A second potential limiting factor is the Legislature. Today, the California Legislature is one of the most progressive lawmaking bodies in the nation and is less likely than its predecessors to take a back seat to the court in pursuing a progressive vision of equality and personal autonomy. As the aid-in-dying bill shows, rights activists can choose to go to the Legislature to achieve their aims, and an ambitious court might find itself competing with the political branches for leadership in the expansion of rights. A third potential limiting factor is the U.S. Supreme Court. The new judicial federalism has flourished where state supreme courts are more progressive than the U.S. Supreme Court and have expanded rights beyond where the U.S. Supreme Court is willing to go. If new progressive justices cause the U.S. Supreme Court to begin aggressively expanding federal constitutional rights, that Court will dominate the field and create fewer opportunities for the California Supreme Court, or other state supreme courts, to assert leadership.

Finally, it is uncertain how the California electorate would respond to a revival of the new judicial federalism. During the Wright-Bird era, the electorate accepted some of the court's rights-expanding decisions, but overwhelmingly repudiated the court's jurisprudence in the areas of criminal law and mandatory desegregation. The electorate of the 1970s and 1980s was considerably more conservative than the court on these issues, and that chasm between their respective values led the public to adopt court-constraining amendments and, eventually, to remove three progressive justices. Today, the California electorate is more liberal than it was then and thus, in theory, should be more inclined to embrace new rights-expanding decisions in a range of areas. How the public would actually respond remains to be tested.

CONCLUSION

The new judicial federalism flourished in California during the 1970s and 1980s as the state supreme court became the national leader in expanding state constitutional rights beyond federal minimums. Many of those rights remain in place today. Yet, in its enthusiasm to align California's constitutional law with the values of modern liberalism, the court distanced itself too far from the public's deeply held convictions in certain areas, including busing, capital punishment, and criminal procedure. In those cases, the court's pursuit of a highly counter-majoritarian progressive agenda was unsustainable—it resulted in the wholesale reversal of decisions through state

constitutional amendments, the removal of most of the court's progressive members, and their replacement with a new conservative majority.

Since the crisis of the 1986 election, the California Supreme Court has been more cautious in its approach to the new judicial federalism. While in the post-Bird era the court defended the concept of independent state constitutionalism, it showed restraint in exercising that power. This self-restraint helped produce a period of stability on the court, with few attempted court-constraining amendments and no serious challenges to the justices in retention elections.

The state has now entered an era in which Democratic governors can be expected to nominate progressive justices for the foreseeable future. As a new progressive majority emerges, it has the opportunity to revive the court's leadership in establishing new rights. The prospect undoubtedly has appeal. State supreme courts receive respect and affirmation from the community of progressive legal academics and practitioners by expanding the frontier of rights through expansive interpretations of state constitutions. Moreover, as social change creates new conceptions of rights, the court will have many invitations to innovate.

If it seeks to expand rights, however, the new court will face some limitations, including potential opposition from the contemporary electorate. As the experience of the past several decades demonstrates, the California Constitution gives the people, not the court, the last word on the definition of contested state constitutional rights. While this majoritarian check may limit the new court's ability to expand rights, it will also provide greater legitimacy to any new state constitutional rights the court establishes and the people accept. The California electorate's increasingly progressive orientation means that it is now more likely to embrace rights-expanding decisions, at least on some issues, than voters were a generation ago. But when contemplating their future course, the new justices cannot forget the fate of the Bird court, which will always serve as a cautionary reminder that the California Constitution's majoritarian features limit how far an ambitious court can veer from the popular will.

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Direct Democracy as a Legislative Act

Henry Noyes*

INTRODUCTION

Direct democracy has been referred to as “The People’s Law”¹ and “Citizen Lawmaking.”² The actors who engage in acts of direct democracy have been referred to as “Citizen Lawmakers”³ and “Citizens as Legislators.”⁴ Does that mean that citizens who engage in acts of direct democracy are literally (and *legally*) “legislators” undertaking legislative acts? This Article argues that, at least in certain situations, the answer is “yes” and considers the implications of that conclusion.

Part I briefly discusses the history of direct democracy in the United States. Direct democracy was born out of frustration with reliance on elected representatives to legislate. Direct democracy allows ordinary citizens to legislate. Part II explains that direct democracy does not diminish some inherent, immutable power of the legislature. Instead, it is an exercise of the people’s inherent power to legislate. *All* power derives from the people, who can choose to delegate it to representative instruments which they create, or they can reserve to themselves the power to legislate. Several states—Arizona, California, Washington, Colorado, Oregon, and Utah—have constitutions that define the initiative and referendum as the exercise of legislative power. Part III discusses the circumstances in which direct democracy activity is a legally operative legislative act. At a minimum, the act of sponsoring an initiative or referendum petition is a legislative act. Finally, Part IV discusses some of the possible legal implications of the conclusion that direct democracy (or at least some such activity) is a legislative act. First, undertaking a legislative act does not implicate the First Amendment. Second,

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¹ See generally CHARLES SUMNER LOBINGIER, *THE PEOPLE’S LAW OR POPULAR PARTICIPATION IN LAW-MAKING* (1909).

² See generally JOSEPH F. ZIMMERMAN, *THE INITIATIVE: CITIZEN LAWMAKING* (SUNY Press, 2d ed. 2014) (1999).

³ DAVID D. SCHMIDT, *CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION*, at ix (1989).

⁴ Samuel C. Patterson, *Foreword* to *CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES*, at viii (Shaun Bowler et al. eds., 1998).

undertaking a legislative act entails legislative immunity and a legislative privilege. Third, direct democracy as a legislative act (in some cases) will confer the official proponents with standing to defend the initiative against legal challenge.

I. DIRECT DEMOCRACY IN THE UNITED STATES

Direct democracy has existed in the United States since the first town hall meetings were held in the American colonies in the 1600s.⁵ These town hall meetings allowed citizens to propose new laws and to veto laws passed by their elected representatives. Three of the earliest state constitutions included some features of direct democracy. The Pennsylvania Constitution of 1776 provided for the recall of public officials.⁶ The Massachusetts and New Hampshire Constitutions were the product of citizen lawmaking. These states held constitutional conventions at which citizens drafted a constitution and then submitted it to the people for their approval.⁷

Modern direct democracy began with the adoption and implementation of the primary tools of direct democracy—the ballot initiative, the referendum and the recall election—in the late 1800s and the early 1900s as a result of the Populist and Progressive movements.⁸ Populists wanted to take back control of government for ordinary citizens from the hands of the moneyed elite. Progressives wanted to improve government by making it more responsive to the will of the people and less corrupt. The ballot initiative allows the people of a state (or local government) to make law without action by their elected representatives. The referendum allows the people of a state (or local government) to have submitted for their approval any law enacted by their elected representatives.

The initiative operates entirely outside the States' representative assemblies; it allows "voters [to] petition to propose statutes or constitutional amendments to be adopted or rejected by the voters at the polls." While the initiative allows the electorate to adopt positive legislation, the referendum serves as a negative check. It allows "voters [to] petition to refer a legislative action to the voters [for approval or disapproval] at the polls. "The initiative [thus] corrects sins of omission" by representative bodies, while the "referendum corrects sins of commission."⁹

⁵ See, e.g., LOBINGIER, *supra* note 1, at 81; *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2659 (2015).

⁶ JOSEPH F. ZIMMERMAN, *THE RECALL: TRIBUNAL OF THE PEOPLE* 7 (SUNY Press, 2d ed. 2013) (1970).

⁷ HENRY S. NOYES, *THE LAW OF DIRECT DEMOCRACY* 4 (2014).

⁸ *Id.* at 9–10.

⁹ *Ariz. State Legislature*, 135 S. Ct. at 2660 (citations omitted) (quoting Lewis J.

Between 1898 and 1918, twenty-four states adopted the initiative, the referendum, or both.¹⁰ Today, three states utilize the veto referendum, three states utilize the ballot initiative and, twenty-one states utilize both the veto referendum and the ballot initiative.¹¹

II. DIRECT DEMOCRACY IS AN EXERCISE OF THE PEOPLE'S INHERENT LEGISLATIVE POWER

A. All Political Power Is Inherent in the People

Direct democracy is an exercise of the people's inherent legislative power. It is not a delegation of power from the state legislature, nor is it a diminishment of power inherent in the state legislature. It is a direct and express exercise of the people's inherent legislative power.¹²

This concept—that the power to legislate and govern is an exercise of the people's inherent power—is expressed in the Declaration of Independence¹³ and the constitution of every state except New York.¹⁴ The U.S. Supreme Court recently stated that “the animating principle of our Constitution [is] that the people themselves are the originating source of all the powers of government.”¹⁵ Because the people hold the power to legislate, they may choose to delegate this power to representatives, or they may choose to reserve the power for themselves. Direct democracy is the most direct expression of the people's power to govern themselves.¹⁶

Johnson, *Direct Legislation as an Ally of Representative Government*, in *THE INITIATIVE, REFERENDUM, AND RECALL* 139, 142 (William B. Munro ed., 1912); DAVID B. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* 1 (1984)).

¹⁰ NOYES, *supra* note 7, at 10.

¹¹ *Id.* at 78 tbl.3.1, 104 tbl.4.1.

¹² *See id.* at 10–12.

¹³ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“Governments are instituted among Men, deriving their just Powers from the Consent of the Governed . . . [and] it is the Right of the People to alter or abolish it, and to institute new Government, laying its Foundation on such Principles and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.”).

¹⁴ NOYES, *supra* note 7, at 11 (setting forth all citations in every state constitution, except New York, that support the proposition that all political power is inherent in the people).

¹⁵ *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2671 (2015); *see also id.* at 2675 (“[O]ur fundamental instrument of government derives its authority from ‘We the People.’”); U.S. CONST. amend. IX (“The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.”); *id.* amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

¹⁶ *Ariz. State Legislature*, 135 S. Ct. at 2674 (“[T]he invention of the initiative was in full harmony with the Constitution’s conception of the people as the font of governmental power.”).

B. The Initiative and the Referendum Are Part of the People's Legislative Power

The Supreme Court has declared that—in states that adopt these tools of direct democracy—use of the initiative or the referendum is an exercise of the people's legislative power. In *Ohio ex rel. Davis v. Hildebrant*¹⁷ the Supreme Court considered an early challenge to Ohio's use of the referendum power. *Hildebrant* involved an amendment to the Constitution of Ohio that adopted the veto referendum.¹⁸

[T]he legislative power was expressly declared to be vested not only in the senate and house of representatives of the state, constituting the general assembly, but in the people, in whom a right was reserved by way of referendum to approve or disapprove by popular vote any law enacted by the general assembly.¹⁹

The Ohio General Assembly passed an act redistricting Ohio for the purpose of congressional elections, and the Governor approved the act. The requisite number of Ohio electors then signed a referendum petition and the measure was put to a popular vote.²⁰ The voters disapproved the law and Ohio state election officials filed an action seeking to declare the referendum void as violative of the Elections Clause of the U.S. Constitution.²¹ The Elections Clause of Article I of the Constitution provides:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations ²²

The elections officials claimed that "the referendum vote was not and could not be a part of the legislative authority of the state."²³

The Supreme Court rejected the challenge to Ohio's referendum power. The Court held that the State of Ohio had the power to allocate its governmental authority according to the wishes of the people of Ohio, including the power to legislate.

¹⁷ *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 566–67 (1916).

¹⁸ *Id.* at 566.

¹⁹ *Id.*

²⁰ *Id.*

²¹ See *id.* at 567. The elections officials also claimed that the referendum violated the Guarantee Clause. See *id.* at 569. Article IV, Section 4 of the U.S. Constitution provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government" U.S. CONST. art. IV, § 4. The Supreme Court rejected that challenge because it did not present a justiciable issue. *Hildebrant*, 241 U.S. at 570. For a discussion of challenges to direct democracy as violative of the Republican Guarantee Clause, see NOYES, *supra* note 7, at 12–29 and authorities cited therein.

²² U.S. CONST. art. I, § 4, cl. 1.

²³ *Hildebrant*, 241 U.S. at 567.

Ohio, like numerous other states, had amended its state constitution to incorporate the power of referendum. The Ohio Supreme Court had determined that the amendment to the state constitution was valid—that is, the referendum power constituted a part of the state constitution and laws.²⁴ That determination was binding on the U.S. Supreme Court. The U.S. Supreme Court considered whether the referendum was “part of the [state] legislative power”²⁵ consistent with the Elections Clause and answered in the affirmative. Congress had the power to alter Ohio’s redistricting scheme, but the Supreme Court noted that Congress, in recognition of the direct democracy movement, had modified the applicable federal statutes “to provide that where, by the state Constitution and laws, the referendum was treated as a part of the legislative power, the power as thus constituted should be held and treated to be the state legislative power for the purpose of creating congressional districts by law.”²⁶

The Supreme Court again recognized the right of the people to retain their legislative power, and also made clear that the referendum did not constitute an improper delegation of legislative power, in *City of Eastlake v. Forest City Enterprises, Inc.*²⁷ *City of Eastlake* involved a challenge to a city charter provision requiring “that any changes in land use agreed to by the Council be approved by a 55% Vote in a referendum.”²⁸ Plaintiffs argued that the Ohio city’s adoption of this referendum requirement for certain zoning changes was an unconstitutional delegation to the people of a legislative power. The Court rejected that challenge, stating:

A referendum cannot, however, be characterized as a delegation of power. Under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create. In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature.²⁹

The Court confirmed that the people may choose to delegate their legislative power to elected representatives, but they also may choose to retain their legislative power.

²⁴ *Id.* at 567–68.

²⁵ *Id.* at 568; *see also* *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2666 (2015) (“For redistricting purposes, *Hildebrant* thus established, ‘the Legislature’ did not mean the representative body alone. Rather, the word encompassed a veto power lodged in the people.”).

²⁶ *Hildebrant*, 241 U.S. at 568.

²⁷ *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 672 (1976) (“In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature.”).

²⁸ *Id.* at 670.

²⁹ *Id.* at 672 (citations omitted).

In *Arizona State Legislature v. Arizona Independent Redistricting Commission*,³⁰ the Court confirmed that the exercise of the initiative power is an exercise of the people's legislative power. By ballot initiative, the people of Arizona amended the Arizona Constitution to remove redistricting authority—the power to create and adopt congressional and state legislative districts—from the Arizona Legislature and to vest it in an independent commission.³¹ The Arizona Legislature sued, complaining that Arizona's exercise of direct democracy violated the Elections Clause of Article I of the Constitution.³² In short, the Court had to determine whether the phrase "the Legislature" in the Elections Clause included only Arizona's official body of elected representatives (the Arizona House and Senate) or whether "the Legislature" also included the Arizona voters when engaged in direct democracy.

The Court held that the "lawmaking power in Arizona includes the initiative process."³³ When the voters engaged in direct democracy, they constituted "the Legislature."

The Framers may not have imagined the modern initiative process in which the people of a State exercise legislative power coextensive with the authority of an institutional legislature. But the invention of the initiative was in full harmony with the Constitution's conception of the people as the font of governmental power.³⁴

The Court recognized the right and power of individual states to determine the structure of their government and to determine who may exercise governmental authority.³⁵ The U.S. Supreme Court considered the text of the Arizona Constitution, and the Arizona Supreme Court's interpretation of that text, and concluded "the Arizona Constitution 'establishes the electorate [of Arizona] as a coordinate source of legislation' on equal footing with the representative legislative body."³⁶

³⁰ *Ariz. State Legislature*, 135 S. Ct. at 2658–59.

³¹ *Id.*

³² U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . .").

³³ *Ariz. State Legislature*, 135 S. Ct. at 2659; see also *id.* at 2660 n.3 ("The people's sovereign right to incorporate themselves into a State's lawmaking apparatus, by reserving for themselves the power to adopt laws and to veto measures passed by elected representatives, is one this Court has ranked a nonjusticiable political matter.").

³⁴ *Id.* at 2674.

³⁵ *Id.* at 2673.

³⁶ *Id.* at 2660 (quoting *Queen Creek Land & Cattle Corp. v. Yavapai City Bd. of Supervisors*, 501 P.2d 391, 393 (Ariz. 1972)); see also *id.* at 2673 ("Arizona engaged in definition of that kind when its people placed both the initiative power and the AIRC's redistricting authority in the portion of the Arizona Constitution delineating the State's legislative authority.").

C. State Constitutions Define the Initiative and Referendum as the Exercise of Legislative Power

A number of states in addition to Arizona have state constitutions that define the initiative and referendum as the exercise of legislative power. Article IV of the California Constitution states: "The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum."³⁷ The California Supreme Court has interpreted the initiative power to "represent[] an exercise by the people of their reserved power to legislate."³⁸ In the Washington Constitution, the initiative power and referendum powers are found in article II ("Legislative Department"), section 1 ("Legislative Powers, Where Vested").³⁹ The Washington Supreme Court has stated that the "exercise of the initiative power is an exercise of the reserved power of the people to legislate" and that "[in] approving an initiative measure, the people exercise the same power of sovereignty as the Legislature does when enacting a statute."⁴⁰ In the Colorado Constitution, the initiative and referendum powers are found in article V ("Legislative Department"),⁴¹ and the Colorado Supreme Court has stated that "the people have reserved for themselves the right to legislate."⁴² Oregon and Utah also have concluded that the exercise of the initiative and referendum power is the exercise of the people's legislative power.⁴³

³⁷ CAL. CONST. art. IV, § 1.

³⁸ *Builders Ass'n of Santa Clara-Santa Cruz Counties v. Superior Court*, 529 P.2d 582, 586 (Cal. 1974).

³⁹ WASH. CONST. art. II, § 1.

⁴⁰ *Amalgamated Transit Union Local 587 v. State*, 11 P.3d 762, 779 (Wash. 2000).

⁴¹ COLO. CONST. art. V, § 1 ("The legislative power of the state shall be vested in the general assembly consisting of a senate and house of representatives, both to be elected by the people, but the people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly and also reserve power at their own option to approve or reject at the polls any act or item, section, or part of any act of the general assembly.").

⁴² *McKee v. City of Louisville*, 616 P.2d 969, 972 (Colo. 1980).

⁴³ See OR. CONST. art. IV, § 1 ("The legislative power of the state, except for the initiative and referendum powers reserved to the people, is vested in a Legislative Assembly, consisting of a Senate and a House of Representatives."); *MacPherson v. Dep't of Admin. Servs.*, 130 P.3d 308, 314 (Or. 2006) ("In Oregon, the Legislative Assembly and the people, acting through the initiative or referendum processes, share in exercising legislative power."); UTAH CONST. art. VI, § 1 ("The Legislative Power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah . . ."); *Gallivan v. Walker*, 54 P.3d 1069, 1080 (Utah 2002) ("[T]he Utah Constitution vests the people's sovereign legislative power in both (1) a representative legislature and (2) the people of the State, in whom all political power is inherent.").

III. DIRECT DEMOCRACY AS LEGISLATIVE ACT

A. Initiative Petition Circulation and Signature-Gathering and the First Amendment

The Supreme Court has reviewed various state law requirements relating to direct democracy activities and has assessed these requirements against First Amendment challenges. In *Meyer v. Grant*,⁴⁴ the Court considered a challenge to Colorado's ban on payment of petition circulators. The Court found that "circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change."⁴⁵ The Court concluded that the Colorado law involved a limitation on political expression and was, therefore, subject to exacting scrutiny under the First Amendment.⁴⁶ The Court struck down the Colorado law because circulation of a petition involved "core political speech" that was not justified by the State's "interest in making sure that an initiative has sufficient grass roots support to be placed on the ballot, or by its interest in protecting the integrity of the initiative process."⁴⁷

In *Buckley v. American Constitutional Law Foundation, Inc.*,⁴⁸ the Court struck down Colorado's requirement that initiative petition circulators wear an I.D. badge bearing the circulator's name, as well as its requirement that initiative proponents report the names, addresses, and compensation received by each paid initiative circulator. The Court determined that the petition circulators' and the petition signatories' conduct expressed a political view and, therefore, implicated a First Amendment right.⁴⁹

Constitutional Law Professor Akihil Reed Amar criticized the Court's conclusion—that initiative petition circulation and signature gathering constitutes expressive activity entitled to First Amendment protection—shortly after the *A.C.L.F.* opinion was issued.

The Colorado initiative process is not about "petitions." It's about state lawmaking. Strictly speaking, the state was not regulating "petitions" or "speech" at all. It was merely saying that unless signatures were collected in a certain way, they would not count for purposes of the state initiative process. In other words, anyone in

⁴⁴ *Meyer v. Grant*, 486 U.S. 414 (1988).

⁴⁵ *Id.* at 421.

⁴⁶ *Id.* at 420.

⁴⁷ *Id.* at 420, 425.

⁴⁸ *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182 (1999).

⁴⁹ *See id.* at 192.

Colorado has a right to petition to his heart's content—to do so anonymously and with no disclosure, even if he is not a registered voter. But he has no First Amendment right to insist that Colorado treat his petition as anything more than a handbill. Most importantly, Colorado was not trying to treat a nonconforming signature as anything *less* than a handbill, fully protected by the First Amendment. Colorado merely said that unless its rules were followed, any signature gathered would be treated as a petition, pure and simple.

To see the point another way, imagine that I go to Denver next week and demand a right to vote for Mickey Mouse as governor. Surely Colorado need not count my vote in the next election because (a) I am not a registered Colorado voter, (b) Mickey Mouse is not an eligible candidate, and (c) the state may properly insist that all ballots be cast on election day, or pursuant to a regulated absentee ballot system. In one sense I can “vote” for Mickey—just watch me!—and the state would be wrong to punish me. But the state has a perfect right not to count my vote. The facts of *Buckley* are no different.⁵⁰

Professor Akhil Amar's brother, Constitutional Law Professor Vikram David Amar, used the same reasoning to argue that the signing of an initiative is not subject to First Amendment protection because it is citizen lawmaking.

The Court's reasoning in [the *A.C.L.F.* and *Meyer v. Grant*] cases seems plausible if plaintiffs were “petitioning” within the meaning of the First Amendment. But that label is inapt. The Colorado initiative process is not about “petitioning the Government for a redress of grievances.” It is about circumventing government by engaging in lawmaking itself. Thus, state law did not regulate “petitions” or “speech” at all. Instead, it merely provided that unless signatures were collected in a certain way, they would not count for purposes of qualifying an initiative for the statewide ballot.⁵¹

These commentators suggest that the ballot initiative process consists of legally operative legislative acts that are not subject to First Amendment protection.

B. *John Doe No. 1 v. Reed* and the Disclosure of the Identity of Petition Signatories

In *John Doe No. 1 v. Reed*,⁵² the Supreme Court considered a challenge to the State of Washington's Public Records

⁵⁰ Akhil Reed Amar, *The Five-Legged Dog*, AM. LAW., Sept. 1999, at 47, 47.

⁵¹ Vikram David Amar, *Adventures in Direct Democracy: The Top Ten Constitutional Lessons from the California Recall Experience*, 92 CAL. L. REV. 927, 929 (2004); see also *S.F. Forty-Niners v. Nishioka*, 89 Cal. Rptr. 2d 388, 396 (Ct. App. 1999) (“The initiative petition with its notice of intention is not a handbill or campaign flyer—it is an official election document It is the constitutionally and legislatively sanctioned method by which an election is obtained on a given initiative proposal.”).

⁵² *John Doe No. 1 v. Reed*, 561 U.S. 186 (2010).

Act,⁵³ which authorizes private parties to obtain copies of government documents, including referendum petitions revealing the identities of petition signatories. The State of Washington argued that Washington's disclosure requirements did *not* implicate First Amendment rights because "signing a petition is a legally operative legislative act, not speech."⁵⁴

The act of signing an initiative petition is a legislative act because the electors are exercising legislative power and acting as citizen legislators. No one person can place a measure on the ballot. It requires the support of other electors in order to qualify for the ballot. This requirement—gathering signatures to ensure a significant level of support for placing the measure on the ballot—"is analogous to the parliamentary rule that a motion must be seconded before it will be considered."⁵⁵ Individual electors do not control the content of the petition. Once the official sponsor supplies the appropriate state official with a petition in proper form for circulation, the electors can choose to sign the petition or not. They can lobby others to sign (or not to sign) the petition—certainly expressive conduct protected by the First Amendment—but the decision whether to sign is binary: "Yes" or "No." Each signature has exactly the same legal effect. It is a legally operative legislative act.

Several prominent legal scholars agree with this position.⁵⁶ Professor Eugene Volokh wrote:

[P]olitical statements are just speech. Signing an initiative, referendum, or recall petition is a legally operative act—it helps achieve a particular result not just because of its persuasiveness, but because it is given legal effect by the state election law.

The government is surely entitled to require that people who want their signature to have such a legally operative effect must disclose their identities to the government. And I see no reason why the government might not then disclose those identities to the public, who after all are in charge of the government. To do that is to inform the people about who is taking legally operative steps to change the state's laws (or the state's elected representatives, in the case of a recall).⁵⁷

⁵³ WASH. REV. CODE §§ 42.56.001–42.56.904 (West 2015).

⁵⁴ Brief of Respondent Sam Reed at 22, *Reed*, 561 U.S. 186 (No. 09-559).

⁵⁵ DELOS F. WILCOX, *GOVERNMENT BY ALL THE PEOPLE: THE INITIATIVE, THE REFERENDUM, AND THE RECALL AS INSTRUMENTS OF DEMOCRACY* 16 (Da Capo Press 1972) (1912); see also Brief of Respondent Sam Reed, *supra* note 54, at 26–28.

⁵⁶ See Amicus Curiae Brief of Direct Democracy Scholars in Support of Respondents at 7, *Reed*, 561 U.S. 186 (No. 09-559) ("The referendum is a *legislative* act and is central to the lawmaking process in Washington."); *id.* at 5 ("This Court has never decided whether the act of signing, as distinct from circulating, a petition is a form of 'core political speech.'").

⁵⁷ Eugene Volokh, *Federal Judge Temporarily Restrains Release of Names of*

The Supreme Court ultimately determined, however, that the petition circulators' and the petition signatories' conduct expressed a political view and, therefore, implicated a First Amendment right.⁵⁸ The Court considered the argument that "signing a petition is a legally operative legislative act" and, therefore, not subject to First Amendment protection, but concluded that "[p]etition signing remains expressive even when it has legal effect in the electoral process."⁵⁹ The Court reviewed such challenges under "exacting scrutiny," which "requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest."⁶⁰

Justice Scalia concurred with the Supreme Court's judgment in *Reed*, but he wrote separately to express his "doubt" that the act of signing a referendum petition implicates "the 'freedom of speech' at all."⁶¹ For Justice Scalia, an elector's conduct in signing a referendum petition was a legislative act:

A voter who signs a referendum petition is therefore exercising legislative power because his signature, somewhat like a vote for or against a bill in the legislature, seeks to affect the legal force of the measure at issue.⁶²

Justice Scalia noted that the *Reed* plaintiffs could not identify any Supreme Court precedent "holding that legislating is protected by the First Amendment."⁶³

While no other justices joined Justice Scalia's concurrence, it raises several interesting questions: Are there some direct democracy procedures that are, in fact, legislative acts? If so, what is the significance of a legislative act? What is the legal significance, if any, of citizens as legislators?

Anti-Domestic-Partnership Petition Signers in Washington States, VOLOKH CONSPIRACY (Sept. 11, 2009, 9:57 AM), http://www.volokh.com/posts/chain_1245174890.shtml [<http://perma.cc/T7Y7-BQA4>]; see also Rick Hasen, *Ninth Circuit Issues Its Opinion Explaining Its Ruling in Washington R-71 Referendum Case*, ELECTION L. BLOG (Oct. 22, 2009, 4:25 PM), <http://electionlawblog.org/archives/014620.html> [<http://perma.cc/X6U3-L9PU>] ("What about *Burdick v. Takushi*, and the Supreme Court's rejection of the idea that voting is an expressive activity entitled to First Amendment protection? Does this or does this not apply to signing a ballot measure petition?").

⁵⁸ *Reed*, 561 U.S. at 195.

⁵⁹ *Id.*

⁶⁰ *Id.* at 196 (citations omitted) (quoting *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366–67 (2010)).

⁶¹ *Id.* at 219 (Scalia, J., concurring).

⁶² *Id.* at 221–22.

⁶³ *Id.* at 222; cf. *Molinari v. Bloomberg*, 564 F.3d 587, 595–602 (2d Cir. 2009) (rejecting plaintiffs' claim that New York unreasonably burdened the First Amendment rights clustered around the state's initiative process by allowing legislative bodies to amend popularly passed measures and holding that plaintiffs' argument did not even raise a First Amendment issue).

C. *Chula Vista Citizens for Jobs and Fair Competition v. Norris* and the Role of the Official Proponent

In *Chula Vista Citizens for Jobs and Fair Competition v. Norris*,⁶⁴ the Ninth Circuit, sitting en banc, considered First Amendment challenges to requirements of the State of California and the City of Chula Vista (i) that the official proponent of a ballot measure (the person who sponsors a local ballot measure) must be an elector (and therefore not a corporation) and (ii) that the name of the official proponent (the person who sponsors a local ballot measure) appear on each section of the petition that is circulated to voters for their signature. The Ninth Circuit upheld the elector requirement because it “does not impose any meaningful burden on First Amendment rights.”⁶⁵ The City and State defendants contended that the elector requirement did not implicate First Amendment rights “because it is a regulation of the legislative process,” but the court declined to decide that question, given that the elector requirement survived First Amendment scrutiny.⁶⁶ The court described the elector requirement as a “legislative power,” and noted that “many legislative and official political acts are properly reserved to members of the electorate.”⁶⁷

The initiative power that California and the City of Chula Vista have reserved to electors is indisputably a legislative power. . . . Much like a legislator who begins the traditional legislative process by placing a bill in the hopper, an official proponent commences the process of legislating by initiative by asking voters to sign a petition to place an initiative on the ballot. Thus, by seeking to serve as official proponents, the plaintiffs seek to wield a legislative power.⁶⁸

The official proponent of a ballot initiative serves a “unique role” in the legislative process that is distinct from the role of other electors who may support the ballot initiative. The official proponent controls and manages the initiative process—preparing the text of the petition, filing it, managing the signature-gathering process and the signature gatherers, filing the signatures, and responding to challenges to the petitions and signatures.⁶⁹ In California, the official proponent also has special authority to defend the initiative against legal challenge, if public officials decline to do so.⁷⁰

⁶⁴ *Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 782 F.3d 520 (9th Cir. 2015) (en banc).

⁶⁵ *Id.* at 529.

⁶⁶ *Id.* at 529 n.8.

⁶⁷ *Id.* at 529 (emphasis added).

⁶⁸ *Id.* at 529–30 (citations omitted).

⁶⁹ *Id.* at 530.

⁷⁰ *Id.* (quoting *Perry v. Brown*, 265 P.3d 1002, 1006 (Cal. 2011)); see also *infra*

Thus, while all California voters play a quasi-legislative role in the initiative process, the official proponent is particularly akin to a legislator—sponsoring legislation and shepherding it through the legislative process. Indeed, like a legislator introducing legislation, and unlike a mere lobbyist (the plaintiffs’ preferred characterization), an official proponent performs a series of necessary steps for the people to exercise the power to legislate by initiative.⁷¹

The Ninth Circuit also applied exacting scrutiny to the disclosure requirement and upheld that requirement.⁷² The en banc panel acknowledged that the “legislative character of an initiative petition inform[ed] [its] analysis,”⁷³ but it did not consider whether the disclosure requirement was a “legislative act.” Instead, the “legislative character” and the public nature of being the “official proponent” influenced the court’s First Amendment analysis and the court concluded that exacting scrutiny—not strict scrutiny—applied.⁷⁴

D. When Direct Democracy Is a Legislative Act

The more that direct democracy procedures regulate advocacy for, and circulation of, an initiative petition, the more that these procedures regulate “core political speech.”⁷⁵ But these activities are different from the mechanics of initiation of a petition.⁷⁶

Voters act as legislators in the ballot-measure context, and interest groups and individuals advocating a measure’s defeat or passage act as lobbyists; both groups aim at pressuring the public to pass or defeat legislation. We think Californians, as lawmakers, have an interest in knowing who is lobbying for their vote, just as members of Congress may require lobbyists to disclose who is paying for the lobbyists’ services and how much.⁷⁷

The act of sponsoring an initiative or referendum petition—drafting and submitting it to the Secretary of State—is a necessary first step in law-making. It is a *legislative* act that can only be done by the members of the relevant legislative body—

Section IV.C.

⁷¹ *Id.* at 530–31.

⁷² *Id.* at 535–42.

⁷³ *Id.* at 536.

⁷⁴ *Id.* at 536–37.

⁷⁵ See *Meyer v. Grant*, 486 U.S. 414, 421–22 (1988) (involving a law that placed a ban on payment of signature gatherers); see also *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182 (1999) (involving a statute that required initiative petition circulators to wear I.D. badge bearing circulator’s name and initiative proponents to report names, addresses, and amounts paid to each paid initiative circulator).

⁷⁶ See *Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 875 F. Supp. 2d 1128, 1133–35 (S.D. Cal. 2012), *aff’d in part, rev’d in part, remanded*, 755 F.3d 671 (9th Cir. 2014), *aff’d on reh’g en banc*, 782 F.3d 520 (9th Cir. 2015).

⁷⁷ *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1106 (9th Cir. 2003).

here, the electors—who choose to sponsor a proposed initiative.⁷⁸ Likewise, an initiative or referendum petition that is filed with the state (usually the Secretary of State) is a legislative document, and the act of filing a petition is a legislative act.⁷⁹ In addition, the act of submitting petition signatures to the state to qualify for the ballot is a legislative act that is performed by the sponsors of an initiative.

Individual states may require direct democracy actions by the sponsor of an initiative or referendum that constitute legislative acts. In Utah, for example, the official sponsors of an initiative must hold seven public hearings in different geographic regions of the state.⁸⁰ The official sponsors must provide notice of the hearings, and either video tape or audio tape the meeting or “take comprehensive minutes of the public hearing, detailing the names and titles of each speaker and summarizing each speaker’s comments.”⁸¹

IV. IMPLICATIONS OF DIRECT DEMOCRACY AS A LEGISLATIVE ACT

A. No First Amendment Protection

As noted above, if a particular act of direct democracy is a legislative act it may take the activity outside the scope of the First Amendment.⁸² The more that the activity in question involves the mechanics of initiation of a petition and submission of the petition to qualify for the ballot, the more likely that it is a legislative act that is outside the scope of the First Amendment. But what other legal implications, if any, are there for legislative acts undertaken by citizen lawmakers?

B. Legislative Immunity

The Supreme Court has stated that “[i]t is well established that federal, state, and regional legislators are entitled to absolute immunity from civil liability for their legislative activities.”⁸³ If direct democracy constitutes a legislative act and

⁷⁸ *Chula Vista*, 875 F. Supp. 2d at 1137.

⁷⁹ This distinction between expressive activity and the mechanics of legislation is the reason that a majority of courts have held that initiative and referendum subject matter restrictions do not raise a free speech issue. *See NOYES, supra* note 7, at 109–20; *see also Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1102 (10th Cir. 2006) (en banc) (“[The First Amendment] does not apply to structural principles of government making some outcomes difficult or impossible to achieve.”).

⁸⁰ UTAH CODE ANN. § 20A-7-204.1 (West 2015).

⁸¹ *Id.*

⁸² *See John Doe No. 1 v. Reed*, 561 U.S. 186, 222 (2010) (Scalia, J., concurring) (“Plaintiffs point to no precedent from this Court holding that legislating is protected by the First Amendment.”).

⁸³ *Bogan v. Scott-Harris*, 523 U.S. 44, 46 (1998); *see also* Supreme Court of Va.

if the official sponsors of an initiative or referendum petition are acting as legislators when they (1) sponsor an initiative or referendum, (2) file an initiative or referendum petition, and (3) file petition signatures with the state, then they may be entitled to legislative immunity for these legislative acts that they undertake.⁸⁴

Legislative immunity provides immunity from trial and from civil and criminal liability for performing legislative acts.⁸⁵ Legislative acts include sponsoring and introducing a bill,⁸⁶ which is akin to being an official sponsor of an initiative or referendum petition and filing the petition with the state. Legislative acts also may include holding hearings on proposed legislation.⁸⁷

The doctrine of legislative immunity does not prevent a court from declaring a legislative act to be unconstitutional,⁸⁸ but it does protect those engaging in the legislative act from liability for the act.⁸⁹ The legislative immunity doctrine also includes the legislative testimonial privilege⁹⁰ and a ban on inquiry into the motive behind legislative action.⁹¹

v. Consumers Union of U.S., Inc., 446 U.S. 719, 732 (1980) (“[The Court has] recognized that state legislators enjoy common-law immunity from liability for their legislative acts, an immunity that is similar in origin and rationale to that accorded Congressmen under the Speech or Debate Clause.”). As of 2003, forty-three state constitutions contained one or more provisions granting state legislators a legal privilege in connection with their legislative work. See Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 WM. & MARY L. REV. 221, 221 (2003). Despite not having such a provision in their state constitutions, several of the remaining seven states have recognized some type of legislative immunity by statute or judicial opinion. *Id.* at 237–38 n.54. California, for example, recognizes the principle of legislative immunity. See *Steiner v. Superior Court*, 58 Cal. Rptr. 2d 668, 678 (Ct. App. 1996) (“[L]egislators have absolute immunity from damage suits based on legislative acts.”).

⁸⁴ See *Bruce v. Riddle*, 631 F.2d 272, 279 (4th Cir. 1980) (“[I]f legislators of any political subdivision of a state function in a legislative capacity, they are absolutely immune from being sued . . .”).

⁸⁵ See *Tenney v. Brandhove*, 341 U.S. 367 (1951); see also *Consumers Union of U.S., Inc.*, 446 U.S. at 720.

⁸⁶ See *United States v. Helstoski*, 442 U.S. 477 (1979); see also *Hinshaw v. Smith*, 436 F.3d 997, 1008–09 (8th Cir. 2006).

⁸⁷ See *Gravel v. United States*, 408 U.S. 606, 624 (1972).

⁸⁸ See *Romer v. Colo. Gen. Assembly*, 810 P.2d 215 (Colo. 1991); see also *Walker v. Jones*, 733 F.2d 923 (D.C. Cir. 1984).

⁸⁹ See *Powell v. McCormack*, 395 U.S. 486 (1969).

⁹⁰ See *Gravel*, 408 U.S. at 615–16 (stating that privilege against testifying concerning legislative activities applies in a criminal case to senator and also to the legislator’s aides). The legislative testimonial privilege applies in civil cases in which the legislator is a party. See *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 502–03 (1975). In addition, it applies in civil cases in which the legislator is not a party. See *Miller v. Transamerican Press, Inc.*, 709 F.2d 524 (9th Cir. 1983) (holding that legislative testimonial privilege protects a legislator from having to testify in a civil action in which the legislator is not a party concerning the legislator’s “legislative acts”).

⁹¹ See *Greenburg v. Collier*, 482 F. Supp. 200 (E.D. Va. 1979) (granting protective order in favor of state legislator prohibiting inquiry into “any legislative activity or his

C. Standing to Defend the Initiative

Direct democracy as a legislative act also may impact the initiative proponents' standing to defend the initiative against legal challenge. In *Hollingsworth v. Perry*,⁹² the Supreme Court was asked to address the merits of Proposition 8—California's ballot initiative to amend the California Constitution to eliminate the right of same-sex couples to marry. Plaintiffs had challenged Proposition 8 as violative of the Equal Protection Clause of the Fourteenth Amendment. The State of California "refused to defend [Proposition 8], although they . . . continued to enforce it throughout [the] litigation." Thus, the federal district court allowed the official proponents to intervene and defend the action.⁹³ Article III standing was not an issue because the plaintiffs were aggrieved—Proposition 8 prevented them from getting married.⁹⁴ The district court then held a two-week long trial and found that Proposition 8 violated the Equal Protection Clause.⁹⁵

Standing became an issue upon appeal to the Ninth Circuit. Plaintiffs had won; they had no reason to seek appeal. The State of California refused to defend Proposition 8, so it did not appeal. Proposition 8's proponents appealed to the Ninth Circuit. The Ninth Circuit asked petitioners (the official Proposition 8 proponents) to address "why this appeal should not be dismissed for lack of Article III standing."⁹⁶ After considering the parties' responses, the Ninth Circuit certified to the California Supreme Court the question whether, under California law, the official proponents of a ballot initiative

possess either a particularized interest in the initiative's validity or the authority to assert the State's interest in the initiative's validity, which would enable them to defend the constitutionality of the initiative upon its adoption or appeal a judgment invalidating the initiative, when the public officials charged with that duty refuse to do so.⁹⁷

motive for same" on the basis of federal common law legislative immunity); *see also* *Knights of Columbus v. Town of Lexington*, 138 F. Supp. 2d 136 (D. Mass. 2001); *Steiner v. Superior Court*, 58 Cal. Rptr. 2d 668, 676 (Ct. App. 1996) ("An equally important corollary of the separation of powers doctrine is courts cannot inquire into the impetus or motive behind legislative action.").

⁹² *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

⁹³ *Id.* at 2660.

⁹⁴ *Id.* at 2661–62.

⁹⁵ *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1004 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

⁹⁶ *Perry v. Schwarzenegger*, No. 10-16696, 2010 WL 3212786, at *2 (9th Cir. Aug. 16, 2010).

⁹⁷ *Perry v. Schwarzenegger*, 628 F.3d 1191, 1193 (9th Cir. 2011).

The California Supreme Court accepted the question and answered in the affirmative.⁹⁸ Based on the California Supreme Court's response, the Ninth Circuit held that the official Proposition 8 proponents had Article III standing to defend the measure on appeal in federal court, and then affirmed the district court's decision on the merits.⁹⁹

The U.S. Supreme Court refused to address the merits of Proposition 8. Instead, the Court held that the official Proposition 8 proponents lacked Article III standing.¹⁰⁰ The Court noted that the proponents were "plainly not agents of the State—'formal' or otherwise"—and that they, "[u]nlike California's elected officials, . . . ha[d] taken no oath of office."¹⁰¹ Professor Vikram David Amar has emphasized the importance of this distinction:

[A]llowing initiative-proponent standing poses serious problems that permitting legislator standing does not. Most fundamentally, the fact that voters adopted an initiative measure that the proponents wrote and offered does not mean that the electorate decided—or intended—that these proponents should speak or act for the voters in any representative capacity.¹⁰²

This distinction is critical. There is a difference between the person (or group) who drafts and proposes a law and the institution or body that is empowered to enact a proposal into law. It is noteworthy that in the legislator-standing context, the standing that is permitted is the standing of *elected leaders* of the legislative body, who speak not for themselves as individual lawmakers, but rather on behalf of the entire lawmaking body. By contrast, the individual members of the legislature who may have been involved in—or even central to—the proposing, drafting, or lobbying with respect to a bill generally do not enjoy standing to defend the measure. As important as these members might have been in bringing the law about, they are not (and do not speak for) the entire lawmaking body whose votes made the proposal law.¹⁰³

The Supreme Court's decision in *Hollingsworth v. Perry* did not, however, resolve the problem of standing when direct democracy is a legislative act. The Court's opinion left us in a

⁹⁸ *Perry v. Brown*, 265 P.3d 1002, 1033 (Cal. 2011).

⁹⁹ *Perry v. Brown*, 671 F.3d 1052, 1064 (9th Cir. 2012), *vacated and remanded sub nom.* *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

¹⁰⁰ *Hollingsworth*, 133 S. Ct. at 2668.

¹⁰¹ *Id.* at 2666–67.

¹⁰² Vikram David Amar, *Standing Up for Direct Democracy: Who Can Be Empowered Under Article III to Defend Initiatives In Federal Court?*, 48 U.C. DAVIS L. REV. 473, 480 (2014).

¹⁰³ *Id.* at 480–81 (2014).

very curious place where the official proponents of a ballot initiative will, with increasing frequency, have standing to defend their initiative against legal attack.

First, the Supreme Court's opinion held only that the official proponents lacked standing in federal court to defend their initiative on appeal.¹⁰⁴ The official proponents will continue to be able to intervene and defend their initiative against attack at trial when the state fails or refuses to do so. The official proponents also will continue to have standing in *state court* to defend their initiative on appeal. At least where (as in California) the state supreme court so says. This might lead to an odd situation: assume that the Proposition 8 plaintiff had brought their Equal Protection Clause violation claim in California state court and had prevailed. Assume that the California Supreme Court determined (as it did) that the official proponents had standing, *under California law*, to defend Proposition 8 and also determined that Proposition 8 violates the U.S. Constitution. Would the official proponents then have standing, *under Article III*, to appeal to the U.S. Supreme Court?¹⁰⁵

Second, in response to the Supreme Court's *Hollingsworth* decision, ballot initiative proponents are making it express in the initiative itself that they are agents of the state, thereby addressing the concern about lack of agency. These official proponents are also including language in their initiatives that the electorate decided—and intended—that these proponents should speak and act for the voters and the state itself in a representative capacity, thereby addressing the concern raised by Professor Amar. The language of the initiative that amends the state constitution empowers the initiative proponents with standing to defend the initiative in any court proceedings.

The California "Online Privacy" initiative (#14-0007), for example, contained the following provision:

Proponent Standing.

- (a) The people of the State of California declare that the proponents of this Act have a direct and personal stake in defending this Act and grant formal authority to the proponents to defend this Act in any legal proceeding, either by intervening in such legal proceeding, or by defending the Act on behalf of the people and the State in the event that the State declines to defend the Act or declines to appeal an adverse ruling or judgment against the Act.

¹⁰⁴ *Hollingsworth*, 133 S. Ct. 2652.

¹⁰⁵ See NOYES, *supra* note 7, at 10; William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CAL. L. REV. 263, 294–95 (1990).

- (b) In the event that the proponents are defending this Act in a legal proceeding because the State has declined to defend it or to appeal an adverse ruling or judgment against it, the proponents shall:
- (1) act as agents of the people and the State;
 - (2) be subject to all ethical, legal, and fiduciary duties applicable to such parties in such legal proceeding; and
 - (3) take and be subject to the Oath of Office prescribed by Article XX, section 3 of the California Constitution for the limited purpose of acting on behalf of the people and the State in such legal proceeding.¹⁰⁶

An initiative on abortion restrictions being circulated for signatures for the 2016 ballot contains a similar provision.¹⁰⁷

Thus, *Hollingsworth* did not end the debate over standing of ballot initiatives' official proponents. It has led to the practical expression of direct democracy as legislative act—the official proponents will ask the electorate to approve the merits of their initiative and to bless them as the substitute voice of the legislature.

CONCLUSION

My aim in this Article is two-fold: first, to demonstrate that states, courts, and direct democracy proponents have begun to treat direct democracy as a legislative act, and second, to begin to consider some of the practical and legal consequences of the conclusion that direct democracy is a legislative act. As people take political matters into their own hands, they seek to give themselves greater legislative power and to acquire more of the perks and powers of being a (citizen) legislator engaging in legislative acts.

¹⁰⁶ The Online Privacy Act, Initiative 14-0007, § 5 (Cal. 2014), [https://oag.ca.gov/system/files/initiatives/pdfs/14-0007%20\(14-0007%20\(Online%20Privacy%20V2\)\).pdf](https://oag.ca.gov/system/files/initiatives/pdfs/14-0007%20(14-0007%20(Online%20Privacy%20V2)).pdf) [<https://perma.cc/9VR9-ZWBR>]; see also Local Control and Accountability in Education Act, Initiative 15-0078, § 15 (Cal. 2015), [https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0078%20\(Certificated%20Employees%20Policy%20Decisions\).pdf](https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0078%20(Certificated%20Employees%20Policy%20Decisions).pdf) [<https://perma.cc/JZ9W-A4HC>].

¹⁰⁷ See Parental Notification, Child and Teen Safety, and Stop Sexual Predators and Sex Traffickers Act, Initiative 15-0025, § 32(u) (Cal. 2015), <http://www.oag.ca.gov/system/files/initiatives/pdfs/15-0025%20%28Parental%20Notification%29.pdf> [<http://perma.cc/VS2M-ARBU>] (containing a proposed California Constitutional Amendment Initiative providing that “the following persons, given priority in the order named, shall be authorized to defend the provisions of this Section approved by voters in any court of law: any official proponent of this Initiative, his or her designee, and any elector at the time this Initiative was approved by the voters”).

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Rethinking the Tyranny of the Majority: The Extra-Legal Consequences of Anti-gay Ballot Measures

Amy L. Stone*

INTRODUCTION

On June 26, 2015, the United States Supreme Court held in *Obergefell v. Hodges* that state bans on same-sex marriage are unconstitutional, legalizing same-sex marriage across the country.¹ This case directly overturned the Ohio Definition of Marriage Amendment, a 2004 initiated constitutional amendment that 61% of voters passed.² This initiative was one of thirty ballot measures since 1998 that explicitly restricted marriage to a “union of one male and female.” In addition, ballot measures in states like Hawaii, Maine, Washington, and Maryland permitted voters to veto existing same-sex marriage laws or permit the legislature to make new laws against same-sex marriage.³ These same-sex marriage bans fit into a history of ballot measures on lesbian, gay, bisexual, and transgender (LGBT) rights that began in the mid-1970s.⁴ Although *Obergefell* overturned same-sex marriage bans across the country, other anti-gay and anti-transgender ballot measures persist in the United States.

Since 1974, there have been over 175 ballot measures on LGBT rights at the town, municipal, county, and state levels.⁵ These ballot measures are typically referendums on municipal or

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1 *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015).

2 *Ohio Definition of Marriage, Amendment 1 (2004)*, BALLOTPEDIA, http://ballotpedia.org/Ohio_Definition_of_Marriage_Amendment_1_%282004%29 [<http://perma.cc/HU52-XZ9N>].

3 2012 Ballot Measures, BALLOTPEDIA, https://ballotpedia.org/2012_ballot_measures [<https://perma.cc/85LG-M8FL>]. See generally Kathleen E. Hull, *The Political Limits of the Rights Frame: The Case for Same-Sex Marriage in Hawaii*, 44 SOC. PERSP. 207 (2001).

4 See generally AMY L. STONE, GAY RIGHTS AT THE BALLOT BOX (2012).

5 See *id.* Over 100 additional referendums and initiatives have been attempted but have been unsuccessful in making it to the ballot box due to pre-ballot judicial challenges or ineffectual petition collection. *Id.*

statewide nondiscrimination laws (40%) and ballot measures about domestic partnerships or same-sex marriage (31%).⁶ Almost a quarter of the additional ballot measures are legal-restrictive initiatives intending to restrict future nondiscrimination laws and eliminate government support for homosexuality more broadly.⁷

There are two central questions in the study of anti-gay ballot measures. First, there is the question of whether these referendums and initiatives are majoritarian tyranny due to the low passage rate of ballot measures on civil rights. Disproportionately, organized conservative movement actors sponsor these ballot measures to oppose LGBT rights, although many same-sex marriage bans were legislatively referred initiatives. Rarely do LGBT organizers propose a vote on their rights.⁸ Between 1974 and 2012, almost 70% of these ballot measures resulted in either the repeal of a LGBT rights law or the creation of a new anti-gay law.⁹ Although many of these measures are challenged in post-ballot judicial review, the high passage rate of said measures is used as evidence for the tyranny of direct democracy for LGBT rights.

Second, this Article pushes beyond the question of legal tyranny to the extra-legal consequences of anti-gay ballot measures. Ballot measures impact the LGBT community in the affected municipality or state, the broader LGBT movement, and the psychological health of lesbian, gay, and bisexual individuals. In this Article, I extend the existing arguments that call for stricter judicial scrutiny of referendums and initiatives to argue for a more holistic understanding of anti-gay ballot measures that accounts for the extra-legal impact of direct democracy on the LGBT community, movement, and individual. I argue that even when these referendums and initiatives do not result in anti-gay outcomes at the ballot box, they tyrannize the LGBT community.

Part I of this Article will provide a brief history of anti-gay ballot measures from 1974 to 2012. Part II will consider the legal literature on whether or not these ballot measures are tyrannical. Part III will analyze the community, movement, and psychological consequences of these ballot measures.

6 Amy L. Stone, Subject of Ballot Measure (unpublished chart) (on file with author).

7 *Id.*

8 *See id.* (documenting the number of ballot measures initiated by the LGBT community).

9 *Id.* *See generally* STONE, *supra* note 4.

I. A BRIEF HISTORY OF BALLOT MEASURES

Ballot measures on LGBT rights emerged at the municipal level as part of a reaction to the advances of the emerging gay and lesbian movement. In the 1970s, the gay and lesbian movement passed municipal nondiscrimination ordinances that provided protections in housing, employment, and/or public accommodations based on sexual orientation.¹⁰ By 1974, the movement had successfully passed fourteen of these ordinances in municipalities across the country with only routine opposition.¹¹ In 1974, Boulder, Colorado community members collected petitions to put their ordinance up for referendum, but the opposition was relatively unorganized and received little national attention.¹² It was not until 1977 that a conservative anti-gay countermovement organized to oppose the growing successes of the gay and lesbian movement.¹³

The Religious Right is a “broad coalition of profamily [sic] organizations and individuals who have come together to struggle for a conservative Christian vision in the political realm.”¹⁴ The anti-gay Religious Right emerged within the New Right from the rising involvement of evangelical Christians in politics in the 1970s, specifically the beginning of the pro-life movement in response to *Roe v. Wade*,¹⁵ the development of the antifeminist movement to defeat the Equal Rights Amendment (ERA), and the mobilization to respond to the growth of the lesbian and gay movement.¹⁶ Although not all campaign leaders or actors involved in municipal or state ballot measures may identify as members of the Religious Right, scholars consistently analyze these campaigns as part of a broader movement agenda; most campaigns are well-networked with national Religious Right organizations and share master frames about LGBT rights to sway public opinion.¹⁷ In general, the Religious Right is far

¹⁰ See generally JAMES W. BUTTON ET AL., *PRIVATE LIVES, PUBLIC CONFLICTS: BATTLES OVER GAY RIGHTS IN AMERICAN COMMUNITIES* (1997).

¹¹ *Id.* at 69 (detailing the history of the ordinances). See generally Mary Bernstein, *Celebration and Suppression: The Strategic Use of Identity by the Lesbian and Gay Movement*, 103 AM. J. SOC. 531 (1997) (analyzing the routine opposition against these movements).

¹² See STONE, *supra* note 4, at 13.

¹³ See BUTTON ET AL., *supra* note 10, at 68.

¹⁴ DIDI HERMAN, *THE ANTIGAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT* 9 (1997).

¹⁵ *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁶ See SARA DIAMOND, *ROADS TO DOMINION: RIGHT-WING MOVEMENTS AND POLITICAL POWER IN THE UNITED STATES* 161–64 (1995). See generally JEAN HARDISTY, *MOBILIZING RESENTMENT: CONSERVATIVE RESURGENCE FROM THE JOHN BIRCH SOCIETY TO THE PROMISE KEEPERS* (1999).

¹⁷ See generally KIMBERLY B. DUGAN, *THE STRUGGLE OVER GAY, LESBIAN, AND BISEXUAL RIGHTS: FACING OFF IN CINCINNATI* (2005); TINA FETNER, *HOW THE RELIGIOUS*

more successful in the arena of ballot measures than they are on the legislative or judicial level.¹⁸ The movement also deploys more radical claims about gay rights for a public audience than they do for a judicial or legislative audience.¹⁹

In 1977, celebrity Anita Bryant, a former Miss America contestant and spokesperson for Florida Orange Juice, led a campaign against the Dade County, Florida nondiscrimination ordinance.²⁰ Bryant and the group Save Our Children, Incorporated gained national attention with their rhetoric about the dangers of gay rights, specifically their arguments about religious rights and the influence on children, implying that gay men were pedophiles looking to recruit children.²¹ Many scholars point to the Dade County conflict and the national attention to gay rights issues in 1977 for motivating an upsurge in lesbian and gay activism across the country during this time.²² The form of the Dade County ballot measure—reactive opposition to the passage of pro-gay legislation—was the most common type of anti-gay ballot measure during this time period.²³

Shortly after Dade County's ballot measure, California State Senator John Briggs, who worked with Bryant on her campaign, sponsored the California Defend Our Children Initiative, a response to a 1975 California law that protected gay and lesbian teachers from being fired.²⁴ Popularly called the Briggs Initiative, this new law would have required the firing of teachers who were lesbian or gay, or who advocated homosexuality.²⁵ Rather than a referendum to overturn an existing law, this initiative was an attempt to write a new, anti-gay law through the ballot measure process.²⁶ The Briggs Initiative was "[o]verwhelmingly opposed by teachers' unions and then-Governor Ronald Reagan" and lost by a million votes.²⁷

RIGHT SHAPED LESBIAN AND GAY ACTIVISM (2008); JOHN GALLAGHER & CHRIS BULL, PERFECT ENEMIES: THE RELIGIOUS RIGHT, THE GAY MOVEMENT, AND THE POLITICS OF THE 1990S (1996); HARDISTY, *supra* note 16; HERMAN, *supra* note 14.

18 See ELLEN ANN ANDERSEN, OUT OF THE CLOSETS AND INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION 143–45 (2005); see also Regina Werum & Bill Winders, *Who's "In" and Who's "Out": State Fragmentation and the Struggle over Gay Rights, 1974–1999*, 48 SOC. PROBS. 386, 400–02 (2001).

19 See Joseph Mello, *Rights Discourse and the Mobilization of Bias: Exploring the Institutional Dynamics of the Same-Sex Marriage Debates in America*, 66 STUD. L. POL. & SOC'Y 1, 2–3, 22 (2015).

20 See BUTTON ET AL., *supra* note 10, at 68.

21 See FRED FEJES, GAY RIGHTS AND MORAL PANIC: THE ORIGINS OF AMERICA'S DEBATE ON HOMOSEXUALITY 96 (2008).

22 See generally *id.*; FETNER, *supra* note 17.

23 See generally STONE, *supra* note 4.

24 HARDISTY, *supra* note 16, at 100.

25 *Id.*; FEJES, *supra* note 21, at 181–212.

26 HARDISTY, *supra* note 16, at 100; FEJES, *supra* note 21, at 181–212.

27 STONE, *supra* note 4, at 14.

In the mid-1980s the Religious Right harnessed panic and fear about AIDS to increase fundraising and anti-gay animosity.²⁸ In 1986, Lyndon LaRouche sponsored a statewide HIV/AIDS initiative which required mandated state reporting of individuals with AIDS, the inclusion of AIDS in quarantine and isolation statutes, and a limitation on the occupations open to afflicted individuals.²⁹ Although unsuccessful, the LaRouche initiative led to a series of similar initiatives addressing AIDS in California.³⁰

In the late 1980s, the Religious Right also innovated with a new form of anti-gay ballot measure, the legal-restrictive initiative. Legal-restrictive initiatives attempted to constrain future legislation by limiting government support for homosexuality or the possibility of passing LGBT rights legislation in the future, along with typically eliminating any existing protections. The Religious Right developed these initiatives out of the failed Family Protection Act of 1981, attempted federal legislation that included provisions for school prayer, parental control over textbooks, traditional roles for women, and prohibited the promotion or support of homosexuality by the government.³¹ In the late 1980s, the movement spearheaded campaigns to eliminate “special rights” based on sexual orientation in the State of Washington, to prohibit the promotion of homosexuality in the California cities of Irvine, Concord, and Riverside, and to require voter approval for LGBT rights laws in Maine, California, and Minnesota (St. Paul).³² Few of these ballot measures made it on the ballot, but their attempt demonstrates an increasing emphasis within the Religious Right on proactive opposition to LGBT rights.

The two most infamous legal-restrictive initiatives are Oregon Ballot Measure 9³³ and Colorado Amendment 2.³⁴ The

28 GALLAGHER & BULL, *supra* note 17, at 25–30.

29 See Jay M. Kohorn, *Petition for Extraordinary Relief: If the LaRouche AIDS Initiative had Passed in California*, 15 N.Y.U. REV. L. & SOC. CHANGE 477, 490 (1986); see also Christopher P. Toumey, *Conjuring Medical Science: The 1986 Referendum on AIDS/HIV Policy in California*, 11 MED. ANTHROPOLOGY Q. 477, 488 (1997).

30 Mark Vandervelden, *Californians Say “No on 64,”* ADVOCATE, Dec. 9, 1986, at 10, 11; see also STONE, *supra* note 4, at 20.

31 See Thomas J. Burrows, *Family Values: From the White House Conference on Families to the Family Protection Act*, in CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS 336 (John D’Emilio et al. eds., 2000) [hereinafter CREATING CHANGE]. See generally Karen Flax, *Women’s Rights and the Proposed Family Protection Act*, 36 U. MIAMI L. REV. 141 (1981).

32 STONE, *supra* note 4, at 21.

33 *Oregon Government Must Discourage Homosexuality, Measure 9* (1992), BALLOTPEDIA, [http://ballotpedia.org/Oregon_Government_Must_Discourage_Homosexuality,_Measure_9_\(1992\)](http://ballotpedia.org/Oregon_Government_Must_Discourage_Homosexuality,_Measure_9_(1992)) [http://perma.cc/2SEJ-8S2R].

34 *Colorado No Protected Status for Sexual Orientation Amendment, Initiative 2* (1992),

Oregon Citizen's Alliance (OCA), led by vocal anti-gay activist Lon Mabon, sponsored legal-restrictive initiatives in the Oregon cities of Corvallis and Springfield in early 1992, which were test cases for the statewide initiative in November 1992.³⁵ Ballot Measure 9 was one of the most extreme anti-gay initiatives in that it would have eliminated all existing and future nondiscrimination laws, along with requiring the firing of lesbian and gay teachers in public schools (along with anyone openly supportive of lesbian, gay, bisexual, transgender, or queer rights), and the removal of all books approving of homosexuality from public schools and libraries.³⁶ Ultimately, Oregon voters rejected Ballot Measure 9.³⁷ In the same election year, the organization Colorado for Family Values (CFV) sponsored Amendment 2, a legalistic initiative that eliminated future and existing gay rights laws in the state.³⁸ CFV had originally mobilized to defeat an ordinance in conservative Colorado Springs. Colorado Amendment 2 distinguished between "true" minorities and gays by using legal language about "protected classes" and "minority status."³⁹ CFV innovated with a secular, legalistic argument about LGBT rights that became widely used by Religious Right campaigns across the country. This language included a legalistic argument about how lesbian and gay rights were "special rights" that usurped the rights of "true minorities" like African Americans.⁴⁰ Through this argument, the Religious Right appealed to both voters who were ambivalent about civil rights and African American community members.⁴¹ Colorado voters passed Amendment 2,⁴² although it was quickly challenged in the courts.⁴³

In the next few years, the Religious Right disseminated the legal-restrictive initiative across the United States. Mabon and

BALLOTPEDIA, [http://ballotpedia.org/Colorado_No_Protected_Status_for_Sexual_Orientation_Amendment,_Initiative_2_\(1992\)](http://ballotpedia.org/Colorado_No_Protected_Status_for_Sexual_Orientation_Amendment,_Initiative_2_(1992)) [<http://perma.cc/HW5G-Z5MF>].

³⁵ GALLAGHER & BULL, *supra* note 17, at 48–51.

³⁶ See generally Elizabeth A. Tedesco, "Humanity on the Ballot": *The Citizen Initiative and Oregon's War over Gay Civil Rights*, 22 B.C. THIRD WORLD L.J. 163 (2002).

³⁷ *Oregon Government Must Discourage Homosexuality, Measure 9 (1992)*, *supra* note 33.

³⁸ HARDISTY, *supra* note 16, at 105. See generally LISA KEEN & SUZANNE B. GOLDBERG, STRANGERS TO THE LAW: GAY PEOPLE ON TRIAL (1998).

³⁹ *Colorado No Protected Status for Sexual Orientation Amendment, Initiative 2 (1992)*, *supra* note 34; see also KEEN & GOLDBERG, *supra* note 38, at 3.

⁴⁰ KEEN & GOLDBERG, *supra* note 38, at 133–58; Didi Herman, (Il)legitimate Minorities: *The American Christian Right's Anti-gay Discourse*, 23 J.L. & SOC'Y 346 *passim* (1996).

⁴¹ See Jean Hardisty & Amy Gluckman, *The Hoax of "Special Rights": The Right Wing's Attack on Gay Men and Lesbians*, in HOMO ECONOMICS: CAPITALISM, COMMUNITY, AND LESBIAN AND GAY LIFE 209, 218 (Amy Gluckman & Betsy Reed eds., 1997).

⁴² *Colorado No Protected Status for Sexual Orientation Amendment, Initiative 2 (1992)*, *supra* note 34.

⁴³ See *Romer v. Evans*, 517 U.S. 620 (1996); see also KEEN & GOLDBERG, *supra* note 38.

the OCA persisted in sponsoring additional legal-restrictive initiatives (often called “the son of 9”)⁴⁴ at the state and town levels for the next two years, passing these initiatives in over thirty towns across the state.⁴⁵ Religious Right affiliates across the country collected petitions for imitation Amendment 2 initiatives, and an affiliate of the OCA sponsored a similar initiative in Idaho, which the voters did not pass.⁴⁶ The most notable successful legal-restrictive initiative was the passage of Issue 3 in Cincinnati in 1993.⁴⁷

In 1996, the Supreme Court repealed Colorado Amendment 2 in *Romer v. Evans*.⁴⁸ This ruling invalidated state legal-restrictive initiatives but also affirmed the legitimacy of sexual orientation as a minority-group category.⁴⁹ This case set an important precedent for future Supreme Court rulings, including the abolition of sodomy laws in *Lawrence v. Texas*⁵⁰ and the establishment of same-sex marriage rights in *United States v. Windsor*⁵¹ and *Obergefell v. Hodges*.⁵²

Although *Romer* foreclosed the use of state legal-restrictive initiatives, the success of these initiatives created tactical repertoires of proactive opposition to LGBT rights that were mobilized to oppose same-sex marriage. In the mid-1990s, many legal-restrictive initiatives included a clause about prohibiting same-sex marriage. Scholars Michael Dorf and Sidney Tarrow argue that anti-gay activists engaged in anticipatory counter mobilization, opposing same-sex marriage before it would be realistically recognized by the courts or legislatures.⁵³ After the 1993 Hawaii Supreme Court case, *Baehr v. Lewin*,⁵⁴ the Religious Right mobilized in anticipatory counter mobilization to pass the Federal Defense of Marriage Act (DOMA)⁵⁵ in 1996 and fifteen

⁴⁴ See STONE, *supra* note 4, at 87.

⁴⁵ See ARLENE STEIN, *THE STRANGER NEXT DOOR: THE STORY OF A SMALL COMMUNITY'S BATTLE OVER SEX, FAITH, AND CIVIL RIGHTS* 27 (2001).

⁴⁶ See Daniel Levin, *The Constitution as Historical Symbol in Western Anti-gay Rights Initiatives: The Case of Idaho*, in *ANTI-GAY RIGHTS: ASSESSING VOTER INITIATIVES* 33, 36 (Stephanie L. Witt & Suzanne McCorkle eds., 1997).

⁴⁷ See DUGAN, *supra* note 17, at 9–10.

⁴⁸ *Romer*, 517 U.S. 620; see also JONATHAN GOLDBERG-HILLER, *THE LIMITS TO UNION: SAME-SEX MARRIAGE AND THE POLITICS OF CIVIL RIGHTS* 22 (2002).

⁴⁹ *Romer*, 517 U.S. at 632–36. However, municipal legal-restrictive ordinances continued in the Midwest. See generally STONE, *supra* note 4.

⁵⁰ *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁵¹ *United States v. Windsor*, 133 S. Ct. 2675 (2013).

⁵² *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

⁵³ See Michael C. Dorf & Sidney Tarrow, *Strange Bedfellows: How an Anticipatory Countermovement Brought Same-Sex Marriage into the Public Arena*, 39 L. & SOC. INQUIRY 449, 463 (2014).

⁵⁴ *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

⁵⁵ Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996), declared unconstitutional by *United States v. Windsor*, 133 S. Ct. 2675 (2013).

statutory DOMAs in states like Arizona, Georgia, Utah, Idaho, and Michigan in 1995 and 1996.⁵⁶ Similarly, after the legalization of civil unions in Vermont in 1999 and same-sex marriage in Massachusetts in 2004, the Religious Right sponsored a series of state constitutional amendment initiatives across the country to forbid same-sex marriages. The first statewide ballot measures on same-sex marriage were in 1998 in Alaska and Hawaii, two states where court cases had authorized the possibility of legal same-sex marriage.⁵⁷ Long before same-sex marriage was legal in Massachusetts, the Religious Right sponsored citizen initiatives or campaigned to support legislatively-referred constitutional amendments on the ballot. Some of these ballot measures were “super-DOMAs” that forbade both same-sex marriage and broader relationships, such as domestic partnerships and recognition rights.⁵⁸ For over a decade, the same-sex marriage ban was the Religious Right’s most successful ballot measure tactic.⁵⁹ Until 2012, voters passed all bans except one, most by a large margin of support. The LGBT movement struggled to defeat same-sex marriage bans due to the lack of voter support for same-sex marriage, limited movement resources, and inexperienced campaigns run in states that rarely had ballot measures on LGBT rights, such as Montana and Missouri.⁶⁰

In early 2008, the California Supreme Court legalized same-sex marriage, and Religious Right organizations quickly collected petitions to put a constitutional amendment on the ballot to ban same-sex marriage in the state. When Proposition 8 was voted on in November of 2008, more than 18,000 same-sex marriages had already been conducted in the State of California.⁶¹ There were two things that were historical about California Proposition 8. First, the initiative was the first time there were legal same-sex marriages conducted in a state that would be rescinded by a ballot measure. Second, the size and

⁵⁶ See Dorf & Tarrow, *supra* note 53, at 450.

⁵⁷ See Kevin G. Clarkson et al., *The Alaska Marriage Amendment: The People’s Choice on the Last Frontier*, 16 ALASKA L. REV. 213, 215 (1999); see also Goldberg-Hiller, *supra* note 48, at 1.

⁵⁸ See Bayliss J. Camp, *Mobilizing the Base and Embarrassing the Opposition: Defense of Marriage Referenda and Cross-Cutting Electoral Cleavages*, 51 SOC. PERSP. 713, 717 (2008).

⁵⁹ See STONE, *supra* note 4, at 129–54.

⁶⁰ Amy L. Stone, *Winning for LGBT Rights, Losing for Same-Sex Marriage*, in *THE MARRYING KIND? DEBATING SAME-SEX MARRIAGE WITHIN THE LESBIAN AND GAY MOVEMENT* 135, 161–62 (Mary Bernstein & Verta Taylor eds., 2013).

⁶¹ John Schwartz, *California High Court Upholds Gay Marriage Ban*, N.Y. TIMES (May 26, 2009), http://www.nytimes.com/2009/05/27/us/27marriage.html?_r=0 [<http://perma.cc/45TU-5JVF>].

scale of the campaigns were remarkable. The Religious Right campaign to pass Proposition 8 successfully defeated the largest LGBT campaign in U.S. history, a campaign that dwarfed any other ballot measure campaign that came before it. The passage of Proposition 8 spurred protests across the country and the play 8 by Dustin Lance Black.⁶² Like Colorado Amendment 2, this initiative was overruled as unconstitutional in the federal courts, and California same-sex marriages resumed in June of 2013.⁶³

The success of the Religious Right in passing same-sex marriage bans was challenged in the 2012 elections. In 2012, there were nine ballot measures: four municipal referendums on nondiscrimination ordinances in Anchorage (Alaska), Royal Oak (Michigan), and the Kansas towns of Salina and Hutchinson; same-sex marriage bans in Minnesota and North Carolina; referendums on same-sex marriage laws in Maryland and Washington; and, a historical first, an initiative sponsored by the LGBT community in Maine to legalize same-sex marriage.⁶⁴

North Carolina voters passed a same-sex marriage ban in May of 2012.⁶⁵ After over a decade of successful same-sex marriage bans, the LGBT movement won all four states in the November 2012 election. In Minnesota, voters overturned a same-sex marriage ban, which allowed the later legalization of same-sex marriage in the state.⁶⁶ In Maryland and Washington, where the state legislatures had legalized same-sex marriage, voters elected to retain the legislation through a referendum.⁶⁷ And Maine voters legalized same-sex marriage through an initiative.⁶⁸ However, only the referendum in Royal Oak resulted

⁶² Jesse McKinley, *Across U.S., Big Rallies for Same-Sex Marriage*, N.Y. TIMES (Nov. 15, 2008), <http://www.nytimes.com/2008/11/16/us/16protest.html> [<http://perma.cc/2BT2-3CT7>]; AM. FOUND. FOR EQUAL RIGHTS, *Why "8," 8*, <http://www.8theplay.com/about-8/> (last visited Dec. 19, 2015).

⁶³ *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated sub nom* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

⁶⁴ See *Chart of 2012 Ballot Measure Issues*, BALLOTPEDIA, http://ballotpedia.org/Chart_of_2012_ballot_measure_issues [<http://perma.cc/Y9NF-JNGH>].

⁶⁵ *North Carolina Same-Sex Marriage, Amendment 1 (May 2012)*, BALLOTPEDIA, [http://ballotpedia.org/North_Carolina_Same-Sex_Marriage_Amendment_1_\(May_2012\)](http://ballotpedia.org/North_Carolina_Same-Sex_Marriage_Amendment_1_(May_2012)) [<http://perma.cc/KQ9Y-BP9C>].

⁶⁶ *Minnesota Same-Sex Marriage Amendment, Amendment 1 (2012)*, BALLOTPEDIA, http://ballotpedia.org/Minnesota_Same-Sex_Marriage_Amendment,_Amendment_1_%282012%29 [<http://perma.cc/Y43R-89YC>].

⁶⁷ *Maryland Same-Sex Civil Marriage Referendum, Question 6 (2012)*, BALLOTPEDIA, http://ballotpedia.org/Maryland_Same-Sex_Civil_Marriage_Referendum,_Question_6_%282012%29 [<http://perma.cc/D669-GTPR>]; *Washington Same-Sex Marriage Veto Referendum, Referendum 74 (2012)*, BALLOTPEDIA, http://ballotpedia.org/Washington_Same-Sex_Marriage_Veto_Referendum,_Referendum_74_%282012%29 [<http://perma.cc/Z3MG-LM75>].

⁶⁸ *Maine Same-Sex Marriage Question, Question 1 (2012)*, BALLOTPEDIA, [http://ballotpedia.org/Maine_Same-Sex_Marriage_Question,_Question_1_\(2012\)](http://ballotpedia.org/Maine_Same-Sex_Marriage_Question,_Question_1_(2012)) [<http://perma.cc/9HJZ-39Q4>].

in the retention of a nondiscrimination ordinance; in the other three cities, Religious Right scare tactics about transgender women may have influenced voters' decision.⁶⁹

Obergefell forecloses any future marriage ban ballot measures, but the Religious Right still mobilizes against state and municipal nondiscrimination laws with ballot measures.⁷⁰ Increasingly, these referendums focus on protections for gender identity, making transgender rights central to Religious Right campaigns.⁷¹

II. THE TYRANNY OF THE MAJORITY

There are legal, social, and political questions about the consequences of anti-gay ballot measures. Scholars have long debated the merits of direct democracy itself, whether it is a tyranny of the majority or an ideal form of citizen governance. K.K. DuVivier likens the citizen-initiated ballot measure to a "genie" being let out of bottle by the Progressive and Populist movements that advocated for direct democracy.⁷² Activists idealized these initiatives as a purer form of democracy that was devoid of the special interests of representative democracy. However, "unintended consequences arise from the genie master's ignorance rather than greed" in the case of citizen voters.⁷³ There are ongoing questions about whether ballot measures reflect the will of the majority due to problems with voter fatigue,⁷⁴ voter turnout,⁷⁵ voter education,⁷⁶ and voter confusion.⁷⁷

⁶⁹ Khalil AlHajal, *Gay Rights Ordinance Passes in Royal Oak*, MLIVE (Nov. 5, 2013, 9:30 PM), http://www.mlive.com/news/detroit/index.ssf/2013/11/gay_rights_ordinance_passes_in.html [<http://perma.cc/AD9P-CTNK>]; William Yardley, *Anchorage Voters Reject Extension of Rights Protections to Gay Residents*, N.Y. TIMES (Apr. 4, 2012), <http://www.nytimes.com/2012/04/05/us/proposition-5-gay-rights-anchorage-alaska.html>.

⁷⁰ Editorial, *In Houston, Hate Trumps Fairness*, N.Y. TIMES (Nov. 4, 2015), <http://www.nytimes.com/2015/11/05/opinion/in-houston-hate-trumped-fairness.html>; Alan Hickman, *Gay and Lesbian Movement*, ENCYCLOPEDIA ARK. HIST. & CULTURE, <http://www.encyclopediaofarkansas.net/encyclopedia/entry-detail.aspx?entryID=1177> [<http://perma.cc/H9XE-NLXK>].

⁷¹ See STONE, *supra* note 4, at 170.

⁷² K.K. DuVivier, *Out of the Bottle: The Genie of Direct Democracy*, 70 ALB. L. REV. 1045 (2007).

⁷³ *Id.* at 1050.

⁷⁴ See Shaun Bowler et al., *Ballot Propositions and Information Costs: Direct Democracy and the Fatigued Voter*, 45 W. POL. Q. 559 (1992).

⁷⁵ See Caroline J. Tolbert et al., *The Effects of Ballot Initiatives on Voter Turnout in the American States*, 42 AM. POL. RES. 625 (2001).

⁷⁶ See Michele S. Moses & Lauren P. Saenz, *Hijacking Education Policy Decisions: Ballot Initiatives and the Case of Affirmative Action*, 78 HARV. EDUC. REV. 289 (2008).

⁷⁷ See generally Elise Hofer, *The Case for Judicial Review of Direct Democracy*, 4 J.L. 49 (2014).

Many scholars contend that the referendum and initiative processes can be tyrannical assertions of majority power over minorities.⁷⁸ In her early work, Barbara Gamble argues, "Typically, civil rights laws seek to shift political power from the majority to the minority, creating a conflict steeped in self-interest. Thus, where the civil rights of a political minority are at stake, the absence of the representative filter opens the door to the tyranny."⁷⁹ Other scholars have argued that direct democracy "uniquely facilitate[s] majoritarian oppression of disfavored minority interests."⁸⁰ The main evidence for the tyrannical nature of these measures is the frequency with which voters reject civil rights at the ballot box. The low passage rate of referendums on civil rights measures suggests that civil rights measures fare poorly when subject to majority approval. The passage rates are even more dramatic for anti-civil rights initiatives, such as affirmative action bans, AIDS policies, housing and public accommodations for racial minorities, English language laws, and same-sex marriage bans.⁸¹ Three-quarters of initiatives on these topics are enacted to restrict or eliminate minority rights in some way.⁸² The exceptions to this pattern are initiatives that focus on women's issues such as women's suffrage, the Equal Rights Amendment (ERA), and reproductive rights issues, in which the passage rate is similar to other forms of citizen initiatives.⁸³ The greater success of ballot measures on women's issues is partly a consequence of the demographic prominence of women; comparatively, the first large-scale government survey of sexual orientation, the National Health Interview Survey, reported in July 2014, that less than three percent of Americans identify as gay, lesbian, or bisexual.⁸⁴

⁷⁸ See generally DANIEL A. SMITH & CAROLINE J. TOLBERT, *EDUCATED BY INITIATIVE: THE EFFECTS OF DIRECT DEMOCRACY ON CITIZENS AND POLITICAL ORGANIZATIONS IN THE AMERICAN STATES* (2004); Todd Donovan & Shaun Bowler, *Direct Democracy and Minority Rights: An Extension*, 42 AM. J. POL. SCI. 1020 (1998); Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245 (1997); Donald P. Haider-Markel et al., *Lose, Win, or Draw? A Reexamination of Direct Democracy and Minority Rights*, 60 POL. RES. Q. 304 (2007); Daniel C. Lewis, *Direct Democracy and Minority Rights: Same-Sex Marriage Bans in the U.S. States*, 92 SOC. SCI. Q. 364 (2011).

⁷⁹ Gamble, *supra* note 78, at 248.

⁸⁰ Hofer, *supra* note 77, at 57.

⁸¹ LYDIA CHAVEZ, *THE COLOR BIND: CALIFORNIA'S BATTLE TO END AFFIRMATIVE ACTION* (1998); Jodi Miller, "Democracy in Free Fall," *The Use of Ballot Initiatives to Dismantle State-Sponsored Affirmative Action Programs*, 1999 N.Y.U. ANN. SURV. AM. L. 1.

⁸² Gamble, *supra* note 78, at 245.

⁸³ THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 97-98 (1989).

⁸⁴ Sandhya Somashekhar, *Health Survey Gives Government Its First Large-Scale Data on Gay, Bisexual Population*, WASH. POST (July 15, 2014), http://www.washingtonpost.com/national/health-science/health-survey-gives-government-its-first-large-scale-data-on-gay-bisexual-population/2014/07/14/2db9f4b0-092f-11e4-bbf1-cc51275e7f8f_story.html

Ballot measures on LGBT rights require the strong support of heterosexual allies in order to pass.

The tyrannical aspects of direct democracy have led to the call for stricter pre-ballot and post-ballot judicial review of ballot measures,⁸⁵ along with harsher requirements for initiative petition collecting. Historically, the LGBT movement has effectively used both pre- and post-ballot judicial review to subvert direct democracy. In her book *Out of the Closets and into the Courts*, Ellen Ann Andersen traces the history of judicial challenges to anti-gay ballot measures from 1974 to 2003.⁸⁶ National organizations, like Lambda Legal, and local campaigns alike, have systematically filed pre-ballot legal challenges, which led to the deterrence of multiple legal-restrictive initiatives in the 1990s.⁸⁷ Some of the most tyrannical ballot measures have been deflected before petition collection and voting. Additionally, two extreme forms of anti-gay initiatives—legal-restrictive initiatives and same-sex marriage bans—have been overturned by post-ballot judicial review.⁸⁸ Other ballot measures—such as referendums on municipal nondiscrimination laws—typically do not foreclose political actors from passing said legislation again in the future.⁸⁹ Thus, the high passage rate of anti-gay ballot measures is mitigated by pre- and post-ballot legal challenges. However, post-ballot legal challenges may be successful years or decades after an anti-gay initiative, leaving residents of that city or state with anti-gay laws and policies in the meantime.

This literature on the tyrannical nature of anti-gay ballot measures focused disproportionately on the constitutionality of initiatives during pre-ballot judicial review, the high passage rate of ballot measures as evidence for tyranny, and broader

[<http://perma.cc/M6U9-ECT3>].

⁸⁵ Hofer, *supra* note 77, at 52. See generally Kevin R. Johnson, *A Handicapped, Not "Sleeping," Giant: The Devastating Impact of the Initiative Process on Latina/o and Immigrant Communities*, 96 CAL. L. REV. 1259 (2008); Anya J. Stein, *The Guarantee Clause in the States: Structural Protections for Minority Rights and Necessary Limits on the Initiative Power*, 37 HASTINGS CONST. L.Q. 343 (2009).

⁸⁶ ANDERSEN, *supra* note 18.

⁸⁷ *Id.* at 143–74; STONE, *supra* note 4, at 63–90.

⁸⁸ See ANDERSEN, *supra* note 1887.

⁸⁹ Indeed it is common for the same city to have multiple referendums over a period of decades about these nondiscrimination ordinances. For example, Houston, Texas, had two referendums in January of 1985 on nondiscrimination protections, a vote on domestic partnerships in 2001, and a vote on a nondiscrimination ordinance in 2015. Ferndale, Michigan, had three separate referendums and initiatives on nondiscrimination ordinances in November 1991, February 2000, and November 2006. In the final referendum, a nondiscrimination ordinance was passed. Cincinnati, Ohio, had a legal restrictive initiative in 1993 and a vote to rescind the legal restrictive initiative in 2006. Miami-Dade, Florida, had referendums on nondiscrimination ordinances in 1977, 1978, and 2002.

philosophical questions about whether or not referendums and initiatives allow for a tyranny of the majority. This Article presses this question of tyranny further, to examine the extra-legal consequences of said ballot measures. Even if direct democracy does not result in a negative legal outcome, I argue that there are extra-legal consequences due to the campaigning by the Religious Right and LGBT movement.

III. EXTRA-LEGAL CONSEQUENCES

Beyond sociolegal questions about the democratic nature of anti-gay ballot measures, there are extra-legal ramifications for the LGBT community and individuals who live in municipalities or states experiencing a ballot measure. From the drain on community monetary resources to the exacerbation of secondary marginalization within the LGBT movement, these referendums and initiatives have consequences at the local, state, and national levels. Many scholars document the psychological toll for lesbian, gay, and bisexual individuals experiencing a local anti-gay ballot measure.⁹⁰ Some of these community, movement, and individual consequences can be productive; anti-gay campaigns result in new community organizations, escalated mobilization within the movement, and stronger voting habits. However, most anti-gay ballot measures produce negative outcomes for the LGBT community, movement, and individuals.

First, I focus on how the LGBT community in a particular city or state is impacted by a local ballot measure. Large-scale, organized campaigns must be mobilized to fight anti-gay ballot measures. Consistently, lesbian and gay ballot measure campaigns struggle with marshalling enough resources and funding to run successful campaigns.⁹¹ Ballot measure campaigns are frequently unanticipated, have to be mobilized quickly, and require much funding. The campaign to fight Proposition 8, the same-sex marriage initiative in California in

⁹⁰ Unfortunately, little of this work has included transgender individuals. Given the increase in anti-transgender ballot measures and the increasing use of anti-transgender framing by Religious Right campaigns, future work should include transgender individuals in studies of the impact of anti-LGBT animus. See Ellen D.B. Riggle et al., *Marriage Amendments and Lesbian, Gay, and Bisexual Individuals in the 2006 Election*, 6 SEXUALITY RES. & SOC. POL'Y 80 (2009); Sharon Scales Rostosky et al., *Lesbian, Gay, and Bisexual Individuals' Psychological Reactions to Amendments Denying Access to Civil Marriage*, 80 AM. J. ORTHOPSYCHIATRY 302 (2010) [hereinafter Rostosky, *Psychological Reactions*]; Sharon Scales Rostosky et al., *Marriage Amendments and Psychological Distress in Lesbian, Gay, and Bisexual (LGB) Adults*, 56 J. COUNSELING PSYCHOL. 56 (2009); Glenda M. Russell & Jeffrey A. Richards, *Stressor and Resilience Factors for Lesbians, Gay Men, and Bisexuals Confronting Antigay Politics*, 31 AM. J. COMMUNITY PSYCHOL. 313 (2003).

⁹¹ See STONE, *supra* note 4, at 133–35.

2008, spent \$43.3 million, shattering campaign-spending records and outspending most gubernatorial campaigns.⁹² The Proposition 8 campaign spent more money than the combined funds of twenty-four other campaigns to fight same-sex marriage bans in other states.⁹³ Although some of these funds were raised from out-of-state contributors, anti-gay ballot measures are a direct financial strain on the communities in which they take place.⁹⁴ This demand for resources in ballot measure campaigns can draw resources away from LGBT community non-profit organizations, health organizations, community centers, and businesses, along with other ongoing activist projects and Democratic candidates.⁹⁵ The funds raised during ballot measure campaigns do not result in long term products for the local community; these funds often disappear into thin air as political ads or consulting fees rather than fueling durable community organizations. Oftentimes, even the political ads crafted to fight the ballot measure do not change public opinion about LGBT issues. In the 2000s, polling consultants advised many marriage ban campaigns to run political ads that did not focus on same-sex marriage. Instead, campaigns ran ads focusing on the damaging impact of revising the state constitution.⁹⁶ One campaign organizer remarked, "We spent a quarter of a million dollars on a big ad buy [about the constitution] and still lost with thirty percent of the vote. In the months following the campaign I really thought about the benefits of a gay-positive ad, that the community would have been better off."⁹⁷

In addition to financial resources, successful campaigns have to engage in mass mobilization of leaders and volunteers. In each state with such marriage bans, including states like Arkansas and Louisiana, the LGBT community had to mobilize a response to the Religious Right.⁹⁸ Organizers of inexperienced campaigns complained that it diverted local movement resources away from ongoing projects like anti-bullying or anti-violence laws and instead focused activist energy on same-sex marriage.⁹⁹ Even a municipal ballot measure may require over 10,000 volunteers to make phone calls, do door-to-door canvassing to talk to voters,

⁹² Justin Ewers, *California Same-Sex Marriage Initiative Campaigns Shatter Spending Records*, U.S. NEWS & WORLD REP. (Oct. 29, 2008, 1:06 PM), <http://www.usnews.com/news/national/articles/2008/10/29/california-same-sex-marriage-initiative-campaigns-shatter-spending-records> [<http://perma.cc/JHB8-HU7R>].

⁹³ STONE, *supra* note 4, at xiii.

⁹⁴ *Id.* at 71–72, 134–35.

⁹⁵ *Id.* at xxvii.

⁹⁶ *Id.* at 145.

⁹⁷ *Id.*

⁹⁸ Stone, *supra* note 60.

⁹⁹ STONE, *supra* note 4, at 133.

put up yard signs, and organize rallies. This requires the mobilization of heterosexual volunteers as well as broad community coalitions. In cities where the ballot measure is a referendum response to a passed nondiscrimination ordinance, there is typically an existing organization or coalition of individuals who worked to pass the nondiscrimination ordinance.¹⁰⁰ This organization frequently mobilizes to run a campaign when the ordinance is challenged in a referendum. When the Religious Right engages in proactive opposition by proposing anti-gay initiatives or constitutional amendments, the LGBT movement has to mobilize in new and unexpected ways. In her study of an anti-gay initiative in Timbertown, a small town in Oregon targeted by the OCA in the 1990s, sociologist Arlene Stein documents the mobilization that had to happen in a town with no pre-existing LGBT organizations.¹⁰¹ Progressive locals met in private homes, worked with no paid staff, and engaged in a personal campaign with their neighbors.¹⁰² When Louisiana had a legislative-initiated constitutional amendment to ban same-sex marriage, LGBT organizers in the state had never coordinated a statewide campaign of any kind.¹⁰³ The marriage ban required the formation of a statewide coalition and new social networks between organizers.¹⁰⁴ These requirements for mobilization can serve the LGBT community in the long term. In Louisiana and other states with marriage bans, this mobilization frequently extends past the campaign into the formation of statewide LGBT rights organizations that work throughout the year on state legislative issues or protests. In 2010, one-fifth of all existing statewide LGBT rights organizations were founded as a result of marriage ban campaigns or other ballot measures.¹⁰⁵ Other kinds of organizing can also result from these campaigns. After Colorado Amendment 2 passed in 1992, new chapters of Parents and Friends of Lesbians and Gays (PFLAG) began across the state, public libraries increased their holdings of LGBT books, and a task force to address the climate for LGBT individuals on campus was created at the University of Colorado at Boulder.¹⁰⁶

¹⁰⁰ See generally *id.*

¹⁰¹ STEIN, *supra* note 45, at 16–18.

¹⁰² *Id.* at 17–18.

¹⁰³ Telephone Interview with Randy Evans, Political Director, Forum for Equality (May 7, 2010).

¹⁰⁴ *Id.*

¹⁰⁵ STONE, *supra* note 4, at xxiv–xxv, 135. See generally Donald P. Haider-Markel, *Lesbian and Gay Politics in the States*, in *THE POLITICS OF GAY RIGHTS* 290 (Craig Rimmerman et al. eds., 2000) (describing how threatening the gay community can incentivize formation of new gay organizations).

¹⁰⁶ Glenda M. Russell et al., *Trauma, Recovery, and Community: Perspectives on the*

These campaigns are often mobilized to fail. In areas where LGBT rights are unpopular, even the most diligent LGBT campaign cannot succeed. For example, even the most effective campaign to fight same-sex marriage bans failed until there was a dramatic shift in public opinion about same-sex marriage.¹⁰⁷ This situation, in which LGBT organizers and volunteers work tirelessly for a campaign that loses, can be demoralizing and challenging. At the end of a campaign, particularly a losing campaign, there may be little to show for all the effort put in by activists.

This intensified mobilization can dramatize inter-community conflicts, particularly secondary marginalization, city-rural differences, movement ideological division, and racial coalition building.¹⁰⁸ Campaigns require a level of consensus about tactics that can be challenging for any social movement, but particularly challenging for one as diverse as the LGBT movement. These campaigns tend to increase movement dissent and marginalize direct action and queer activism.¹⁰⁹ Queer activism challenges campaign work by advocating for the importance of proud, diverse representations of the LGBT community. In many campaigns, if LGBT lives are represented at all, they are typically white, gender-normative, middle-class gay men or lesbians in monogamous relationships. In so representing the LGBT community, diversity within the movement is stifled and community members who are less palatable to mainstream voters—such as drag queens, transgender women, or leathermen—are hidden from view.¹¹⁰ In addition, there are frequently tensions over racial coalition building during ballot measure campaigns that exacerbate existing racial marginalization within the LGBT movement.¹¹¹ In her study of multiple statewide referendums and initiatives in Maine, Kimberly Simmons elaborates on the divisions between strategies deployed in rural and urban organizing against ballot measures.¹¹² Specifically, activists in rural areas chafed under the directives of the statewide campaign, which was often housed in an urban area and used tactics that worked better in cities.

Beyond the immediate community, anti-gay ballot measures impact the trajectory of the LGBT movement. Scholars have studied

Long-Term Impact of Anti-LGBT Politics, TRAUMATOLOGY, June 2011, at 14, 20.

¹⁰⁷ STONE, *supra* note 4, at 132.

¹⁰⁸ *Id.* at 155–78; DUGAN, *supra* note 17.

¹⁰⁹ STONE, *supra* note 4, at 85.

¹¹⁰ *Id.* at 155–78.

¹¹¹ *Id.* at 166.

¹¹² KIMBERLY CLARKE SIMMONS, GRASSROOTS GOES TO THE POLLS: CITIZEN INITIATIVES AND SOCIAL MOVEMENTS 342 (2002).

the relationship between the LGBT movement and the Religious Right as a classic example of a movement-countermovement dynamic. Movements and countermovements operate in a sustained, oppositional relationship in which one movement impacts the other by making contested claims about similar subjects of concern.¹¹³ Countermovements may alter the framing of social issues, create new social institutions, or generally shape movement tactics and strategies.¹¹⁴ In her book, *How the Religious Right Shaped Lesbian and Gay Activism*,¹¹⁵ sociologist Tina Fetner documents the continual impact of the Religious Right on the LGBT movement. Fetner argues that the Religious Right has “affected lesbian and gay activists’ choices of which issues to rally around and which issues to put on the back burner. It has blocked or reversed the implementation of policies that would benefit lesbians and gay men.”¹¹⁶

Although the campaigns operate on the municipal or state level, anti-gay ballot measures divert movement resources on the national level. Most notably, national LGBT organizations such as the Human Rights Campaign (HRC) and National Gay and Lesbian Task Force (Task Force) provide campaign startup funds, train campaign leaders, strategize about campaign tactics, and invest the time and energy of paid staff members to help run campaigns.¹¹⁷ This energy can divert movement resources from other activist causes. Escalated mobilization of the Religious Right in sponsoring ballot measures like legal-restrictive initiatives and marriage bans had a strong impact on national

¹¹³ David S. Meyer & Suzanne Staggenborg, *Movements, Countermovements, and the Structure of Political Opportunity*, 101 AM. J. SOC. 1628, 1631 (1996); Mayer N. Zald & Bert Useem, *Movement and Countermovement Interaction: Mobilization, Tactics and State Involvement*, in SOCIAL MOVEMENTS IN AN ORGANIZATIONAL SOCIETY 247, 247–48 (Mayer N. Zald & John D. McCarthy eds., 1987).

¹¹⁴ See generally Nancy Whittier, *The Consequences of Social Movements for Each Other*, in THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS 531 (David A. Snow et al. eds., 2004) (discussing women’s movements and the successive countermovements that followed from their influence); Kenneth T. Andrews, *Movement-Countermovement Dynamics and the Emergence of New Institutions: The Case of “White Flight” Schools in Mississippi*, 80 SOC. FORCES 911 (2002) (analyzing the creation of “private segregationist academies” that developed in the U.S. South after court-ordered desegregation); Dawn McCaffrey & Jennifer Keys, *Competitive Framing Processes in the Abortion Debate: Polarization-Vilification, Frame Saving, and Frame Debunking*, 41 SOC. Q. 41 (2000) (investigating how social movements regarding abortion frame their arguments in a competitive response to countermovements); Deana A. Rohlinger, *Framing the Abortion Debate: Organizational Resources, Media Strategies, and Movement-Countermovement Dynamics*, 43 SOC. Q. 479 (2002) (studying social movements’ framing literature regarding abortion and how they create media frames and packages in response to their opposition).

¹¹⁵ FETNER, *supra* note 17.

¹¹⁶ *Id.* at xv.

¹¹⁷ STONE, *supra* note 4, at 142.

organizations and the direction of the movement.¹¹⁸ In the 1990s, the Task Force developed a program called Fight the Right, which was criticized by organization board member and gay historian John D'Emilio as "thoroughly reactive, completely dependent on what one's political opponents did rather than on what queer communities wanted or needed."¹¹⁹ Some election cycles completely diverted the energy of national organizations. In the November 2004 election, eleven states faced same-sex marriage bans; most of these bans were legislatively referred initiatives and occurred in states like Oklahoma,¹²⁰ Georgia,¹²¹ and Kentucky,¹²² where the LGBT community had never fought a ballot measure. National organization staff members spent time and funding training campaigns leaders in all eleven states, and they triaged Oregon as the state most likely to be victorious.¹²³

Beyond the effect on the community and movement, anti-gay ballot measures have dramatic psychological impacts not only on individuals involved in campaigns, but also lesbian, gay, and bisexual individuals in the broader community. Religious Right campaigns often rely on existing homophobia or transphobia in public opinion in order to win a campaign.¹²⁴ Early Religious Right campaigns relied on messaging about gay men as sexual predators, which was transformed in the 1990s into legalistic arguments about "special rights."¹²⁵ Same-sex marriage ban campaigns often emphasize the benefits of children having one mother and one father, along with the sanctity of marriage and concerns about the teaching of same-sex marriage in elementary schools.¹²⁶ Since the late 1990s, increasingly Religious Right campaigns to rescind municipal nondiscrimination laws include arguments about transgender individuals, specifically transgender women. These arguments frame transgender women as "men in dresses" trying to invade the bathrooms of women and

¹¹⁸ *Id.* at 63–90, 129–54.

¹¹⁹ John D'Emilio, *Organizational Tales: Interpreting the NGLTF Story*, in *CREATING CHANGE*, *supra* note 31, at 469, 485.

¹²⁰ *Oklahoma Definition of Marriage, State Question 711 (2004)*, BALLOTPEDIA, [http://ballotpedia.org/Oklahoma_Definition_of_Marriage,_State_Question_711_\(2004\)](http://ballotpedia.org/Oklahoma_Definition_of_Marriage,_State_Question_711_(2004)) [<http://perma.cc/M937-ND3V>].

¹²¹ *Georgia Marriage Amendment, Question 1 (2004)*, BALLOTPEDIA, [http://ballotpedia.org/Georgia_Marriage_Amendment,_Question_1_\(2004\)](http://ballotpedia.org/Georgia_Marriage_Amendment,_Question_1_(2004)) [<http://perma.cc/9HZ4-7XR4>].

¹²² *Kentucky Marriage Amendment (2004)*, BALLOTPEDIA, [http://ballotpedia.org/Kentucky_Marriage_Amendment_\(2004\)](http://ballotpedia.org/Kentucky_Marriage_Amendment_(2004)) [<http://perma.cc/SV94-H86N>].

¹²³ STONE, *supra* note 4, at 134.

¹²⁴ Patrick McCreery, *Save Our Children/Let Us Marry: Gay Activists Appropriates the Rhetoric of Child Protectionism*, *RADICAL HIST. REV.*, Winter 2008, at 186; *see also* HERMAN, *supra* note 14.

¹²⁵ HARDISTY, *supra* note 16, at 112; HERMAN, *supra* note 14, at 47–48.

¹²⁶ STONE, *supra* note 4, at 36–37.

children.¹²⁷ The proliferation of these homophobic and transphobic arguments can be psychologically painful for LGBT residents and create a hostile and at times dangerous community to live in.

The evidence for negative psychological impacts is overwhelming and extends beyond the legal outcome of the vote to the campaign experience itself. Although there is some evidence that these campaigns mobilize lesbian, gay, and bisexual individuals to vote more often,¹²⁸ to fight for justice and equal rights,¹²⁹ and to publicly disclose their sexuality,¹³⁰ most research uncovers negative psychological and behavioral impacts. Multiple studies demonstrate that the experience of a local anti-gay campaign is stressful for gay, lesbian, and bisexual residents of a city or state.¹³¹ Studies show that contentious same-sex marriage ballot measures contribute to increased minority stress among lesbian, gay, and bisexual state residents and heightened awareness of anti-gay activity.¹³² Surveys taken right before the vote on California Proposition 8 showed high levels of anger and deleterious impacts on personal and familial relationships.¹³³ The anti-gay rhetoric of campaigns can lead to high rates of fear, creation of stress due to community divisions, heightened awareness of anti-gay activity, and an increase in internalized homophobia.¹³⁴ These psychological effects extend beyond LGBT individuals to their family members, who may experience heightened stress and concern for lesbian and gay people in their lives.¹³⁵

The impact of the passage of an anti-gay law also leads to negative psychological effects. Some of the most detailed work has been conducted by scholar Glenda Russell and her colleagues about the effects of Colorado Amendment 2. A longitudinal study of lesbian, gay, and bisexual residents of Colorado during the

¹²⁷ *Id.* at 28; see also Laurel Westbrook & Kristen Schilt, *Doing Gender, Determining Gender: Transgender People, Gender Panics, and the Maintenance of the Sex/Gender/Sexuality System*, 28 GENDER & SOC'Y 32, 37 (2014) (discussing the construction of gender panics about transgender women).

¹²⁸ See Riggle et al., *supra* note 90.

¹²⁹ Rostosky, *Psychological Reactions*, *supra* note 90, at 307.

¹³⁰ KEEN & GOLDBERG, *supra* note 39, at 233.

¹³¹ Riggle et al., *supra* note 90, at 86; Rostosky, *Psychological Reactions*, *supra* note 90, at 305.

¹³² Rostosky et al., *supra* note 90, at 62; Russell & Richards, *supra* note 90, at 316.

¹³³ Natalya C. Maisel & Adam W. Fingerhut, *California's Ban on Same-Sex Marriage: The Campaign and its Effects on Gay, Lesbian, and Bisexual Individuals*, 67 J. SOC. ISSUES 242, 253 (2011).

¹³⁴ Russell & Richards, *supra* note 90, at 316–22.

¹³⁵ Sharon G. Horne et al., *Impact of Marriage Restriction Amendments on Family Members of Lesbian, Gay, and Bisexual Individuals: A Mixed-Method Approach*, 67 J. SOC. ISSUES 358, 370–71 (2011).

legal-restrictive initiative Amendment 2 suggests that the harmful effects of said ballot measures may persist decades after the initiative.¹³⁶ More recently, psychologists have found that living in states with instituted bans on same-sex marriage increases the probability of lesbian, gay, and bisexual individuals having psychiatric issues, including anxiety, mood disorders, and alcohol use.¹³⁷

CONCLUSION

The history of anti-gay ballot measures extends beyond same-sex marriage bans to the first referendums on municipal nondiscrimination ordinances in the 1970s. Legal-restrictive initiatives and same-sex marriage bans have been the most systematic, proactive uses of the initiative process by the Religious Right and have resulted in anti-gay laws and policies that were overturned in the courts. Although both forms of ballot measures have been outlawed by the courts, the Religious Right still persists in sponsoring referendums against municipal ordinances or laws that support LGBT rights. These Religious Right campaigns have become increasingly anti-transgender as the support of lesbian, gay, and bisexual individuals has shifted with the legalization of same-sex marriage.

Although legal scholars have disproportionately focused on the question of whether ballot measures about civil rights are tyrannical, there has been less attention paid to the extra-legal consequences of these referendums and initiatives. Most of the research on extra-legal consequences has been conducted in the fields of sociology and psychology, not political science or law. This research demonstrates that the extra-legal consequences for anti-gay measures are mostly negative and impact the community and individuals directly affected by the referendum or initiative in question, along with the broader trajectory of the LGBT movement. Regardless of the outcome of said measures, the experiences of living in a community with an anti-gay campaign and working on a ballot measure campaign may themselves be challenging for LGBT individuals. When considering the tyrannical aspects of ballot measures, this Article pushes scholars to move beyond analyzing just the rate of passage of said measures and instead suggests that the extra-legal impact of these referendums and initiatives may be just as important.

¹³⁶ Russell et al., *supra* note 106, at 17–18.

¹³⁷ Mark L. Hatzenbuehler et al., *The Impact of Institutional Discrimination on Psychiatric Disorders in Lesbian, Gay, and Bisexual Populations: A Prospective Study*, 100 AM. J. PUB. HEALTH 452, 454 (2010).

This research calls for a holistic understanding of the impact of ballot measures about civil rights on gender, racial, and sexual minority group members. Other researchers have documented the consequences of these ballot measures for other minority group members, including disenfranchisement.¹³⁸ Like other scholars, I echo the need for more stringent judicial review of ballot measures affecting civil rights before these referendums and initiatives go before voters. The extreme extra-legal consequences of these ballot measures for LGBT individuals, communities, and movements should be included during judicial review as part of the potential harm of said initiatives. Although judges are often deferential to the “will of the people,” the complex, layered majoritarian tyranny that is part of anti-gay ballot measures should be considered as a reasonable justification to restrict these referendum and initiatives.

¹³⁸ See generally Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287 (1982) (discussing the origins of the political process and the difficulty that minorities have in participating); Johnson, *supra* note 85 (focusing on the effect of ballot measures on the latino/a community and discussing their difficulty in engaging in the political process).

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Teaching the Digital Caveman: Rethinking the Use of Classroom Technology in Law School

*James B. Levy**

INTRODUCTION	242
I. "IT'S DÉJÀ VU ALL OVER AGAIN": A BRIEF HISTORY OF MODERN CLASSROOM TECHNOLOGY	246
II. "CAVEMAN NO FOOL!": WHAT LEARNING SCIENCE CAN TELL US ABOUT HOW THE BRAIN WORKS.....	255
A. Did I Mention the Importance of Attention?.....	256
B. The Fantastic Plastic Machine	264
C. They Need Face-Time not Facebook.....	269
D. The Eyes Have It: The Reality and Myths of Visual Learning.....	274
III. STRATEGIES FOR USING CLASSROOM TECHNOLOGIES EVEN A CAVEMAN WOULD LOVE	276
A. General Guidelines	277
B. "Should I Stay or Should I Go?": What to Do About Laptops	279
C. Death by PowerPoint and Other Visual Crimes	285
D. The King is Dead, Long Live the King: Books and Screens	291
E. "That's Not Writing, That's Typing".....	298
F. "Survey Says!": Meta-Analyses of Digital Teaching Tools	303
CONCLUSION	305

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INTRODUCTION

Law students who have never lived in a world without computers or the Internet are known as “digital natives.”¹ Many assume that constant exposure to these technologies has changed the way our students think and learn. As a result, legal educators have also changed the way they teach to accommodate this supposedly new learning style by relying more heavily on visual tools like laptops and PowerPoint.² The assumptions about digital natives are considered so self-evident based on what we see around us that no one bothers to question them. In reality, these assumptions are not accurate but reflect instead the “illusion of truth” in which observations and beliefs are substituted for fact.³ The purpose of this Article is to encourage legal educators to be more skeptical about these claims, particularly when it comes to the use of classroom technology.⁴

1 See Marc Prensky, *Digital Natives, Digital Immigrants, Part 1*, 9 ON THE HORIZON 1 (2001). Other terms used to describe students born into a digital world include Generation Y, i-Generation, Net-Generation, Homo Zapiens, and Millennials. Kwok-Wing Lai & Kian-Sam Hong, *Technology Use and Learning Characteristics of Students in Higher Education: Do Generational Differences Exist?*, 46 BRIT. J. EDUC. TECH. 725, 726 (2015).

2 PowerPoint is so 2013; for purposes of this Article, I use it synonymously with visual presentation tools generally, like Prezi.

3 See Sue Bennett et al., *The ‘Digital Natives’ Debate: A Critical Review of the Evidence*, 39 BRIT. J. EDUC. TECH. 775, 779 (2008) (though many claims about digital natives appeal to common sense they lack empirical support); Sue Bennett & Karl Maton, *Beyond the ‘Digital Natives’ Debate: Toward a More Nuanced Understanding of Students’ Technology Experiences*, 26 J. COMPUTER ASSISTED LEARNING 321, 328 (2010); see also Daniel Haun, *Repetition, Availability and Truth, in IS THE INTERNET CHANGING THE WAY YOU THINK?: THE NET’S IMPACT ON OUR MINDS AND FUTURE* 293, 293 (John Brockman ed., 2011) [hereinafter *IS THE INTERNET CHANGING THE WAY YOU THINK?*] (psychologists report that people have the tendency to mistake repetition for truth owing to the “illusion of truth” effect); *infra* p. 252 and accompanying notes.

4 In fact, there is little to no evidence “digital natives” think or learn differently than other students. See Bennett et al., *supra* note 3, at 780, 783; Bennett & Maton, *supra* note 3, at 328; Mark Bullen et al., *Digital Learners in Higher Education: Generation Is Not the Issue*, 37 CANADIAN J. LEARNING & TECH., Spring 2011, at 1, 17–18 (no evidence that so-called digital native university students have different learning needs than others); Ellen J. Helsper & Rebecca Eynon, *Digital Natives: Where Is the Evidence?*, 36 BRIT. EDUC. RES. J. 503, 517–18 (2010) (observing no empirical support for making distinction between “digital natives” and “digital immigrants”; continuing to do so could be harmful to their education); Chris Jones & Binhui Shao, *The Net Generation and Digital Natives: Implications for Higher Education*, HIGHER EDUC. ACAD., YORK 1, 2, 34 (2011), http://oro.open.ac.uk/30014/1/Jones_and_Shao-Final.pdf [<http://www.perma.cc/ML7N-BHSG>] (showing that meta-analysis of global studies, including those from U.S., find no support for generational differences in university students’ attitudes, use, and desire for classroom technology); Chris Jones et al., *Net Generation or Digital Natives: Is There a Distinct New Generation Entering University?*, 54 COMPUTERS & EDUC. 722, 731 (2010); Lai & Hong, *supra* note 1, at 726; Anne Mangen & Don Kuiken, *Lost in an iPad: Narrative Engagement on Paper and Tablet*, 4 SCI. STUDY LITERATURE 150, 171 (2014) (concluding so-called “digital natives” have the same preference and cognitive response to print as “digital immigrants,” suggesting lack of support for “generational differences”

New forms of media have always led to a “moral panic” that technology is changing the way people think.⁵ Educators see the influence of new technologies on popular culture and worry that if they do not quickly embrace them as well, they will seem out of date, and their students will get left behind.⁶ Initially, however, no research exists on the classroom effectiveness of these technologies, so educators rely instead on intuition to guide their choices.⁷ But the track record for making decisions in this way is fraught with mistaken assumptions and failed experiments.⁸

Seeing all this through the more objective lens of “learning science,” however, shows that the way we think and learn has not changed much in 50,000 years.⁹ Thus, a more accurate

claimed by Prensky and others); see also DURHAM STUDY, *infra* note 228, at 20. Another mistaken assumption about today’s students is that they are all tech savvy. See *infra* p. 252 and note 54.

⁵ Steven Pinker, Opinion, *Mind Over Mass Media*, N.Y. TIMES, at A31 (June 10, 2010), <http://www.nytimes.com/2010/06/11/opinion/11Pinker.html> [<http://perma.cc/736M-ZNEB>] [hereinafter Pinker, *Mind Over Mass Media*]; see WILLIAM POWERS, HAMLET’S BLACKBERRY 194–97 (2010) (early 1960s characterized by widespread fear that mass media was turning the public into “helpless automatons”); MARYANNE WOLF, PROUST AND THE SQUID: THE STORY AND SCIENCE OF THE READING BRAIN 70–71 (2007) (Socrates worried transition from oral to written culture threatened society); Vaughan Bell, *Don’t Touch That Dial!: A History of Media Technology Scares, From the Printing Press to Facebook*, SLATE (Feb. 15, 2010, 7:00 AM), http://www.slate.com/articles/health_and_science/science/2010/02/dont_touch_that_dial.html [<http://perma.cc/JKA8-34S4>] (in the 1930s, educators worried radio was having a deleterious effect on learning by dividing students’ attention between the “humdrum preparation of school assignments and the compelling excitement of the loudspeaker”); see also Nicholas A. Christakis, *There Is No New Self, in IS THE INTERNET CHANGING THE WAY YOU THINK?*, *supra* note 3, at 202, 203 (the Internet is no different than equally monumental brain-enhancing technologies like books and telephones, yet it is doubtful they changed the way we think either); Mihaly Csikszentmihalyi, *I Must Confess to Being Perplexed, in IS THE INTERNET CHANGING THE WAY YOU THINK?*, *supra* note 3, at 374, 374 (preeminent professor of psychology says no evidence the printing press changed the way we think much less the Internet); Carissa Young, “*With Great Power Comes Great Responsibility*”: *American Comic Book Censorship and the Cold War Consensus*, 1 NORTHWEST PASSAGES 164, 166 (2014) (the 1950s saw widespread fear comic books harmed student learning).

⁶ See *infra* p. 251 and accompanying notes.

⁷ See BENEDICT CAREY, *HOW WE LEARN* 213 (2014) (most of our instincts about learning are misplaced, incomplete, and flat wrong); STANISLAS DEHAENE, *READING IN THE BRAIN: THE SCIENCE AND EVOLUTION OF A HUMAN INVENTION* 327 (2009) (educational decisions are often grounded in well-meaning intentions that turn out to be wrong resulting in misguided teaching practices); John Palfrey, *Smarter Law School Casebooks, in LEGAL EDUCATION IN THE DIGITAL AGE* 106, 122–23 (Edward Rubin ed., 2012) (law professors need to incorporate research from other fields to inform their teaching instead of relying on observable student behavior); *infra* p. 252 and accompanying notes.

⁸ See *infra* Part I.

⁹ Roger Schank, *The Thinking Process Hasn’t Changed in 50,000 Years*, EDGE, <https://edge.org/response-detail/11519> [<https://perma.cc/SJV9-HEVH>] [hereinafter Schank, *The Thinking Process*] (Professor Schank, one of world’s leading scholars on artificial intelligence, learning theory, cognitive science, and virtual learning environments, says “the Internet has not changed the way [we] think,” only the way we gather information has changed); see HANK DAVIS, *CAVEMAN LOGIC: THE PERSISTENCE OF PRIMITIVE*

picture of how today's law students really learn is suggested by the title in that they use digital tools to gather information, but still process it into knowledge using the original factory equipment of our caveman ancestors.¹⁰

THINKING IN A MODERN WORLD 33–34 (2009); Roger Schank, *Everyone is an Expert, in IS THE INTERNET CHANGING THE WAY YOU THINK?*, *supra* note 3, at 355, 355 [hereinafter Schank, *Everyone is an Expert*] (the Internet is not changing the way anyone thinks; that has not changed since caveman days); Pinker, *Mind Over Mass Media*, *supra* note 5 (environmental factors like technology do not revamp the basic information processing capacities of the brain); Matt Richtel, *Technology Changing How Students Learn, Teachers Say*, N.Y. TIMES, at A18 (Nov. 1, 2012), <http://www.nytimes.com/2012/11/01/education/technology-is-changing-how-students-learn-teachers-say.html?mc=eta1&r=0> [<http://perma.cc/HJ9M-T7NU>] [hereinafter Richtel, *Technology Changing How Students Learn, Teachers Say*] (technology may be changing student learning behaviors but no long-term studies support the claim that it is changing attention spans); Daniel T. Willingham, Opinion, *Smartphones Don't Make Us Dumb*, N.Y. TIMES, at A23 (Jan. 21, 2015), <http://www.nytimes.com/2015/01/21/opinion/smartphones-dont-make-us-dumb.html> [<http://perma.cc/X6VP-TS56>] [hereinafter Willingham, *Smartphones Don't Make Us Dumb*]; *infra* pp. 267–69 and accompanying notes. But see Johan J. Bolhuis et al., *Darwin in Mind: New Opportunities for Evolutionary Psychology*, 9 PLOS BIOLOGY 1, 2 (July 2011), <http://www.plosbiology.org/article/doi/10.1371/journal.pbio.1001109&representation=PDF> [<http://perma.cc/4XKC-HBPN>] (noting new research challenging the assumption that evolution stopped 50,000 years ago and that man-made environmental changes including advances in agriculture, domestication of animals, etc. have resulted in genetic, evolutionary changes within the last 10,000 years; it is possible some could occur in as few as twenty-five generations).

As a preliminary matter, it is important to define what is meant by “thinking.” From a phenomenological perspective, nearly all environmental influences can “change” our perceptions and the content of our thoughts. In the educational context, everything from the color of the chalkboard to the pictures hanging on the wall may arguably affect the way students think and learn to a small degree. Compare Bradley Emerling, *Lessons Learned from a Chalkboard: Slow and Steady Technology Integration*, LARRY CUBAN ON SCH. REFORM & CLASSROOM PRAC. (Apr. 26, 2015, 1:00 AM), <https://larrycuban.wordpress.com/2015/04/26/lessons-learned-from-a-chalkboard-slow-and-steady-technology-integration-bradley-emerling/> [<https://perma.cc/S7WD-GHAB>] (research shows green colored chalkboards help students concentrate better than whiteboards), with Sapna Cheryan et al., *Designing Classrooms to Maximize Student Achievement*, 1 POL’Y INSIGHTS BEHAV. & BRAIN SCI. 4, 8 (2014) (study found that placing a photo of Bill Clinton in a classroom caused males to speak longer than females; replacing it with a photo of Hillary Clinton eliminated gender differences in speech length).

However, this Article is responding to the claim that digital technologies have changed the way our students process information such that we need to also change the way we teach. Yet so far there is no evidence to support that assertion. See Mark Pagel, *Brain Candy & Bad Mathematics*, in *IS THE INTERNET CHANGING THE WAY YOU THINK?*, *supra* note 3, at 70, 70 (professor of evolutionary biology says we know the Internet has not changed the brain because we can visit people who do not have Internet access and they think the same as we do); Steven Pinker, *Not at All*, in *IS THE INTERNET CHANGING THE WAY YOU THINK?*, *supra* note 3, at 86, 87 (it is “ludicrous” to believe that digital technology has changed the way scientists think compared to a decade ago); *supra* note 4; see also DAVIS, *supra*, at 186 (“extraordinary claims require extraordinary evidence”); Gregory Paul, *Hell if I Know*, in *IS THE INTERNET CHANGING THE WAY YOU THINK?*, *supra* note 3, at 122, 122 (the only way to know if the Internet is changing the way we think and learn is to run a controlled experiment, and it is unclear how we would even do that). Significantly, experts tell us it is unlikely the brain is even capable of the changes suggested by those who claim the existence of a so-called cognitive divide. See *infra* pp. 267–69.

¹⁰ STEVEN PINKER, *HOW THE MIND WORKS* 343 (1997) [hereinafter PINKER, *HOW THE*

This Article is based on the premise that the most important skill we teach in law school, particularly in the first year, is how to “think like a lawyer.”¹¹ The critical thinking and problem solving skills at the heart of “thinking like a lawyer” are arguably more important today than ever, given a job market where lawyers may increasingly find that only the most intellectually prepared get hired to handle the difficult tasks that cannot otherwise be commoditized and outsourced to cheaper, non-lawyer alternatives.¹² In light of the substantial evidence that digital technologies can undermine the very skills we are trying to impart, we need to reassess the commonly held assumptions about how best to teach so-called “digital native” law students.¹³

This Article begins in Part I with a short history of modern classroom technology, why it has routinely failed to produce the student learning outcomes promised, and the lessons this can teach us. To make better informed decisions about whether and how best to use classroom technologies in ways that advance our learning objectives, Part II discusses the “science” of how our students really learn.¹⁴ In light of these discussions, Part III

MIND WORKS]; see DAVIS, *supra* note 9, at 33–40.

¹¹ See WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 13, 33, 87, 195 (2007) (Carnegie report on legal education finds that the “cognitive apprenticeship” in how to “think like a lawyer” is the primary goal of the first-year curriculum); Jay Sterling Silver, *Pedagogically Sound Cuts, Tighter (Not Looser) Accreditation Standards, and a Well-Oiled Doomsday Machine: The Responsible Way Out of the Crisis in Legal Education*, 66 RUTGERS L. REV. 353, 391 (2014) (cultivation of critical thinking skills is not just central to legal education, it is legal education).

¹² See RICHARD SUSSKIND, THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES *passim* (2010); John O. McGinnis, *Law Schools Must Respond to Technological Change*, LIBR. L. & LIBERTY (Feb. 17, 2015), <http://www.libertylawsite.org/2015/02/17/law-schools-must-respond-to-technological-change/> [<http://perma.cc/8BVE-6GZX>] (during era when lawyers are being replaced by technology and other low cost options, schools need to focus on producing students who are better, more creative thinkers because only those skills will remain beyond the reach of the machines).

Of course, teaching students “practical legal skills” is also a high priority these days even though, to date, there is not much evidence it actually leads to jobs. See Deborah J. Merritt, *An Employment Puzzle*, LAW SCHOOL CAFÉ (June 18, 2013, 10:24 PM), <http://www.lawschoolcafe.org/thread/an-employment-puzzle/> [<http://perma.cc/XYE7-6HJT>] (law school that changed curriculum to focus on practical skills got accolades from legal educators but employment outcomes for graduates actually declined); Jason W. Yackee, *Does Experiential Learning Improve JD Employment Outcomes?* (Univ. of Wis. Legal Stud. Res. Paper No. 1343), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2558209 (no statistical relationship between opportunities for legal skills training in law school and employment outcomes). *But see infra* note 227.

¹³ It is not just the misuse of laptops during class that is the problem. Digital technologies can also hinder the development of analytical skills, critical reading skills, and other vital cognitive skills like attention, focus, and the capacity for deep, reflective thinking. See *infra* Part III.

¹⁴ “Learning science” refers to interdisciplinary work from fields that include cognitive science, neurobiology, and evolutionary psychology to explain the mental

suggests strategies for using, and knowing when not to use, popular classroom technologies like laptops and PowerPoint in ways that promote the critical thinking skills we want our students to develop. Part IV concludes by recommending that we reject popular stereotypes and clichés about how best to teach digital native law students, and instead employ a hybrid approach to classroom technology that blends traditional tools with new, digital ones in ways that better match our methods with the learning outcomes we seek.

I. "IT'S DÉJÀ VU ALL OVER AGAIN": A BRIEF HISTORY OF MODERN CLASSROOM TECHNOLOGY¹⁵

Teaching has always depended on effectively communicating information and ideas to students. As electronic technologies began to proliferate in the early twentieth century, educators naturally looked for ways to adapt them to the classroom. This led to a series of educational experiments over the past one hundred years involving the paradigm shifting technologies of their day, including film, radio, television, and early desktop computers.¹⁶ Each promised to "revolutionize" the way students learn.¹⁷ In some cases, these experiments were preceded by an "academic moral panic," much like the one today in that educators believed students raised on new forms of media had developed unique learning styles, which meant teaching methods also had to change to accommodate this new way of thinking.¹⁸

processes involved in learning, the neurobiological changes that occur, and the evolutionary circumstances that explain why human cognition is constrained in the ways that it is. Reflecting this synergy, a new field has emerged in recent years called "Evolutionary Cognitive Neuroscience" that incorporates all these disciplines. Austen Krill et al., *Where Evolutionary Psychology Meets Cognitive Neuroscience: A Précis To Evolutionary Cognitive Neuroscience*, 5 *EVOLUTIONARY PSYCHOL.* 232, 233 (2007); see PINKER, *HOW THE MIND WORKS*, *supra* note 10, at 342, 352 (to fully succeed as teachers, it is critical to understand not only how the brain works, but also what it was originally designed to do); ROGER SCHANK, *TEACHING MINDS: HOW COGNITIVE SCIENCE CAN SAVE OUR SCHOOLS*, at xv, xvi, 13, 16 (2011) [hereinafter SCHANK, *TEACHING MINDS*] (educators need to understand how the brain works); Palfrey, *supra* note 7, at 122–23 (law professors need to incorporate research from other fields to better inform their teaching).

¹⁵ *Yogi Berra*, WIKIQUOTES, http://en.wikiquote.org/wiki/Yogi_Berra [<http://perma.cc/46UN-29AR>].

¹⁶ LARRY CUBAN, *TEACHERS AND MACHINES: THE CLASSROOM USE OF TECHNOLOGY SINCE 1920*, at 3, 19, 27, 72–73 (1986) [hereinafter CUBAN, *TEACHERS AND MACHINES*]; AUDREY WATTERS, *THE MONSTERS OF EDUCATION TECHNOLOGY* 21–22 (2014) (noting that early classroom computer technology used in the 1960s included many features of today's counterparts such as message boards, chat rooms, instant messaging, multiplayer games, and shared screens).

¹⁷ LARRY CUBAN, *OVERSOLD AND UNDERUSED: COMPUTERS IN THE CLASSROOM* 130 (2001) [hereinafter CUBAN, *OVERSOLD AND UNDERUSED*].

¹⁸ Bennett et al., *supra* note 3, at 782 ("moral panic" refers to a form of public discourse, often initiated by the media using sensationalist, dramatic language, in which

Ironically, many of the promises made about these early classroom technologies are remarkably similar to the ones made today about digital classroom tools. For instance, Thomas Edison began predicting in 1913 that “film will soon replace the textbook because there is nothing that is taught by a book that cannot be taught better through the eye.”¹⁹ Educators have been making the identical claim about “visual,” screen-based digital technologies for more than a decade.²⁰ By the 1920s, “education by radio” was being hailed as an innovative use of new media that would “bring the world to the classroom, to make universally available the services of the finest teachers, the inspiration of the greatest leaders,” which is the very same promise made today about MOOCs.²¹ A few decades later, educators were wiring classrooms for television in the belief it was a “mode of learning that is valuable because kids are oriented to the electronic age,” reflecting the same assumptions about “digital natives” who have supposedly developed a unique learning style because of their constant exposure to technology.²²

None of these experiments worked as promised, and neither were fears realized that new technologies had changed the way students think or learn.²³ No doubt Edison’s prediction seemed

a particular group in society, like digital natives, is portrayed as radically different and posing a threat to the status quo); see Bennett & Maton, *supra* note 3, at 328 (educators believed in the 1950s and 1960s that students raised on television and popular music were “radically” different than their predecessors, leading schools to change the way students were taught); Bell, *supra* note 5 (educators in the 1930s were concerned that radio was destroying students’ ability to pay attention and do their homework); *supra* p. 243; *supra* note 5.

¹⁹ CUBAN, TEACHERS AND MACHINES, *supra* note 16, at 11; see TODD OPPENHEIMER, THE FLICKERING MIND: SAVING EDUCATION FROM THE FALSE PROMISE OF TECHNOLOGY 3 (2004) (Edison said, “In ten years textbooks as the principle medium of teaching will be as obsolete as the horse and carriage are now. . . . There is no limitation to [what] the camera [can do]”).

²⁰ See *infra* Section III.C.

²¹ MOOC stands for “Massive Open Online Course.” See CUBAN, TEACHERS AND MACHINES, *supra* note 16, at 19; Robert A. Reiser, *A History of Instructional Design and Technology: Part I: A History of Instructional Media*, 49 EDUC. TECH. RES. & DEV. 53, 56 (2001) (a spokesman for the National Educational Association said in 1932 that “film and radio will be as common as the book and powerful in their effect on learning and teaching”).

²² See CUBAN, TEACHERS AND MACHINES, *supra* note 16, at 42; Bennett & Maton, *supra* note 3, at 328 (educators in the 1950s and 1960s believed that children immersed in a culture of television and popular music had developed fundamentally different learning needs); see also *supra* p. 243; *supra* note 5.

²³ See CUBAN, TEACHERS AND MACHINES, *supra* note 16, at 17, 25–26, 33, 38, 109; CUBAN, OVERSOLD AND UNDERUSED, *supra* note 17, at 133, 138, 189; OPPENHEIMER, *supra* note 19, at 5 (the proliferation of classroom film and TV equipment in the 1960s and 1970s far outpaced student achievement); JOHN PALFREY & URS GASSER, BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES 250 (2008) (television did not transform education and neither will the Internet); Reiser, *supra* note

like a sure thing at the time since film was likely perceived to be just as revolutionary back then as the Internet is today. Yet more than one hundred years later and after several attempts to replace textbooks with “visual” technologies, books remain the most popular and effective classroom technology we have.²⁴ Education-by-radio must have also seemed like a surefire way to use new technology to bring the world’s best teachers to underserved classrooms, yet it failed as well.²⁵ Perhaps that makes it less surprising that only a few years after the first MOOCs launched, Silicon Valley entrepreneur Sebastian Thrun, widely considered the “Godfather” of this technology, conceded that his “overhyped” invention was also a failure.²⁶ In his words, MOOCs do not work because they are a “lousy” product that cannot substitute for the individualized, face-to-face attention most students need to learn.²⁷

One educational technology historian notes that many of the “overhyped and overfunded and overvalued” classroom technologies being marketed today are, like MOOCs, the same recycled ideas that already failed at least once before during the

21, at 58 (by the mid-1960s, much of the interest in instructional television was over).

Regarding fears that technology is changing the way students think and learn, requiring a corresponding change in the way we teach, see WOLF, *supra* note 5, at 210 (neuroscientist notes that reading pedagogy has not changed much since the ancient Sumerians invented reading and writing more than 5000 years ago because the most important teaching principles are “as old as written language itself”); Christakis, *supra* note 5, at 203; Csikszentmihalyi, *supra* note 5, at 374; see also DURHAM STUDY, *infra* note 228, at 20 (based on meta-analysis of thousands of independent studies from around the world researchers found no evidence that the Internet has changed the way students learn); see also *supra* p. 243; *supra* note 5; *infra* pp. 268–69 and accompanying notes.

24 Palfrey, *supra* note 7, at 106 (textbooks are still used at Harvard Law School because they are an effective way to communicate information to students); see *infra* Section III.D.

25 See CUBAN, TEACHERS AND MACHINES, *supra* note 16, at 25–26; WATTERS, *supra* note 16, at 27.

26 WATTERS, *supra* note 16, at 35; Carmel DeAmicis, A Q&A with “Godfather of MOOCs” Sebastian Thrun After He Disavowed His Godchild, PANDO (May 12, 2014), <http://pando.com/2014/05/12/a-qa-with-godfather-of-moocs-sebastian-thrun-after-he-disavowed-his-godchild/> [<http://perma.cc/QR7Q-GX7T>] (Thrun disowned MOOCs saying, “[W]e don’t educate people as others wished, or as I wished. We have a lousy product”); see Randy Best, Have MOOCs Helped or Hurt?, INSIDE HIGHER ED. (Jan. 9, 2015), <https://www.insidehighered.com/views/2015/01/09/essay-ways-moocs-helped-and-hurt-debates-about-future-higher-education> [<http://perma.cc/3DJE-UWUM>]. A 2014 study by the University of Pennsylvania Graduate School of Education found that only 4% of students who registered for MOOCs completed them. One of the reasons proffered for why MOOCs have such an abysmal retention rate is that many are free of charge; presumably, courses that students must pay to attend have better retention rates. *Id.*

27 DeAmicis, *supra* note 26; see Rebecca Schuman, The King of MOOCs Abdicates the Throne: Sebastian Thrun and Udacity’s “Pivot” Toward Corporate Training, SLATE (Nov. 19, 2013, 11:43 AM), http://www.slate.com/articles/life/education/2013/11/sebastian_thrun_and_udacity_distance_learning_is_unsuccessful_for_most_students.html [<http://perma.cc/Z69F-S7HP>].

last Dot Com boom.²⁸ Professor Karl Maton, a scholar of educational sociology, says the tendency of educators to repeat these mistakes reflects “historical amnesia” in their inability to recall the failed experiments of the past or the mistaken assumptions about changing student learning styles that led to some of them in the first place.²⁹

Stanford Professor Emeritus Larry Cuban has spent his career studying the relationship between teachers and modern classroom technology in a variety of contexts from kindergarten to universities, including Stanford and its law school.³⁰ His goal has been to understand why these experiments repeatedly fail so educators can better avoid making the same mistakes again.³¹ What he has found is a “remarkably consistent” pattern extending over time in which classroom technology is both “oversold and underused.”³² He found a similar pattern with respect to teaching practices that he characterizes as “change amidst constancy,” meaning that even when teachers adopt new technologies, they tend to do so in ways that reinforce established classroom practices rather than change them.³³

²⁸ See WATTERS, *supra* note 16, at 15. Some of the educational technology products introduced during the first Dot Com boom like AllLearn and Fathom were backed by a consortium of the nation’s most elite universities. *Id.* Ms. Watters speculates that perhaps they are not remembered today because of the shame associated with their failure. *Id.* at 17–18.

²⁹ Bennett & Maton, *supra* note 3, at 328; see WATTERS, *supra* note 16, at 34; Lawrence A. Cunningham, *Digital Evolution in Law School Course Books*, in LEGAL EDUCATION IN THE DIGITAL AGE 81, 95–96, 100 (Edward Rubin ed., 2012) (“[P]lus ça change, plus c’est la même chose” [sic]; several contemporary trends in law school pedagogy like “skills training” and “storytelling” are merely recycled ideas from past).

³⁰ See CUBAN, OVERSOLD AND UNDERUSED, *supra* note 17, at 107, 127, 137–39; CUBAN, TEACHERS AND MACHINES, *supra* note 16, *passim*.

³¹ See CUBAN, OVERSOLD AND UNDERUSED, *supra* note 17, at 19; CUBAN, TEACHERS AND MACHINES, *supra* note 16, at 109.

³² See CUBAN, OVERSOLD AND UNDERUSED, *supra* note 17, at 137, 171, 195.

³³ CUBAN, TEACHERS AND MACHINES, *supra* note 16, at 50, 63–65, 109; see CUBAN, OVERSOLD AND UNDERUSED, *supra* note 17, at 129–30, 195–96; WATTERS, *supra* note 16, at 27, 37 (educators conflate the adoption of new teaching tools with new ideas when in fact new technologies are most often used “to do the same old stuff”); Cunningham, *supra* note 29, at 100 (with respect to innovations in legal education, “plus ça change, plus c’est la même chose” [sic]); Jake New, *Professors Say Technology Helps in Logistics, Not Learning*, CHRON. HIGHER ED. (Jan. 28, 2013), <http://chronicle.com/blogs/wiredcampus/professors-say-technology-helps-in-logistics-rather-than-in-learning/41777> [<http://perma.cc/2EE7-KM-XL>] (classroom technology mostly used as a management tool; little to no indication it is used for truly innovative pedagogy); see also Noel Enyedy, *New Interest, Old Rhetoric, Limited Results, and the Need for a New Direction for Computer-Mediated Learning*, NAT’L EDUC. POLY CTR., U. COLO. BOULDER (Nov. 2014), [http://perma.cc/EF6Q-WZ8T](http://nepc.colorado.edu/publication/personalized-instruction)] (with respect to secondary school education, more than 30 years after computers were first placed in classrooms, they are now commonplace; yet teaching practices and learning outcomes still look the same).

Professor Cuban has identified several reasons why these patterns persist.³⁴ A few may no longer apply due to differences between today's digital technologies and the analog ones he studied many years ago regarding their ease of use and flexibility.³⁵ On the other hand, his conclusion that classroom technology has been historically underused because administrators hastily invest in it without first consulting teachers still holds true today.³⁶ For instance, Professor John Palfrey describes how administrators at Harvard Law School did exactly that in the 1990s when, like many other law school administrators at the time, they unilaterally decided to put Internet connections in every classroom.³⁷ Once the faculty figured out students were using the Internet during class to surf the web instead of learn, they ordered the connections removed.³⁸

Administrators feel a great sense of urgency to adopt new technologies because of the public perception that if a school is not doing so, it is falling behind.³⁹ New technology also generates its own hype, which creates even more pressure to adopt it now and ask questions later.⁴⁰ Professor Cuban observes that high

³⁴ See CUBAN, *TEACHERS AND MACHINES*, *supra* note 16, at 104; WATTERS, *supra* note 16, at 16–22 (even the use of classroom computers today reflect the same patterns associated with earlier experiments in the 1960s with a platform called PLATO, and again during the first Dot Com boom with AllLearn and Fathom).

Professor Cuban recently acknowledged on his blog that digital technologies are now much more widely adopted and used more frequently than the analog technologies he has studied in the past. Larry Cuban, *Using Technology to Nail Down What We Know and Don't Know About Effects of High-Tech on People Today*, LARRY CUBAN ON SCH. REFORM & CLASSROOM PRAC. (Jan. 27, 2014, 1:00 AM), <https://larrycuban.wordpress.com/2014/01/27/using-technology-to-nail-down-what-we-know-and-dont-know-about-effects-of-high-tech-on-people-today/> [https://perma.cc/B53L-TTWB] [hereinafter Cuban, *Using Technology to Nail Down What We Know*]. In all other respects, however, Professor Cuban asserts that his original conclusions still obtain. *Id.*

³⁵ See CUBAN, *TEACHERS AND MACHINES*, *supra* note 16, at 18, 52–53. *But see* Simon Canick, *Infusing Technology Skills into the Law School Curriculum*, 42 CAP. U. L. REV. 663, 676 (2014) (noting that legal educators reject digital technologies because they have difficulty using them, and due to issues with reliability, amongst other reasons).

³⁶ See CUBAN, *OVERSOLD AND UNDERUSED*, *supra* note 17, at 137, 158; PALFREY & GASSER, *supra* note 23, at 238; CUBAN, *TEACHERS AND MACHINES*, *supra* note 16, at 36.

³⁷ PALFREY & GASSER, *supra* note 23, at 237–38.

³⁸ *Id.*; Palfrey, *supra* note 7, at 107–08.

³⁹ See CUBAN, *OVERSOLD AND UNDERUSED*, *supra* note 17, at 158; CUBAN, *TEACHERS AND MACHINES*, *supra* note 16, at 76–77; Bennett & Maton, *supra* note 3, at 321; Larry Cuban, *Does Online Instruction Work? (Part 3)*, LARRY CUBAN ON SCH. REFORM & CLASSROOM PRAC. (June 7, 2013, 1:00 AM), <https://larrycuban.wordpress.com/2013/06/07/does-online-instruction-work-part-3/> [https://perma.cc/WTC3-N8US] [hereinafter Cuban, *Does Online Instruction Work? -3*]; Larry Cuban, *The Lack of Evidence-Based Practice—The Case of Classroom Technology (Part 2)*, LARRY CUBAN ON SCH. REFORM & CLASSROOM PRAC. (Feb. 9, 2015, 1:00 AM), <https://larrycuban.wordpress.com/2015/02/09/the-lack-of-evidence-based-practice-the-case-of-classroom-technology-part-2/> [https://perma.cc/K94F-3YAG] [hereinafter Cuban, *The Lack of Evidence Based Practice-2*].

⁴⁰ See, e.g., Issie Lapowsky, *What Schools Must Learn from LA's iPad Debacle*,

tech carries great symbolism in the public's mind and, like high fashion, "conveys a whiff of superiority" compared to schools that do not have it.⁴¹ By investing in new technology, a school creates the perception of innovative teaching because the public easily conflates the two.⁴² In practice, however, Professor Cuban finds that technology, with rare exceptions, is used in ways that maintain conventional teaching practices rather than change them.⁴³

Pressure to innovate means that administrators invest in new technology before a need is identified or teachers have even had a chance to figure out whether or how to use it.⁴⁴ Thus, technology often becomes a solution in search of a problem, which further explains Professor Cuban's paradoxical conclusion that it is "oversold" yet "underused."⁴⁵

Of course, whenever a new classroom technology is first introduced, no research yet exists on its effectiveness or whether it is even compatible with the way students learn.⁴⁶ But because educators feel so much pressure to show they are keeping up with the times, they are either unable or unwilling to wait for that research to be done, so they forge ahead anyway based on intuition and "common sense."⁴⁷

Once the technology is paid for and in place, confirmation bias helps validate belief in the correctness of the original

WIRED (May 8, 2015, 7:00 AM), <http://www.wired.com/2015/05/los-angeles-edtech/> [<http://perma.cc/W2T2-DM6F>] (Los Angeles Unified School District's aborted \$1.3 billion agreement to buy every student an iPad "is a classic case of . . . getting caught up in the ed tech frenzy" over a new device before administrators had taken the time to understand it).

⁴¹ See CUBAN, *OVERSOLD AND UNDERUSED*, *supra* note 17, at 158–59; Cuban, *Does Online Instruction Work?-3*, *supra* note 39.

⁴² See CUBAN, *OVERSOLD AND UNDERUSED*, *supra* note 17, at 158–59; WATTERS, *supra* note 16, at 5, 27, 37; Palfrey, *supra* note 7, at 109 (spending money on technology helps a law school burnish its reputation, even if the hardware sits unused while the faculty figures out what to do with it); Cuban, *Does Online Instruction Work?-3*, *supra* note 39.

⁴³ See CUBAN, *OVERSOLD AND UNDERUSED*, *supra* note 17, at 134, 156, 170, 196; *see also supra* note 33.

⁴⁴ See Cuban, *Does Online Instruction- Work?-3*, *supra* note 39; PALFREY & GASSER, *supra* note 23, at 238 (law schools at every level have done what Harvard did in the late 1990s, which is to spend thousands of dollars on new classroom technologies that remain unused while the faculty decides what to do with them).

⁴⁵ See CUBAN, *OVERSOLD AND UNDERUSED*, *supra* note 17, at 139; PALFREY & GASSER, *supra* note 23, at 238.

⁴⁶ Cuban, *Does Online Instruction Work?-3*, *supra* note 39.

⁴⁷ *Id.*; Cuban, *The Lack of Evidence-Based Practice-2*, *supra* note 39 (in the absence of research, educators adopt new technology because of the high value the public places on it, pressure to appear current, and the fear of negative perceptions if they don't); *see also* DEHAENE, *supra* note 7, at 327 (educational decisions are often grounded in well-meaning ideologies but in the absence of rational thought, these intuitive judgments become largely misguided teaching practices).

decision since educators see with their own eyes how technology is influencing the lives of those around them and the culture at large.⁴⁸ So what began as assumption and intuition is soon treated by all as fact.⁴⁹ And the more these assumptions are repeated, their credibility is undeservedly enhanced due to a phenomenon called the “illusion of truth.”⁵⁰ This further discourages skepticism and critical review of the underlying beliefs which allows them to proliferate even more.⁵¹

Professor Maton describes a “certainty-complacency spiral” among scholars in which stereotypes about digital natives circulate in the literature without challenge.⁵² The only support these authors provide are references to other authors making the same unsubstantiated claims.⁵³ For example, the assertion that all digital natives are tech savvy is widely accepted as true, even though the data says otherwise.⁵⁴

48 Bennett et al., *supra* note 3, at 779 (though many claims about digital natives appeal to common sense, they lack empirical support); Cuban, *Does Online Instruction Work?* 3, *supra* note 39; see DANIEL WILLINGHAM, WHY DON'T STUDENTS LIKE SCHOOL?: A COGNITIVE SCIENTIST ANSWERS QUESTIONS ABOUT HOW THE MIND WORKS AND WHAT IT MEANS FOR YOUR CLASSROOM 121 (2009) [hereinafter WILLINGHAM, WHY DON'T STUDENTS LIKE SCHOOL] (confirmation bias turns the intuitive beliefs educators hold about how students learn into firmly held views).

49 Bennett & Maton, *supra* note 3, at 328; see DEHAENE, *supra* note 7, at 327 (intuition should not replace carefully accumulated scientific knowledge); ROBERT SYLWESTER, A CELEBRATION OF NEURONS: AN EDUCATOR'S GUIDE TO THE HUMAN BRAIN 54 (1995) (intuition about how students learn leads to mistakes, overgeneralizations, and stereotypes).

50 See Haun, *supra* note 3, at 293 (the “illusion-of-truth” effect is a well-documented psychological phenomenon in which people conflate the frequency with which a statement is repeated with its veracity); Lynn Hasher et al., *Frequency and the Conference of Referential Validity*, 16 J. VERBAL LEARNING & VERBAL BEHAV. 107, 111 (1977) (studies show that merely repeating a statement over and over increases the listener's belief in its truth); Jeremy Dean, *The Illusion of Truth*, PSYBLOG (Dec. 8, 2010), <http://www.spring.org.uk/2010/12/the-illusion-of-truth.php> [<http://perma.cc/9GTR-6FUK>] (one of the simplest, most effective persuasive techniques is to keep repeating a statement because the brain equates familiarity with truth).

51 See Bennett et al., *supra* note 3, at 783; see also Cuban, *Does Online Instruction Work?* 3, *supra* note 39.

52 Bennett & Maton, *supra* note 3, at 328.

53 *Id.*

54 Educators incorrectly assume digital natives are tech savvy because they conflate fluency with proficiency. See *id.* at 324 (surveys find many digital natives are not knowledgeable about Web 2.0 tools, do not create content, do little gaming, and instead use the Internet mostly for social activity); Jones & Shao, *supra* note 4, at 34; Lai & Hong, *supra* note 1, at 735 (no difference between digital natives and immigrants in their use of technology); Penny Thompson, *The Digital Natives as Learners: Technology Use Patterns and Approaches to Learning*, 65 COMPUTERS & EDUC. 12, 20, 23 (2013) (surveys show college students have limited proficiency with a small number of devices that get used for a narrow range of activities like socializing, gaming, and surfing the web); Shiang-Kwei Wang et al., *An Investigation of Middle School Science Teachers and Students Use of Technology Inside and Outside of Classrooms: Considering Whether Digital Natives Are More Technology Savvy than Their Teachers*, 62 EDUC. TECH. RES. & DEV. 637, 643, 655

It is only later, when classroom technology fails to work as promised, or the unintended consequences come to light, that some may question the wisdom of the original decision.⁵⁵ It has been happening for years in legal education with the backlash against classroom laptops that were first touted as necessary to accommodate the new, “multitasking learning style” of digital natives.⁵⁶ It is consistent with, and indeed predicted by, Professor Cuban’s work, as he finds that teachers typically stop using a new technology once the initial hype subsides and they realize that a supposedly “revolutionary” tool is actually less effective than the one it replaced.⁵⁷

At the classroom level, Professor Cuban finds that historical patterns show teachers are generally pragmatic; they adopt new technology when it helps solve a problem not addressed by existing solutions.⁵⁸ Otherwise they tend to stick with what is already working, which is why they are frequently criticized for being resistant to change and stuck in the past.⁵⁹ Teachers also have a track record of rejecting new technology when they believe it will interfere with student classroom rapport, a concern expressed by some law professors about digital technologies as well.⁶⁰ On the other hand, they routinely embrace it if they think it will help them motivate students to learn.⁶¹ And though a

(2014) (study of more than 1000 New York and Utah high school students finds they are no more tech savvy than their teachers); Megan O’Neil, *Confronting the Myth of the ‘Digital Native,’* CHRON. HIGHER EDUC. (Apr. 21, 2014), <http://chronicle.com/article/Confronting-the-Myth-of-the/145949/> [http://perma.cc/S5L8-CN8Z] (observing that the assumption today’s students are tech savvy is a myth).

⁵⁵ See CUBAN, OVERSOLD AND UNDERUSED, *supra* note 17, at 132–33.

⁵⁶ See Paul L. Caron & Rafael Gely, *Taking Back the Law School Classroom: Using Technology to Foster Active Student Learning*, 54 J. LEGAL EDUC. 551, 555–58 (2004) (noting criticism by law professors of the “unbridled use” of PowerPoint and laptops because of their negative effect on learning); Eric A. DeGroff, *The Dynamics of the Contemporary Law School Classroom: Looking at Laptops Through a Learning Style Lens*, 39 U. DAYTON L. REV. 201, 208–10 (2014) (describing backlash by law professors against classroom laptops); Maxwell, *infra* note 60, at 4; Palfrey, *supra* note 7, at 107–08.

⁵⁷ See CUBAN, TEACHERS AND MACHINES, *supra* note 16, at 54; Palfrey, *supra* note 7, at 107 (when it comes to the use of classroom technology in law school, we tend to lurch ahead into the future, retreat and then, perhaps, advance again).

⁵⁸ See CUBAN, OVERSOLD AND UNDERUSED, *supra* note 17, at 167–68; CUBAN, TEACHERS AND MACHINES, *supra* note 16, at 66; see also *infra* Section III.A.

⁵⁹ See CUBAN, OVERSOLD AND UNDERUSED, *supra* note 17, at 140; CUBAN, TEACHERS AND MACHINES, *supra* note 16, at 58; see also SULLIVAN ET AL., *supra* note 11, at 89–91 (noting legal educators are persistently criticized for being stuck in the past).

⁶⁰ See CUBAN, OVERSOLD AND UNDERUSED, *supra* note 17, at 169; CUBAN, TEACHERS AND MACHINES, *supra* note 16, at 61, 88–90; Caron & Gely, *supra* note 56, at 558; Nancy G. Maxwell, *From Facebook to Folsom Prison Blues: How Banning Laptops in the Classroom Made Me a Better Law School Teacher*, 14 RICH. J.L. & TECH. 1, 4–5 (2007) (discussing the negative effect of laptops on student-teacher classroom rapport in law school); *infra* p. 290 and accompanying notes.

⁶¹ See CUBAN, TEACHERS AND MACHINES, *supra* note 16, at 68.

connection between new technology and better student engagement is widely assumed, one of the largest meta-studies to date on the effectiveness of digital classroom tools found no evidence to support that belief.⁶²

In sum, the history of classroom technology shows that pressure to innovate mixed with intuition and assumptions about changing student learning styles can often be a toxic combination.⁶³ Yet legal educators today face even more pressure to “innovate” as schools compete for a shrinking pool of applicants while they also struggle to figure out how best to train students for the challenging job market ahead. Throwing more technology at these issues at least *seems* like a good solution because it carries many of the right connotations. But unlike classroom experiments of the past, there is substantial evidence that digital technologies in particular can make things worse by lowering student learning outcomes.⁶⁴ Avoiding that means ignoring the stereotypes about how digital natives learn best and looking instead to learning science to better inform our classroom practices.⁶⁵

⁶² See *infra* p. 279 and notes 237–38; see also Bill Ferriter, *Are Kids Really Motivated by Technology?*, LARRY CUBAN ON SCH. REFORM & CLASSROOM PRAC. (Sept. 2, 2012), <https://larrycuban.wordpress.com/2012/09/02/are-kids-really-motivated-by-technology-bill-ferriter/> [<https://perma.cc/76VB-WHTJ>] (the claim technology motivates students in ways that demonstratively improve learning is a red herring).

⁶³ CUBAN, *TEACHERS AND MACHINES*, *supra* note 16, at 102–03 (overselling technology together with unexamined assumptions and unanticipated consequences does not yield good results); Larry Cuban, *FAQs for a Skeptic on Technology*, LARRY CUBAN ON SCH. REFORM & CLASSROOM PRAC. (Aug. 16, 2012) [hereinafter Cuban, *FAQs for a Skeptic*], <https://larrycuban.wordpress.com/2012/08/16/faqs-for-a-skeptic-on-technology/> [<https://perma.cc/ZB2D-FPDX>]; see CAREY, *supra* note 7, at 214 (educators do not have good instincts about how students learn); *infra* pp. 277–78 and accompanying notes.

⁶⁴ See Shahid Alvi, *Proceed with Caution: Technology Fetishism and the Millennial Generation*, 8 INTERACTIVE TECH. & SMART EDUC. 135, 136–37 (2011) (we should be cautious in using digital technologies because they can cause more harm than good); *infra* Section III.B–E.

⁶⁵ “Learning science” is not a perfect solution either because the insights gained by researchers working in a lab under controlled conditions do not always translate to the realities of the classroom. See DEHAENE, *supra* note 7, at 218, 326–27 (though a gap separates knowledge gained in the lab from the classroom, we cannot detach the two; neuroscience sheds indispensable light on how the brain works in ways that can benefit educators); WILLINGHAM, *WHY DON’T STUDENTS LIKE SCHOOL*, *supra* note 48, at 1; Palfrey, *supra* note 7, at 122–23. Nevertheless it adds an important element of objectivity to a decision-making process that is too frequently informed solely by assumptions and observations about the changing technology habits of our students.

II. "CAVEMAN NO FOOL!": WHAT LEARNING SCIENCE CAN TELL US ABOUT HOW THE BRAIN WORKS⁶⁶

To a cognitive scientist, the brain is merely an information processing machine designed to solve whatever problems stand between it and survival.⁶⁷ It does that by comparing the problem at hand to similar ones it has faced in the past.⁶⁸ Those past experiences consist of sensory data, normally called "memories," that are stored in nerve cells, or neurons, comprising the brain's cerebral cortex.⁶⁹ Learning is the process by which these neurons band together, usually through repetition and effort, to form the neural pathways that reflect the underlying experience.⁷⁰ In simple terms, "thinking" is about solving problems the brain has seen before based on pattern recognition.⁷¹

We use the Socratic Method, for instance, to help students build the pattern recognition tools, also known as schemas, they need to issue spot, analyze, and read cases like a lawyer.⁷² How the brain constructs these schemas has not changed much in 50,000 years.⁷³ The mistake legal educators make is conflating

⁶⁶ See THE CRAMPS, *Caveman, on PSYCHEDELIC JUNGLE* (I.R.S. Records 1981) ("Uh, look man, make tool! Caveman no fool!").

⁶⁷ See JOHN MEDINA, *BRAIN RULES: 12 PRINCIPLES FOR SURVIVING AND THRIVING AT WORK, HOME, AND SCHOOL* 32 (2008); PINKER, *HOW THE MIND WORKS*, *supra* note 10, at 182, 210.

⁶⁸ DUANE F. SHELL ET AL., *THE UNIFIED LEARNING MODEL: HOW MOTIVATIONAL, COGNITIVE, AND NEUROBIOLOGICAL SCIENCES INFORM BEST TEACHING PRACTICES* 12, 22, 25–26 (2010).

⁶⁹ See CAREY, *supra* note 7, at 6, 14–15; SHELL ET AL., *supra* note 68, at 10, 13 (cerebral cortex consists of outermost layers of brain responsible for all experiences, perception, emotions, thought and problem solving).

⁷⁰ See CAREY, *supra* note 7, at 94 (learning requires practice and effort; the more difficult the practice, the greater the benefits); SCHANK, *TEACHING MINDS*, *supra* note 20, at 177; SHELL ET AL., *supra* note 68, at 14, 24–27, 55, 144–45; WILLINGHAM, *WHY DON'T STUDENTS LIKE SCHOOL*, *supra* note 48, at 131, 142–43 (learning takes hard work and practice).

⁷¹ See DAVIS, *supra* note 9, at 27; DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 115 (2011); SCHANK, *TEACHING MINDS*, *supra* note 14, at 135; SHELL ET AL., *supra* note 68, at 12, 22, 54, 56, 77; WILLINGHAM, *WHY DON'T STUDENTS LIKE SCHOOL*, *supra* note 48, at 29, 86–91.

⁷² See SHELL ET AL., *supra* note 68, at 13; SYLWESTER, *supra* note 49, at 50, 57; WILLINGHAM, *WHY DON'T STUDENTS LIKE SCHOOL*, *supra* note 48, at 101.

⁷³ See DAVIS, *supra* note 9, at 33–40; PINKER, *HOW THE MIND WORKS*, *supra* note 10, at 34; *supra* p. 243 and note 9; *infra* pp. 265–69 and accompanying notes. Very recently, however, some experts have made the case that human evolution, including genetic changes that affect the brain, might occur in as little as twenty-five generations. See Bolhuis et al., *supra* note 9, at 2 (recent research suggests that man-made environmental changes have yielded corresponding genetic, evolutionary changes within the last 10,000 years and that these could occur in as quickly as a few hundred years). Nonetheless, in the extensive research I did for this Article, I found no empirical support for the claim that the brain, or the way we think and learn, has undergone change in the past thirty years due to the pervasive use of technology. See *infra* pp. 265–69 and accompanying notes. To the contrary, the evidence points decidedly in the other direction. See *infra*

observations about our students' changing technology habits with changes in the cognitive processes that control learning.⁷⁴ However, it is the cognitive processes we cannot see, because they occur inside the brain, that are the most important aspects of learning to understand in assessing the compatibility of our classroom methods with the outcomes we seek. The following is a basic overview.⁷⁵

A. Did I Mention the Importance of Attention?

Learning starts by attending to our experiences, which enter the brain as raw sensory data.⁷⁶ The amount of data flowing into the brain at any given moment is overwhelming.⁷⁷ Consider attending to every sight and sound in your immediate vicinity, including an awareness of your own breathing and every sensation upon your skin.⁷⁸ The brain has nowhere near the processing capacity to handle all that.⁷⁹ Nor would it have served any evolutionary imperative since the brain only needs enough processing power to solve whatever problem stands between it and survival.⁸⁰ Contrary to popular belief, evolution does not favor a big, "smart" brain with lots of computing power.⁸¹ Rather, it favors the smallest, dumbest one for the job, which is the one we got.⁸²

pp. 267–68, notes 162–63.

⁷⁴ See *supra* p. 252 and accompanying notes.

⁷⁵ In attempting to provide the reader with a helpful and concise summary of how the brain learns—an organ that scientists tell us is the most complex structure in the known universe and about which we understand only a small fraction of the mysteries that remain—there is a risk of overgeneralizing explanations and some very nuanced material. I have tried to avoid that by sticking to the basics about which a general consensus exists among experts. To the extent my research revealed otherwise, I have so indicated.

⁷⁶ See WINIFRED GALLAGHER, *RAFT: ATTENTION AND THE FOCUSED LIFE* 25, 146, 163 (2010); JOHN J. RATEY, *A USER'S GUIDE TO THE BRAIN* 185–95 (2001).

⁷⁷ See DAVIS, *supra* note 9, at 27; GALLAGHER, *supra* note 76, at 9 (because we are bombarded with so much stimuli, the function of attention is to distill the universe for us); RATEY, *supra* note 76, at 108; SHELL ET AL., *supra* note 68, at 13; SYLWESTER, *supra* note 49, at 57, 79.

⁷⁸ See GALLAGHER, *supra* note 76, at 9; RATEY, *supra* note 76, at 108; SHELL ET AL., *supra* note 68, at 13; SYLWESTER, *supra* note 49, at 50, 57.

⁷⁹ See GALLAGHER, *supra* note 76, at 9; SHELL ET AL., *supra* note 68, at 11, 13; SYLWESTER, *supra* note 49, at 50, 57.

⁸⁰ See MEDINA *supra* note 67, at 32; *supra* p. 255 and note 67.

⁸¹ See PINKER, *HOW THE MIND WORKS*, *supra* note 10, at 152–55.

⁸² *Id.* at 151–55; PETER J. RICHESON & ROBERT BOYD, *NOT BY GENES ALONE: HOW CULTURE TRANSFORMED HUMAN EVOLUTION* 135 (2005) (creatures are engineered to be as stupid as possible but still survive); WILLINGHAM, *WHY DON'T STUDENTS LIKE SCHOOL*, *supra* note 47, at 3 (contrary to popular belief, the brain is not designed for thinking but to *save us* from having to think at all).

Attention serves the key role of allocating the brain's limited processing capabilities between competing stimuli.⁸³ A function called "working memory" handles the task by deciding what information to ignore, what gets momentary attention, and what merits further consideration such that it might eventually become "learned."⁸⁴ This makes working memory the gatekeeper of all learning.⁸⁵

It does this by directing attention either toward or away from stimuli based on an emotional assessment of its meaningfulness.⁸⁶ Sometimes this happens below the level of consciousness while other times we are acutely aware of it, such as "look out for that saber-toothed tiger!" or "I better pay attention because this might be on the exam!"⁸⁷ Information captures our attention either because it is intrinsically meaningful, e.g., the smell of a savory meal on an empty stomach, or because it relates to an extrinsic goal or interest, such as earning a good grade at semester's end.⁸⁸ Extrinsic goals typically require more effort and motivation to maintain our attention than intrinsic ones.⁸⁹

While unimportant information is ignored altogether, a function called "short-term memory" holds it only for as long as needed to complete the task at hand, like remembering a telephone number.⁹⁰ Short-term memory is how the brain handles most of the routine tasks of daily life. Once the task is done, the information is deleted, reflecting an evolutionary adaptation designed to conserve working memory's limited processing capabilities in much the same way a computer's RAM drive deletes data to free-up processing space.⁹¹ For teachers it

⁸³ See RATEY, *supra* note 76, at 114; SHELL ET AL., *supra* note 68, at 22–23; SYLWESTER, *supra* note 49, at 78.

⁸⁴ See RATEY, *supra* note 76, at 185–95; SHELL ET AL., *supra* note 68, at 20–21.

⁸⁵ See SHELL ET AL., *supra* note 68, at 13; WILLINGHAM, WHY DON'T STUDENTS LIKE SCHOOL, *supra* note 47, at 83, 86 (working memory is the place in the brain where "thinking" happens).

⁸⁶ See MEDINA *supra* note 67, at 79–83; PINKER, HOW THE MIND WORKS, *supra* note 10, at 143, 373; RATEY, *supra* note 76, at 114–15, 120–21, 248; SHELL ET AL., *supra* note 68, at 56; SYLWESTER, *supra* note 49, at 71–72.

⁸⁷ See GALLAGHER, *supra* note 76, at 9 (paying attention means spending one's limited cognitive currency, so you should spend it wisely); MEDINA *supra* note 67, at 81; SHELL ET AL., *supra* note 68, at 69, 119, 143.

⁸⁸ See MEDINA, *supra* note 67, at 81; SHELL ET AL., *supra* note 68, at 39, 67; SYLWESTER, *supra* note 49, at 72, 80.

⁸⁹ See KAHNEMAN, *supra* note 71, at 41; SHELL ET AL., *supra* note 68, at 13–14.

⁹⁰ See RATEY, *supra* note 76, at 194–95; SHELL ET AL., *supra* note 3, at 20–21; SYLWESTER, *supra* note 49, at 80, 92.

⁹¹ See PINKER, HOW THE MIND WORKS, *supra* note 10, at 137–39; SHELL ET AL., *supra* note 68, at 21; SYLWESTER, *supra* note 49, at 92.

means information that does not make it past students' short-term memory—either because they did not attend to it very well or their attention was interrupted—is gone and cannot be learned.⁹²

More meaningful information is transferred to long-term memory, where it may be stored among the patterns, or schemas, used for thinking and problem solving.⁹³ To truly become "learned," however, it usually requires that the neurons comprising the relevant pathways be fired again and again through practice and effort to reinforce and strengthen them.⁹⁴ The more this is rehearsed, the better able the brain is to retrieve that information later.⁹⁵

Significantly, information processed into long-term memory is typically not stored within a single grouping of neural pathways but among several of them devoted to separate aspects of the experience.⁹⁶ It will also be wired together with existing pathways related to similar, past experiences.⁹⁷ For example, sensory data associated with the previously mentioned savory meal will be stored in separate neural pathways relating to its taste, color, and smell.⁹⁸ Though each network is separate, they are all linked together in a chain.⁹⁹ Later thinking about that food activates all the pathways in the chain, which working memory assembles into a cohesive thought in the mind's eye.¹⁰⁰ Even thinking about a single aspect of the experience, like the food's taste or smell, may activate the other pathways as well.¹⁰¹ This is the rationale underlying multimodal learning theory, which posits that instructional methods appealing to multiple senses may encode information more diversely in the brain, which can later aid recall as well as contribute to the breadth of

92 See KAHNEMAN, *supra* note 71, at 22–23 (interfering with attention disrupts our rational, effortful thought processes which diminishes competency); SHELL ET AL., *supra* note 68, at 23–24; WILLINGHAM, WHY DON'T STUDENTS LIKE SCHOOL, *supra* note 48, at 43.

93 See SHELL ET AL., *supra* note 68, at 12, 55.

94 See CAREY, *supra* note 7, at 94 (learning requires practice and effort; the more difficult the practice, the greater the benefits); KAHNEMAN, *supra* note 71, at 238; MEDINA, *supra* note 67, at 107; RATEY, *supra* note 76, at 36–37; SHELL ET AL., *supra* note 68, at 14, 24, 55, 144.

95 See SHELL ET AL., *supra* note 68, at 19, 24.

96 See PINKER, HOW THE MIND WORKS, *supra* note 10, at 119–20; SHELL ET AL., *supra* note 68, at 25.

97 See SHELL ET AL., *supra* note 68, at 12, 26 (working memory connects new experiences to neural pathways associated with similar, earlier ones).

98 See *id.* at 12–13.

99 *Id.* at 12.

100 See *id.* at 12, 26.

101 See *id.* at 12, 26, 77, 183.

pattern recognition tools available for all thinking and problem solving.¹⁰²

To solve problems, working memory activates the neural pathways associated with similar, past experiences which can be assembled in a multitude of combinatorial ways.¹⁰³ At a neurobiological level, the difference between an expert and novice is the breadth and depth of these pattern recognition tools, which is also referred to as “background knowledge.”¹⁰⁴ A larger database of patterns is why experts see solutions to problems that novices never will.¹⁰⁵ Experts are also able to solve problems more quickly than novices because they have spent more time practicing the storage and retrieval of these patterns.¹⁰⁶

As working memory is the gateway to all learning, it is important to understand its limitations and constraints.¹⁰⁷ Cognitive scientists used to think that working memory could only process about seven bits of information at once, though that estimate has since been reduced to four.¹⁰⁸ It drops even more as the complexity of the task increases.¹⁰⁹ And learning new things, in particular, places an additional load on working memory’s very limited processing capacity.¹¹⁰ A technique called “chunking” allows working memory to process more information at one time by organizing it into conceptually similar groups.¹¹¹ For example,

¹⁰² See MEDINA, *supra* note 67, at 208–10, 219; SHELL ET AL., *supra* note 68, at 26, 77, 183–84.

¹⁰³ See SHELL ET AL., *supra* note 68, at 12, 26, 56; WILLINGHAM, WHY DON’T STUDENTS LIKE SCHOOL, *supra* note 48, at 11–12.

¹⁰⁴ See SHELL ET AL., *supra* note 68, at 38–39, 57–58; WILLINGHAM, WHY DON’T STUDENTS LIKE SCHOOL, *supra* note 48, at 29–35, 101 (“When it comes to knowledge, those who have more gain more . . .”). “Memory is like a spiderweb that catches new information. The more it catches, the bigger it grows. And the bigger it grows, the more it catches.” JOSHUA FOER, MOONWALKING WITH EINSTEIN: THE ART AND SCIENCE OF REMEMBERING EVERYTHING 209 (2011).

¹⁰⁵ See KAHNEMAN, *supra* note 71, at 90 (humans are pattern seekers); SHELL ET AL., *supra* note 68, at 57–58; WILLINGHAM, WHY DON’T STUDENTS LIKE SCHOOL, *supra* note 48, at 30, 101–02 (experts don’t just have more experience than novices, it’s also organized in ways that lets them see patterns others don’t).

¹⁰⁶ See PINKER, HOW THE MIND WORKS, *supra* note 10, at 361; SHELL ET AL., *supra* note 68, at 58; WILLINGHAM, WHY DON’T STUDENTS LIKE SCHOOL, *supra* note 48, at 30, 106–07.

¹⁰⁷ See SHELL ET AL., *supra* note 68, at 13.

¹⁰⁸ See FOER, *supra* note 104, at 56; SHELL ET AL., *supra* note 68, at 2, 19; Jennifer Lee et al., *The Impact of Media Multitasking on Learning*, 37 LEARNING MEDIA & TECH. 94, 95–96 (2012).

¹⁰⁹ See SHELL ET AL., *supra* note 68, at 13, 19, 57; David Glenn, *Divided Attention*, CHRON. HIGHER EDUC. (Feb. 28, 2010), <http://chronicle.com/article/Scholars-Turn-Their-Attention/63746/> [<http://perma.cc/5V22-KZ6V>] (the brain is designed to let us “walk and chew gum at the same time, but not walk, chew gum, play Frisbee, and solve calculus problems”).

¹¹⁰ See Lee et al., *supra* note 108, at 96.

¹¹¹ See FOER, *supra* note 104, at 61; SHELL ET AL., *supra* note 68, at 27–28, 40–42;

trying to remember the ten random digits comprising a typical telephone number over-taxes most people's working memory, but by grouping them according to area code, exchange, and subscriber number, working memory treats those ten bits of information as three, which most people can process.¹¹²

By comparison, working memory's ability to attend to more than one task at a time is even more tightly constrained. In truth, it does not exist because it is basically impossible for the brain to "multitask" beyond activities that are so automated, like walking and chewing gum at the same time, that they require no attention.¹¹³ So, what looks like multitasking to the casual observer is actually "task-switching."¹¹⁴ Studies show that students who move back and forth between tasks take more time to complete each one and both are performed with much less proficiency.¹¹⁵

When educators first saw students multitasking in class, many assumed it was a new learning style resulting from constant exposure to digital technology.¹¹⁶ But seeing it through the lens of learning science shows it instead to be a maladaptive learning behavior.¹¹⁷ In describing the results of a leading research study on the effects of multitasking on the brain, one of its authors, Stanford Professor Clifford Nass, observed: "We were

WILLINGHAM, WHY DON'T STUDENTS LIKE SCHOOL, *supra* note 48, at 26.

¹¹² See FOER, *supra* note 104, at 61; SHELL ET AL., *supra* note 68, at 27–28.

¹¹³ See GALLAGHER, *supra* note 76, at 152; DANIEL J. LEVITIN, THE ORGANIZED MIND: THINKING STRAIGHT IN THE AGE OF INFORMATION OVERLOAD 16, 96 (2014); MEDINA, *supra* note 67, at 85; SHELL ET AL., *supra* note 68, at 56–58 (to the extent any task requires attention, we can only perform one at a time; everything else is task switching); SYLWESTER, *supra* note 49, at 81. See generally Eyal Ophir et al., *Cognitive Control in Media Multitaskers*, 106 PROC. NAT'L ACAD. SCI. U.S. 15583 (2009) (study widely cited for the proposition that the ability to multitask does not exist); *infra* p. 261 and note 118; *infra* p. 267 and notes 162–63.

¹¹⁴ See GALLAGHER, *supra* note 76, at 152; SHELL ET AL., *supra* note 68, at 21, 58.

¹¹⁵ As discussed in Part III, there is a robust body of evidence showing that students who task-switch during class learn less and perform more poorly on tests, in some cases significantly so, compared to unitaskers. See GALLAGHER, *supra* note 76, at 153; MEDINA, *supra* note 67, at 84 (a person interrupted in a task can take up to fifty times longer to complete it); POWERS, *supra* note 5, at 59 (one minute of interruption requires fifteen minutes of recovery time); Lee et al., *supra* note 108, at 102 ("[M]ultitasking interferes with knowledge acquisition. It generates extraneous cognitive load that burdens the working memory."). See generally Susan M. Ravizza et al., *Non-academic Internet Use in the Classroom Is Negatively Related to Classroom Learning Regardless of Intellectual Ability*, 78 COMPUTERS & EDUC. 109 (2014) (reporting research results that are consistent with earlier studies finding a negative correlation between the use of wireless devices in class and learning).

¹¹⁶ See Glenn, *supra* note 109 (noting that some professors argue we should accommodate multitasking behaviors because "[o]ne of the basic tenets of good teaching is that you have to start where the students are").

¹¹⁷ See *infra* pp. 282–83 and accompanying notes.

absolutely shocked [M]ultitaskers are terrible at every aspect of multitasking. They're terrible at ignoring irrelevant information; they're terrible at keeping information in their head nicely and neatly organized; and they're terrible at switching from one task to another."¹¹⁸ To dispel any remaining belief that constant exposure to technology can alter the brain by conferring multitasking superpowers, learning science suggests there are physiological and neurobiological constraints that make it impossible.¹¹⁹

All evolutionary adaptations like working memory reflect a trade-off between the needs of survival and biology.¹²⁰ Back in the day, the caveman had no need to multitask beyond walking and swinging a club at the same time.¹²¹ Upgrading the brain's processing capabilities to confer bona fide multitasking powers would have been expensive in physiological terms.¹²² The brain comprises only two percent of the body's total weight but already consumes twenty percent of its energy and nutrients.¹²³ If expanding working memory's ability to process information required additional brain tissue, it would have meant diverting even more bodily resources to deliver the sustenance a bigger brain would need.¹²⁴ And assuming a larger brain would also need a bigger head to contain it, childbirth would have been impossible without also killing the mother, not to mention that a bigger, bobbing head would have made the caveman more susceptible to fatal injuries in a fall.¹²⁵ That natural selection

¹¹⁸ *Frontline: Interview: Clifford Nass* (PBS television broadcast Dec. 1, 2009), <http://www.pbs.org/wgbh/pages/frontline/digitalnation/interviews/nass.html>.

¹¹⁹ See PINKER, *HOW THE MIND WORKS*, *supra* note 10, at 208. As Professor Pinker explains, our physiology does not evolve or change because of "needs;" we do not develop new cognitive powers because technology creates a "need" to process information more quickly or efficiently. Rather, physiological change occurs within a species as the result of random mutations that over millions of years get selected because they better serve the needs of survival. "If wishes were horses, beggars would ride." *Id.* at 206.

¹²⁰ See MEDINA, *supra* note 67, at 41; PINKER, *HOW THE MIND WORKS*, *supra* note 10, at 194; RICHESON & BOYD, *supra* note 82, at 155.

¹²¹ See SHELL ET AL., *supra* note 68, at 58; Glenn, *supra* note 109.

¹²² See MEDINA, *supra* note 67, at 41; PINKER, *HOW THE MIND WORKS*, *supra* note 10, at 138; Robin I.M. Dunbar, *Brain and Cognition in Evolutionary Perspective*, in *EVOLUTIONARY COGNITIVE NEUROSCIENCE* 21, 23 (Steven M. Platek et al. eds., 2007) (brain tissue has a high cost in evolutionary terms).

¹²³ See PINKER, *HOW THE MIND WORKS*, *supra* note 10, at 138, 154; J. Philippe Rushton & C. Davison Ankney, *The Evolution of Brain Size and Intelligence*, in *EVOLUTIONARY COGNITIVE NEUROSCIENCE*, *supra* note 122, at 122, 150.

¹²⁴ See PINKER, *HOW THE MIND WORKS*, *supra* note 10, at 138; POWERS, *supra* note 10, at 74 (expanding the attentional limits of working memory would require structural changes in the brain); Steven Pinker, *The Cognitive Niche: Coevolution of Intelligence, Sociality, and Language*, 107 *PROC. NAT'L ACAD. SCI. U.S.* 8993, 8995 (2010) [hereinafter Pinker, *Cognitive Niche*].

¹²⁵ See PINKER, *HOW THE MIND WORKS*, *supra* note 10, at 154; Pinker, *Cognitive*

opted to give him the efficient, economy version of working memory instead of the gas-guzzling luxury model reflects an evolutionary compromise worthy of King Solomon himself, given the alternatives.

Two other aspects of attention are important to mention for purposes of this discussion. The first is that the brain is not very good at it.¹²⁶ For most of us, attention quickly starts to drift on its own after a few minutes despite our best efforts to stay on task.¹²⁷ Though this is poorly suited to many school and work related tasks associated with contemporary life, it is a trait that was highly advantageous to the caveman.¹²⁸ To survive, our nomadic, hunter-gatherer ancestors had to remain constantly alert to the presence of potential prey and threats from predators.¹²⁹ Research confirms that a caveman with ADD was a much better hunter than his buddies with stronger attentional abilities, a finding that caused one expert to quip that if Ritalin had been around back in the day, the survival of our species may have been in serious doubt.¹³⁰ But getting stuck with the same distracted brain today, however, is a distinct disadvantage to any student trying to survive their first year of law school.¹³¹

Niche, *supra* note 124, at 8995.

¹²⁶ See CAREY, *supra* note 7, at 215, 217 (the ability to concentrate as emphasized by the contemporary model of formal schooling is a mirage that does not exist because the brain was designed to forage and avoid predators, not sit still in class); SHELL ET AL., *supra* note 68, at 13, 15, 29 (it takes effort to sustain attention for more than thirty seconds); SYLWESTER, *supra* note 49, at 120.

¹²⁷ See GALLAGHER, *supra* note 76, at 148–49; MEDINA, *supra* note 67, at 74, 90 (research indicates that the average attention span is ten minutes, after which it typically plummets to zero); SHELL ET AL., *supra* note 68, at 13, 15, 29.

¹²⁸ See GALLAGHER, *supra* note 76, at 17; THOM HARTMANN, BEYOND ADD: HUNTING FOR REASONS IN THE PAST AND PRESENT, at xv–xvi (1996); KAHNEMAN, *supra* note 71, at 35; Dan Eisenberg & Benjamin Campbell, *The Evolution of ADHD: Social Context Matters*, 84 S.F. MED., 21, 21–22 (Oct. 2011), <http://evolution.binghamton.edu/evos/wp-content/uploads/2012/02/eisenberg-and-campbell-2011-the-evolution-of-ADHD-artice-in-SF-Medicine.pdf> [<http://perma.cc/3UZ3-LMGH>] (studies of an isolated group in Kenya showed that traits of ADD have distinct advantages for nomadic peoples); Amanda Schaffer, *The No-Label Movement*, NEW YORKER (Oct. 2, 2013), <http://www.newyorker.com/tech/elements/the-no-label-movement> [<http://perma.cc/JTG9-ZDJD>] (clinical psychologist says symptoms of ADD such as “restlessness, constant visual scanning, and being amped up for quick and aggressive action” are all attributes of good hunters).

¹²⁹ See Eisenberg & Campbell, *supra* note 128; Richard A. Friedman, *A Natural Fix for A.D.H.D.*, N.Y. TIMES, (Oct. 31, 2014), http://www.nytimes.com/2014/11/02/opinion/sunday/a-natural-fix-for-adhd.html?_r=0 [<http://perma.cc/KT5N-LCXE>] (“As hunters, [our caveman ancestors] had to adapt to an ever-changing environment where the dangers were as unpredictable as [the] next meal. . . . [H]aving a rapidly shifting but intense attention span and a taste for novelty would have proved highly advantageous in locating and securing rewards—like a mate and a nice chunk of mastodon. In short, having the profile of what we now call A.D.H.D. would have made you a Paleolithic success story.”).

¹³⁰ See *supra* notes 128–29.

¹³¹ See GALLAGHER, *supra* note 76, at 17 (the distractibility that served our forbearers so well is a big drawback for post-industrial folks living in a world with lots of unwelcome

It goes to show that everything in life truly is a matter of perspective; a cognitive trait so key to the caveman's survival is now listed in the DSM-5 as a learning disability.¹³² Some cognitive scientists argue that ADD is not so much a learning disability as a reflection of how maladapted our classrooms are to the caveman brain.¹³³ Professor Roger Schank, a world renowned cognitive and learning science scholar, goes even further by arguing that nearly all institutional education should be overhauled to better match how and what we teach with the way the caveman brain is designed to learn.¹³⁴ Anyone who has ever seen a classroom full of young children fidget knows that the ability to pay attention does not come naturally to most, which is why educators have always treated it like a skill that must be cultivated.¹³⁵

Related to this, the brain is also programmed to detect and seek out novelty.¹³⁶ This goes hand-in-glove with distractibility in fulfilling the Darwinian survival imperative by alerting the caveman to potential new sources of food, water, friends, and better habitats.¹³⁷ To encourage this behavior, the brain is rewarded with a pleasurable shot of dopamine, the same neurotransmitter associated with drug addiction and orgasms.¹³⁸ In his book *The Shallows: What the Internet is Doing to Our Brains*, author Nicholas Carr argues that because we are genetically engineered to seek new and novel experiences, surfing the web can easily become, if not an addiction, a compulsive habit.¹³⁹ Thus, whether checking Facebook, buying shoes on

distractions).

¹³² AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 59–63 (Am. Psychiatric Ass'n ed., 5th ed. 2013) (attention deficit disorder is a recognized learning disability characterized by symptoms that include being "easily distracted by extraneous stimuli"); see GALLAGHER, *supra* note 76, at 17, 148, 163 (ADD is only considered a disability because modern, western society places a high value on the ability to pay attention).

¹³³ See CAREY, *supra* note 7, at 215, 217 (our modern system of education mistakenly assumes it is based on how the brain works; it is not); SYLWESTER, *supra* note 49, at 71.

¹³⁴ SCHANK, TEACHING MINDS, *supra* note 14, at 207–09; see PINKER, HOW THE MIND WORKS, *supra* note 10, at 302 ("Natural selection . . . did not shape us to earn good grades in science class . . .").

¹³⁵ See GALLAGHER, *supra* note 76, at 10 ("[F]ocus is a skill, which like any other takes discipline and effort to develop."); SYLWESTER, *supra* note 49, at 83.

¹³⁶ See GALLAGHER, *supra* note 76, at 16; PINKER, HOW THE MIND WORKS, *supra* note 10, at 377; SHELL ET AL., *supra* note 68, at 79.

¹³⁷ See PINKER, HOW THE MIND WORKS, *supra* note 10, at 375–77; SHELL ET AL., *supra* note 68, at 20–21 (attention is designed to alight on the new and novel); Friedman, *supra* note 129.

¹³⁸ See LEVITIN, *supra* note 113, at 96, 101–02; RATEY, *supra* note 76, at 116–17.

¹³⁹ See NICHOLAS CARR, THE SHALLOWS: WHAT THE INTERNET IS DOING TO OUR BRAINS 116–17, 120, 194 (2011) (every time we go on the Internet we are training our brain to be distracted); LEVITIN, *supra* note 113, at 101–02 (make no mistake—checking

Zappos, or smoking crack, each of these behaviors contributes to a bio-feedback loop in the brain that encourages more of the same.¹⁴⁰ The implication for teachers is that although wireless devices can be powerful learning tools, giving one to a caveman during class and then expecting him to stay on task is like buying a Prius thinking it will put the polar icecaps back. It's a noble thought, but don't hold your breath.

B. The Fantastic Plastic Machine

One of the brain's most impressive characteristics is a feature called "neural plasticity." While working memory controls the flow of information that serves as the raw material for everything we learn, neural plasticity is what builds the circuitry in the brain to support it. As the name implies, it is a flexible function that accounts for all the knowledge, skills, thoughts, and beliefs we acquire in our lifetime and why they may also change over time.¹⁴¹ Insofar as any of the foregoing are shared by members of our extended social group, neural plasticity is what accounts for all human culture.¹⁴² Indeed, a reciprocal relationship exists between the two in that inventions like the smartphone, a product of neural plasticity, may influence the culture at large which in turn may influence the thoughts and behaviors of the group members.¹⁴³

Neural plasticity was an evolutionary adaptation that gave our ancestors the cognitive flexibility to learn the tool-making, foraging, and other skills needed to survive during a time of dramatic climate change that would have given Al Gore fits.¹⁴⁴ In geo-historical terms, neural plasticity is linked to the Pleistocene age, which began approximately 1.8 million years ago and lasted until about 10,000 BC.¹⁴⁵ It was a period characterized by several

email and Facebook are neural addictions); RATEY, *supra* note 76, at 118.

¹⁴⁰ See LEVITIN, *supra* note 113, at 101–02; RATEY, *supra* note 76, at 118.

¹⁴¹ See RICHESON & BOYD, *supra* note 82, at 64–66, 71, 145–47.

¹⁴² See PINKER, *HOW THE MIND WORKS*, *supra* note 10, at 33; HENRY PLOTKIN, *NECESSARY KNOWLEDGE* 231, 265 (2007); RICHESON & BOYD, *supra* note 82, at 63, 136, 145–47, 156–61.

¹⁴³ See PINKER, *HOW THE MIND WORKS*, *supra* note 10, at 33. See generally RICHESON & BOYD, *supra* note 82, at 45, 113, 145–47, 156–61, 195; *supra* note 9 (discussing from a phenomenological perspective that technology, like all environmental influences, can change the content of our thoughts but not the mechanisms that create them).

¹⁴⁴ See RICHESON & BOYD, *supra* note 82, at 131–36, 146–47; see also Leda Cosmides & John Tooby, *Evolutionary Psychology, Moral Heuristics, and the Law*, in *HEURISTICS AND THE LAW* 181, 184–85 (Gerd Gigerenzer & Christoph Engel eds., 2006).

¹⁴⁵ Kim Ann Zimmermann, *Pleistocene Epoch: Facts About the Last Ice Age*, *LIVESCIENCE* (Oct. 9, 2013, 5:51 PM), <http://www.livescience.com/40311-pleistocene-epoch.html> [http://perma.cc/9JLT-75PR].

rapid cycles of glacial expansion and retreat that saw many species perish.¹⁴⁶

Natural selection favored those creatures with the intellectual firepower needed to figure out within their own lifetime solutions to the problems associated with survival that otherwise would have taken Darwinian evolution millions of years to sort out.¹⁴⁷ It was like an aftermarket bolt-on accessory that gave a few lucky critters the problem-solving ability to sprint ahead of everyone else in an evolutionary footrace where placing second meant getting turned into a fossil.¹⁴⁸ Thus, cognitive scientists say it is no coincidence that an increase in brain size among many mammals, including the caveman, coincides with the Pleistocene period.¹⁴⁹

Despite its impressive versatility, however, neural plasticity has no more ability to change the brain's information processing architecture than software can change the hardware that runs it.¹⁵⁰ Students who practice multitasking might improve their typing skills, but transcending the tightly circumscribed limitations on working memory's ability to toggle between a few simple tasks at once is a bridge too far.¹⁵¹ On the other hand, neither can neural plasticity fry our students' brains by making them permanently more distracted as some lay commentators

¹⁴⁶ See RICHESON & BOYD, *supra* note 82, at 132–36.

¹⁴⁷ See PINKER, *HOW THE MIND WORKS*, *supra* note 10, at 190; RICHESON & BOYD, *supra* note 82, at 131–37, 146–47; Cosmides & Tooby, *supra* note 144, at 185.

¹⁴⁸ See PINKER, *HOW THE MIND WORKS*, *supra* note 10, at 342; RICHESON & BOYD, *supra* note 82, at 146.

¹⁴⁹ See DAVIS, *supra* note 9, at 24 (stating that our ancestors' brains nearly doubled in size during this period); *supra* notes 146–48.

¹⁵⁰ See RICHESON & BOYD, *supra* note 82, at 129–31 (neural plasticity can change behaviors but not the mechanisms of learning); see also L. Mark Carrier, *Multitasking Across Generations: Multitasking Choices and Difficulty Ratings in Three Generations of Americans*, 25 COMPUTERS HUM. BEHAV. 483, 488 (2009) (finding that basic limitations on multitasking abilities are fairly uniform across generations suggesting that technology has not led to differences in the brains of so-called “digital natives” compared to “digital immigrants”); Pinker, *Mind Over Mass Media*, *supra* note 5 (stating that neural plasticity does not mean the brain can be pounded into shape by experience); Daniel Willingham, *Don't Blame the Internet: We Can Still Think and Read Critically, We Just Don't Want to*, REALCLEAR EDUCATION (Apr. 14, 2014), http://www.realcleareducation.com/articles/2014/04/16/dont_blame_the_web_we_can_still_think_and_read_critically_we_just_dont_want_to_942.html [<http://perma.cc/MV22-UQUE>] [hereinafter Willingham, *Don't Blame the Internet*] (stating that neural plasticity is highly constrained and probably not even capable of changing the brain in response to environmental influences like technology as some lay observers have claimed).

¹⁵¹ See DEHAENE, *supra* note 7, at 146 (stating that evolution over millions of years has imposed “severe” limits on what we are able to learn); LEVITIN, *supra* note 113, at 96–98 (claiming that there is no such thing as multitasking); Willingham, *Don't Blame the Internet*, *supra* note 150.

have alarmingly claimed.¹⁵² Increased distractibility may be an occupational hazard of technology use, but it is a learned behavior, that can be unlearned as well, rather than a permanent change in brain structure.¹⁵³ To paraphrase Harvard cognitive scientist Professor Steven Pinker, if you want to be less distracted, stop getting distracted.¹⁵⁴ If our students appear distracted in class because of wireless devices, the solution is not to enable that behavior further but to take steps to help them build better attentional abilities.

The assertion that technology has changed the way our students think and learn first appeared in a 2001 essay by Marc Prensky, an educational consultant at the time.¹⁵⁵ It is the same five-page essay in which he coined the phrase “digital native,” sending legal educators into a tizzy ever since.¹⁵⁶ Author Nicholas

¹⁵² See DEHAENE, *supra* note 7, at 146; Thompson, *supra* note 54, at 13 (stating that while the popular press relies heavily on neural plasticity to support claims that the brain is changing, researchers urge more caution; neural plasticity is involved in all learning and, thus, designed to change only within narrowly constrained limits); Willingham, *Smartphones Are Not Making Us Dumb*, *supra* note 9. *But see* Prensky, *supra* note 1, at 1 (one of the leading alarmists).

Cognitive science tells us that a child's brain is by design more plastic than an adult's to facilitate all the learning that occurs as we grow. See MEDINA, *supra* note 67, at 58–59. Those claiming that technology is transforming the brains of digital natives have seized on this to argue that children raised in a technology rich environment develop brains that are “fundamentally” different than those of digital immigrants. See *infra* note 155. Among the many problems with this theory, however, is that it assumes a relatively homogenous population of students raised under similar circumstances with respect to their exposure and use of technology that are distinct from the circumstances under which digital immigrants live. But phenomenologists argue that all man-made creations, including digital ones, are assimilated into the environment we all share—indeed they *become* the environment—meaning their influence has equal effect on all. See generally N. KATHERINE HAYLES, *HOW WE THINK: DIGITAL MEDIA AND CONTEMPORARY TECHNOGENESIS* 10–11 (2012). Consequently, the claim that digital technology is causing a generational divide due to neural plasticity has serious conceptual flaws beyond the lack of empirical support. See *supra* notes 4, 5, 150; *infra* pp. 267–69 and accompanying notes.

¹⁵³ The ability to pay attention, like most human traits, varies among individuals which means some people are born more easily distracted than others. GALLAGHER, *supra* note 76, at 147–48; see *supra* note 135.

¹⁵⁴ See Pinker, *Mind Over Mass Media*, *supra* note 5 (asserting that with Internet distractions, you are what you eat; the solution is not to bemoan technology but to develop better strategies for self control); Willingham, *Smartphones Are Not Making Us Dumb*, *supra* note 9 (claiming that there is no evidence the Internet is causing attention spans to shorten); cf. GALLAGHER, *supra* note 76, at 10–11 (stating that we can increase our attentional abilities through practice and discipline).

¹⁵⁵ Prensky, *supra* note 1, at 1. In this five-page essay, Mr. Prensky states:

Our students have changed radically. Today's students are no longer the people our educational system was designed to teach. . . . It is now clear that, as a result of this ubiquitous environment and the sheer volume of their interaction with it, today's students think and process information fundamentally differently from their predecessors.

Id.

¹⁵⁶ *Id.* To date, research has failed to find any evidence to support Mr. Prensky's

Carr, among others, made a similar claim in his bestselling book *The Shallows: What the Internet Is Doing to Our Brains*.¹⁵⁷

Cognitive scientists, however, scoff at this notion, pointing out that of course the brain gets rewired every time we interact with environmental influences like technology.¹⁵⁸ That is exactly how neural plasticity is supposed to work in helping us learn new things.¹⁵⁹ The brain does indeed build new neural pathways to support nearly everything we learn just as when we stop doing those things, the pathways decay.¹⁶⁰ But it does not mean neural plasticity can alter the brain's fundamental thinking and learning characteristics.¹⁶¹ As proof, some point to studies showing that the heaviest multitaskers do worse on tests that measure multitasking proficiency compared to those who do it less.¹⁶² If the Internet was really changing our students' brains, you would expect the heaviest multitaskers to show improvement, not the opposite.¹⁶³

And despite some impressive characteristics, neural plasticity, like working memory, is "severely" constrained by our genetic programming with respect to how and what we are

assertions that: 1) the Internet is changing the brains of students; or 2) that "digital natives" have unique characteristics that set them apart from so-called "digital immigrants." See *supra* notes 4–5. It is worth noting that in 2001, when Prensky was proclaiming that the Internet is changing students' brains, Yale Professor Jerome Singer, an expert in child psychology, was telling author Dan Oppenheimer that he could not say one way or the other because no serious research had yet been done on the issue. OPPENHEIMER, *supra* note 19, at 201.

¹⁵⁷ See CARR, *supra* note 139, at 116.

¹⁵⁸ See Pinker, *Mind Over Mass Media*, *supra* note 5; Pinker, *Not at All*, *supra* note 9, at 86; Willingham, *Don't Blame the Internet*, *supra* note 150.

¹⁵⁹ See MEDINA, *supra* note 67, at 57, 62 (asserting that all learning involves changes in the brain; even acquiring a simple piece of information results in the physical alteration of neuronal structures); Pinker, *Mind Over Mass Media*, *supra* note 5.

¹⁶⁰ See SYLWESTER, *supra* note 49, at 20, 126.

¹⁶¹ See Pinker, *Mind Over Mass Media*, *supra* note 5; Pinker, *Not at All*, *supra* note 9, at 87 (claiming that it is "ludicrous" to believe the Internet has changed the way scientists think compared to a decade ago); Willingham, *Smartphones Don't Make Us Dumb*, *supra* note 9; *supra* note 4.

¹⁶² Pinker, *Not at All*, *supra* note 9, at 86 (the Ophir & Nass study, *supra* note 113, confirms skepticism about claims that the Internet is changing the brain); see also Joshua Greene, *The Dumb Butler*, in *IS THE INTERNET CHANGING THE WAY YOU THINK?*, *supra* note 3, at 133–34 (stating that researchers have documented the so-called "Flynn Effect," showing that average IQs have increased during the twentieth century; if the Internet was changing our brains as some claim, you would expect science would be able to document that too, yet so far there is no evidence to support it); Carrier, *supra* note 150, at 488; *supra* note 4.

¹⁶³ Pinker, *Not at All*, *supra* note 9, at 87; see Carrier, *supra* note 150, at 488; Pagel, *supra* note 9, at 70 (professor of evolutionary biology says we know the Internet has not changed the brain because we can visit people who do not have Internet access and they think the same as we do).

capable of learning.¹⁶⁴ Known as the theory of “innate intelligence,” experts say that the brain comes factory-equipped with preinstalled templates for interpreting the world in tightly circumscribed, uniform ways across several key knowledge domains including intuitive physics (e.g., a basic understanding of cause and effect), logical reasoning (e.g., an ability to draw inferences), intuitive psychology (e.g., recognizing others have motives and intentions), and rudimentary mathematics, among other areas, that comprise the fundamental assumptions we all share about how the world works.¹⁶⁵ In the absence of these constraints, from the moment of birth forward, learning for each of us would consist of an “unguided cognitive fumbling” through life.¹⁶⁶

Neural plasticity is probably too tightly constrained by our genetic engineering for technology to have much, if any, effect on it.¹⁶⁷ In short, technology is not changing the brain in any significant way as some educational consultants and lay commentators claim; rather technology is changing to become more compatible with the way the brain works.¹⁶⁸ Neither are we

¹⁶⁴ See DEHAENE, *supra* note 7, at 146 (how the brain thinks and works is “highly circumscribed”); Donald Hoffman, *The Sculpting of Human Thought, in IS THE INTERNET CHANGING THE WAY YOU THINK?*, *supra* note 3, at 90–91 (asserting that evolution has placed endogenous limits on learning and although the Internet can change what we learn within those limits, it *cannot* change the limits themselves); Willingham, *Don’t Blame the Internet*, *supra* note 150 (stating that the truth is that the brain is probably not even capable of the changes some have suggested technology is causing).

¹⁶⁵ See DAVIS, *supra* note 9, at 60–61 (we are born with hardwired intuitions that give children a “head start” when it comes to understanding and learning about the world); PINKER, *HOW THE MIND WORKS*, *supra* note 10, at 299–362; PLOTKIN, *supra* note 142, 138–51, 171.

The theory of innate knowledge is not without its critics. See JERRY FODOR, *THE MIND DOESN’T WORK THAT WAY: THE SCOPE & LIMITS OF COMPUTATIONAL PSYCHOLOGY 3* (2001) (“computational nativism” is clearly the best theory of the cognitive mind anyone has thought of so far and it may in fact get the story more or less right, but it is also quite possibly incorrect).

¹⁶⁶ PLOTKIN, *supra* note 142, at 171; see DAVIS, *supra* note 9, at 38–39 (stating that the architecture of the human brain sets limits on the beliefs we generate and share; in the absence of that, the common culture we share could not exist).

¹⁶⁷ See KAHNEMAN, *supra* note 71, at 21; PINKER, *HOW THE MIND WORKS*, *supra* note 10, at 189, 221, 301, 323–30; DEHAENE, *supra* note 7, at 146; Christakis, *supra* note 5, at 202 (even the printing press did not change the way we think); Keith Devlin, *Wisdom of the Crowd, in IS THE INTERNET CHANGING THE WAY YOU THINK?*, *supra* note 3, at 280, 282 (executive director of Stanford’s H-STAR Institute says the Ophir & Nass study, *supra* note 113, suggests there are endogenous limits to whether digital technology can even change our thinking); Greene, *supra* note 162, at 133 (“The Internet hasn’t changed the way we think any more than the microwave oven has changed the way we digest food.”); Hoffman, *supra* note 164, at 91. *But see supra* note 9.

¹⁶⁸ Scott Atran, *The Fourth Phase of Homo Sapien, in IS THE INTERNET CHANGING THE WAY YOU THINK?*, *supra* note 3, at 152, 156. As neuroscientist Maryanne Wolf points out, no matter how revolutionary digital technology might seem to us now, it cannot hold a candle to the effect writing has had on human culture, and even that technology did not

becoming more visually-oriented because of digital technologies.¹⁶⁹ Instead, we are making these devices today because we finally have the technical know-how to give a visually-oriented brain the kind of gadgets it has always wanted right from the start.¹⁷⁰ But as discussed in Part III, that does not mean visual technologies are the best tools for encouraging the kind of deep, effortful engagement needed to impart good critical thinking skills.

C. They Need Face-Time not Facebook

Another important characteristic of the caveman brain relevant to the law school classroom is that it was built for social interaction. This too has origins in our evolutionary past, as natural selection favored social creatures because it conferred significant survival advantages when it came to hunting, foraging, finding a mate, and defending against predators.¹⁷¹ Early group living also necessitated an ability to figure out what the other guy was thinking, because failing to do so might mean he survived but not you.¹⁷² These early group living arrangements, therefore, contributed to a cognitive arms race that gave the caveman an ability to determine the intentions and motives of others based on subtle facial cues and body language.¹⁷³

This ability to read minds based on limited information also explains the survival imperative served by the “fast and frugal” intuitive thinking described in Professor Daniel Kahneman’s

change the brain or the way we think. WOLF, *supra* note 5, at 66; accord DEHAENE, *supra* note 7, at 146, 150 (new inventions can only be acquired insofar as they fit the constraints of our brain’s architecture; thus technologies like writing have evolved to fit how the brain works, not vice versa); cf. HAYLES, *supra* note 152, at 10 (discussing a phenomenological theory called technogenesis that posits technology and humans co-evolve with each informing the evolution of the other).

¹⁶⁹ See PINKER, *HOW THE MIND WORKS*, *supra* note 10, at 206–07 (asserting that the need to adapt to environmental changes does not drive evolution; we do not grow new abilities, rather our abilities find new ways to cope); DEHAENE, *supra* note 7, at 304 (claiming that our cultural inventions are all constrained by our neuronal architecture); Willingham, *Don’t Blame the Internet*, *supra* note 150.

¹⁷⁰ See *infra* pp. 275–76 and accompanying notes.

¹⁷¹ See PINKER, *HOW THE MIND WORKS*, *supra* note 10, at 191–92; RATEY, *supra* note 76, at 302–04 (claiming that the brain is much better suited to solving social problems than abstract math problems); SHELL ET AL., *supra* note 68, at 68.

¹⁷² See PINKER, *HOW THE MIND WORKS*, *supra* note 10, at 192–93; Laurie R. Santos et al., *The Evolution of Human Mindreading: How Nonhuman Primates Can Inform Social Cognitive Neuroscience*, in *EVOLUTIONARY COGNITIVE NEUROSCIENCE*, *supra* note 122, at 433, 433.

¹⁷³ See KAHNEMAN, *supra* note 71, at 90; MEDINA, *supra* note 67, at 45; PINKER, *HOW THE MIND WORKS*, *supra* note 10, at 192–93, 329–33.

bestselling book, *Thinking Fast and Slow*.¹⁷⁴ The caveman did not have the luxury of navel gazing or reflectively sifting through all the evidence before deciding how best to respond to threats or opportunities.¹⁷⁵ Rather, he needed to decide “right now!” whether the other guy posed a threat, suss out the worthiness of a potential mate, or identify cheaters in the group who threatened the social contract.¹⁷⁶ Professor Kahneman refers to this type of quick, intuitive thinking as “System 1.”¹⁷⁷ Because it relies on partial information and subconscious heuristics, System 1 thinking often contains mistaken assumptions and biases that a more careful assessment of the facts would lay bare.¹⁷⁸

Professor Kahneman refers to the deliberate, analytical thinking we teach in law school as “System 2.”¹⁷⁹ Unlike intuitive System 1, System 2 thinking is innately difficult and effortful.¹⁸⁰ But the caveman brain is lazy—indeed the very purpose of System 1 is to *save* us from having to think at all—so it would

174 KAHNEMAN, *supra* note 71, at 90–91 (Professor Kahneman is a Nobel Prize winning cognitive scientist).

175 See DAVIS, *supra* note 9, at 57 (claiming that had our ancestors been required to spend their full intellectual resources on every problem they faced, it would have been a recipe for disaster); KAHNEMAN, *supra* note 71, at 35; SYLWESTER, *supra* note 49, at 71, 73; WILLINGHAM, WHY DON'T STUDENTS LIKE SCHOOL, *supra* note 48, at 3–4.

176 See KAHNEMAN, *supra* note 71, at 90, 243; PINKER, HOW THE MIND WORKS, *supra* note 10, at 403, 415; Cosmides & Tooby, *supra* note 144, at 184; Mark Schaller, *Evolutionary Bases of First Impressions*, in FIRST IMPRESSIONS 1, 3 (Nalini Ambady et al. eds., 2008) (claiming that for survival purposes, you were better off falsely assuming the worst about the other guy than incorrectly assuming the best about him).

177 KAHNEMAN, *supra* note 71, at 24.

178 *Id.* at 24, 86, 105 (stating that “System 1” generates impressions, intuitions, and “feelings,” which “System 2” often endorses out of sheer laziness, which is what transforms intuition into “belief”); see DAVIS, *supra* note 9, at 58 (claiming that heuristic thinking can often result in humans ignoring most of the information available to them); PINKER, HOW THE MIND WORKS, *supra* note 10, at 312–13, 344 (asserting that our brain likes to put things into boxes and organize the world according to stereotypes which are not always accurate).

System 1 is so deeply influential in the way we think because it draws on accumulated experiences and emotions. Indeed, it can be so compelling that it overrides rational thought even among those people who are trained to be dispassionate and analytical. In the book *Make It Stick: The Science of Successful Learning*, the authors discuss just such an example involving commercial airline pilots who relied on System 1 emotionally-driven intuitive thinking rather than trust the aircraft's instruments as their training and reason would dictate, resulting in tragic consequences. PETER C. BROWN ET AL., MAKE IT STICK: THE SCIENCE OF SUCCESSFUL LEARNING 106–08 (2014). The point being that it can be very difficult for a teacher to get students to engage System 2 logical reasoning rather than defaulting to System 1's emotionally-driven intuition. *Id.*

179 See KAHNEMAN, *supra* note 71, at 31.

180 See *id.* at 31, 35, 45–46, 81, 99, 103 (System 1 is characterized by intellectual sloth while System 2 is the skeptic); PINKER, HOW THE MIND WORKS, *supra* note 10, at 344–45 (because of the existence of System 1 thinking, watching college students work on logic problems is not a pretty sight); WILLINGHAM, WHY DON'T STUDENTS LIKE SCHOOL, *supra* note 48, at 4.

much rather avoid the heavy-lifting that System 2 requires.¹⁸¹ What this means for law professors is that we will be most effective when challenging students in ways that show them their intuitive, “common sense” solutions to the problems we pose will not work. Professor Kahneman tells us that, generally speaking, it is only after System 1 breaks down that System 2 takes over, applying logic and reason to work on the problem at hand until it finds a solution.¹⁸²

The foregoing might lead one to wonder that if the caveman brain is designed for System 1, fast-and-frugal solutions to the problems associated with living as part of a nomadic, foraging tribe of socialites, why would evolution also give it the intellectual firepower of System 2 which we use today to solve calculus problems, send a man into space, and invent online shopping.¹⁸³ The caveman, after all, did not need to do any of those things to survive. If evolution is such an efficient mistress, what purpose did System 2 serve?¹⁸⁴

The premise of evolutionary psychology is that the cognitive abilities we use today to solve the problems of modern life have all been repurposed from the ones our ancestors used to survive on the African savannah.¹⁸⁵ Though our brain was never designed for the critical thinking skills we teach in law school, students are still able to do it, with great effort and difficulty,

181 See DAVIS, *supra* note 9, at 57–58 (heuristics are a form of intellectual laziness); KAHNEMAN, *supra* note 71, at 24, 31, 99 (laziness is built deep into our nature; the brain would rather endorse intuitive solutions generated by System 1 than do the hard work required to make a critical assessment under System 2); PINKER, *HOW THE MIND WORKS*, *supra* note 10, at 307–09 (the brain did not evolve to be a good scientist; it did not evolve for “truth”—it evolved to put things into categories and draw inferences from them); WILLINGHAM, *WHY DON’T STUDENTS LIKE SCHOOL*, *supra* note 48, at 3 (the brain is designed to *save* us from thinking).

Some cognitive scientists theorize that multitasking and other distracting behaviors are a form of procrastination to help us avoid System 2 thinking. See Glenn, *supra* note 109. This, of course, is another, independent reason to ban wireless devices from the law school classroom in particular.

182 KAHNEMAN, *supra* note 71, at 24–25, 45–46; see CAREY, *supra* note 7, at 3 (learning is deeper and better when it is effortful); WILLINGHAM, *WHY DON’T STUDENTS LIKE SCHOOL*, *supra* note 48, at 132 (intelligence is shaped by hard work).

183 See PINKER, *HOW THE MIND WORKS*, *supra* note 10, at 352.

184 See *id.*; *supra* p. 21 and note 120.

185 See DAVIS, *supra* note 9, at 13; DEHAENE, *supra* note 7, at 147; PINKER, *HOW THE MIND WORKS*, *supra* note 10, at 23, 42; RATEY, *supra* note 76, at 304. The premise of evolutionary psychology—that the brain evolved in response to environmental pressures just like every organism—is, generally speaking, as well accepted as traditional Darwinian evolutionary theory. Nonetheless, some of the particular explanations offered for specific psychological traits, such as why girls prefer the color pink, have been the subject of criticism. See Bolhuis et al., *supra* note 9 (summarizing criticism of some aspects of evolutionary psychology).

because, as evolutionary psychologists tell us, being a caveman back in the day took a lot more smarts than first meets the eye.¹⁸⁶

Life back then was like being on a camping trip that lasted the rest of your life, but without the tent, Swiss Army knife, fishhook, space blanket, or freeze-dried linguine.¹⁸⁷ To be a successful hunter, you had to out-think your prey to anticipate its next move.¹⁸⁸ You also needed the analytical acumen to read the minds of others based on split-second social cues.¹⁸⁹ And don't forget those vexing climate change issues we still haven't figured out. It goes to show that the only difference between knowing whether your fellow caveman wants to "friend" you or beat you to a pulp and solving the problem of sustainable nuclear fusion is just a matter of degree.

The implications for legal educators are at least two-fold. First, it tells us the brain is not very good at "thinking like a lawyer."¹⁹⁰ While students rise to the occasion, the law school curriculum will always remain innately difficult and effortful.¹⁹¹ Hope springs eternal that technology can save students, and us, from some of the drudgery, though history reminds us that fools rush in where angels fear to tread.¹⁹² Adopting new technologies we do not fully understand in an "unrelenting search," in the words of Professor Cuban, for learning efficiencies that may not even exist, can easily make things worse by reinforcing lazy caveman intuitive thinking instead of promoting effortful System 2.¹⁹³

¹⁸⁶ See DAVIS, *supra* note 9, at 44-45 (the ability to peer into the mind of another based on characteristics not physically obvious takes great intellectual prowess); PINKER, *HOW THE MIND WORKS*, *supra* note 10, at 301 (prospering as a forager back in caveman days required more smarts than being a good chess player today).

¹⁸⁷ See PINKER, *HOW THE MIND WORKS*, *supra* note 10, at 188, 375; Cosmides & Tooby, *supra* note 144, at 185.

¹⁸⁸ See CAREY, *supra* note 7, at 214-15; PINKER, *HOW THE MIND WORKS*, *supra* note 10, at 195.

¹⁸⁹ See Schaller, *supra* note 176, at 2-3; *see also* SYLWESTER, *supra* note 49, at 53-54 (the brain evolved to make quick, intuitive, stereotyped decisions, not accurate ones); *see supra* p. 270 and notes 175-176.

¹⁹⁰ See CAREY, *supra* note 7, at 82 ("school" learning feels difficult because it is); PINKER, *HOW THE MIND WORKS*, *supra* note 10, at 42, 340-42, 358-59 (our minds were adapted for the Stone Age, not the Computer Age); SHELL ET AL., *supra* note 68, at 66-67, 122; WILLINGHAM, *WHY DON'T STUDENTS LIKE SCHOOL*, *supra* note 48, at 3-5.

¹⁹¹ See DEHAENE, *supra* note 7, at 303 (the brain never evolved to do schoolwork like reading); STEVEN PINKER, *THE BLANK SLATE* 223, 342 (2002) (much of formal education is cognitively unnatural and mastering it is not easy despite the mantra that "learning is fun"); SHELL ET AL., *supra* note 68, at 15, 66-67, 122.

¹⁹² See *supra* Part I.

¹⁹³ See CUBAN, *TEACHERS AND MACHINES*, *supra* note 16, at 73 (Professor Cuban describes educators as being in an "unrelenting" pursuit of teaching efficiencies through technology).

Second, with so much focus on technology, it is easy to overlook that the most effective classroom tool we have is the ancient caveman mind-meld technique that enables us to tell at a glance whether students are “getting it” or not so we can make appropriate adjustments.¹⁹⁴ The brain is a far more sophisticated computer than the love-child of IBM’s Watson and Sergey Brin could ever hope to be.¹⁹⁵ And while many teachers may be unaware of the evolutionary underpinnings, it is why we have always placed great importance on good classroom rapport.¹⁹⁶ The concern that putting “machines” in the classroom may interfere with that is a legitimate one, which we must continue to zealously protect.¹⁹⁷ It is the reason MOOCs are “lousy” and why the social media “revolution” that promised to make us more connected is instead making us isolated and lonely.¹⁹⁸ The brain is designed for real interaction, not the virtual kind.¹⁹⁹ Technology offers incredible learning opportunities, but student success will always depend first and foremost on the human touch, which means what they need from us most is face-time, not Facebook.²⁰⁰

¹⁹⁴ See DAVIS, *supra* note 9, at 67–68 (the ability to read students’ minds to tell whether they are confused, or engaged, may be the single most important asset of a good teacher and doing it well likely predicts the good ones from the bad).

¹⁹⁵ Watson is an IBM supercomputer that went on TV to beat champion contestants on the game show Jeopardy and is now being programmed to do legal research and other legal practice tasks. See John Markoff, *Computer Wins on ‘Jeopardy!’: Trivial, It’s Not*, N.Y. TIMES, at A1 (Feb. 17, 2011), <http://www.nytimes.com/2011/02/17/science/17jeopardy-watson.html?emc=eta1&r=0> [<http://perma.cc/7XLN-C5BN>]; Adriana Krasniansky, *Meet Ross, the IBM Watson-Powered Lawyer*, PSFK (Jan. 29, 2015), <http://www.psfk.com/2015/01/ross-ibm-watson-powered-lawyer-legal-research.html> [<http://perma.cc/7XLN-C5BN>] (University of Toronto created legal research app for Watson).

¹⁹⁶ See MEDINA, *supra* note 67, at 45 (there is plenty of empirical support for the proposition that the quality of an education depends on the relationship between the teacher and students); EVGENY MOROZOV, *TO SAVE EVERYTHING, CLICK HERE* 9 (2013) (President of Williams College says research shows the best predictor of student intellectual success is the amount of face-to-face contact with professors); SYLWESTER, *supra* note 49, at 128.

¹⁹⁷ See *supra* p. 253, note 60.

¹⁹⁸ See LEVITIN, *supra* note 113, at 127, 130–31 (social media is not an adequate replacement for real interaction); SHERRY TURKLE, *ALONE TOGETHER: WHY WE EXPECT MORE FROM TECHNOLOGY AND LESS FROM EACH OTHER* *passim* (2012); Robert P. Provine, *Internet Society, in IS THE INTERNET CHANGING THE WAY YOU THINK?*, *supra* note 3, at 168, 168 (psychologist-neuroscientist says that face-to-face contact is the “gold standard” of interpersonal communication); *supra* p. 248 and notes 26–27; *supra* p. 253 and note 60.

¹⁹⁹ See PINKER, *HOW THE MIND WORKS*, *supra* note 10, at 416; Provine, *supra* note 198, at 168; SYLWESTER, *supra* note 49, at 128.

²⁰⁰ See MEDINA, *supra* note 67, at 45 (the ability to learn has deep roots in relationships); MOROZOV, *supra* note 196, at 9; OPPENHEIMER, *supra* note 19, at 397 (education depends on meaningful contact between a good teacher and an inquiring student).

D. The Eyes Have It: The Reality and Myths of Visual Learning

A pervasive assumption about “digital natives” is that they are mostly visual learners who do best with screen-based technologies. The assumption is grounded in “learning style” theory, which posits that every student has a unique way of learning based on one of the main senses like sight or hearing.²⁰¹ Thus, a “visual learner” should learn best when the teacher uses visual modalities like PowerPoint, while an “auditory learner” learns best listening to a verbal explanation.²⁰²

The theory is easy enough to prove by showing that visual learners test better after looking at a pictorial explanation of the material versus a lecture and vice versa for auditory learners.²⁰³ Though several studies have looked for evidence to support learning style theory, none has been found.²⁰⁴ Professor Daniel Willingham, an expert on cognitive science and learning, points out that common sense tells us that even a student claiming to be an auditory learner will not, for example, learn geography better by listening to a description of the countries’ shapes rather than looking at a map.²⁰⁵ Neither will a visual learner learn a foreign language by studying the alphabet instead of listening to a pronunciation of the words.²⁰⁶ The best way to teach and learn any subject is to employ the methods that are most compatible with the desired outcome.²⁰⁷ Using visual technologies in the mistaken belief that “digital natives” learn best this way will have negative consequences if, because of that mistaken assumption, we overlook another modality that is better suited to the objective.²⁰⁸

201 See WILLINGHAM, WHY DON'T STUDENTS LIKE SCHOOL, *supra* note 48, at 113, 120; Harold Pashler et al., *Learning Styles: Concepts and Evidence*, 9 PSYCHOL. SCI. PUB. INT. 105, 116–17 (Dec. 2008) (meta-analysis of independent learning style studies found no evidence to support it); Daniel Willingham, *Classroom Practice—Listen Closely, Learning Styles Are a Lost Cause*, TES (Feb. 13, 2015), <https://www.tes.co.uk/article.aspx?storycode=6451360> [<http://perma.cc/Z9SS-YB3J>] [hereinafter Willingham, *Learning Styles Are a Lost Cause*] (science has proven learning styles do not exist).

202 Willingham, *Learning Styles Are a Lost Cause*, *supra* note 201.

203 See WILLINGHAM, WHY DON'T STUDENTS LIKE SCHOOL, *supra* note 48, at 120; Willingham, *Learning Styles Are a Lost Cause*, *supra* note 201.

204 See SHELL ET AL., *supra* note 68, at 101; WILLINGHAM, WHY DON'T STUDENTS LIKE SCHOOL, *supra* note 48, at 120–21; Pashler, *supra* note 201, at 116–17; Willingham, *Learning Styles Are a Lost Cause*, *supra* note 201.

205 See WILLINGHAM, WHY DON'T STUDENTS LIKE SCHOOL, *supra* note 48, at 120.

206 *Id.*; Willingham, *Learning Styles Are a Lost Cause*, *supra* note 201.

207 See BROWN ET AL., *supra* note 178, at 131–32 (learning style theory is part of teaching folklore, but even if everyone has a learning preference, it does *not* mean students will learn better when the teacher's instructional method fits that preference).

208 See BROWN ET AL., *supra* note 178, at 145–46 (because no evidence supports learning style theory, teachers should focus on trying to match the instructional methods with their classroom goals because at least that strategy has a basis in empiricism).

But even if learning styles existed, learning science makes it abundantly clear that digital natives are no more visually-oriented than anyone else. That is because the entire species evolved to be highly visual, not just the recent few who grew up looking at screens.²⁰⁹ Vision is by far the brain's most dominant sense, though haptics gives it a run for its money.²¹⁰ Vision takes up more neurological real estate than all the other senses combined.²¹¹ The eyes are also the only sensory organs that do not do double duty like the ears or nose; their sole purpose is to transmit visual data to the brain.

Evolutionary theory tells us that vision is so dominant because there is a strong correlation between it and survival.²¹² Simply put, you cannot find food and avoid predators if you cannot see them. Among the advantages, a good set of peepers made the caveman a more successful hunter and gatherer.²¹³ Because natural selection also gave him the deluxe color edition, a rarity in the animal kingdom, he ate better than his fellow forest critters since he could tell which fruits were ripe based on their bright colors.²¹⁴ But wait, there's more!—because the caveman also got the rare stereoscopic package which enabled him to move better in the forest and grab food with his hands.²¹⁵

Having 3-D vision also meant the caveman could see objects positioned in space in relation to each other.²¹⁶ Because of this, evolutionary psychologists theorize that stereoscopic vision contributed to the development of our analytical mind.²¹⁷ The theory goes that because all analytical thinking is based on comparisons, the caveman's ability to perceive objects in relation to each other is the reason the legal analysis we teach in law school today is based on comparing the facts of one case to another.²¹⁸ If not for 3-D vision, who knows what “thinking like a lawyer” might mean instead!

209 See PINKER, *HOW THE MIND WORKS*, *supra* note 10, at 214 (we are highly visual creatures because our mind actually evolved around that sense).

210 See *id.* at 191; SYLWESTER, *supra* note 49, at 61; *infra* Section III.D–E.

211 See MEDINA, *supra* note 67, at 231–32 (about half of the brain's resources are devoted to vision; it is the “dictatorial emperor”); SYLWESTER, *supra* note 49, at 61.

212 See PINKER, *HOW THE MIND WORKS*, *supra* note 10, at 191.

213 See *id.*

214 *Id.*

215 See *id.* at 191–94. Because of this, a “profound and intimate” connection evolved in the brain between the eye and hand that has many important implications for teachers. See *infra* p. 276 and notes 224–25; *infra* p. 300 and note 355; *infra* p. 301 and note 359 (this ancient connection enables the brain to unify and coordinate the eye, hand, and attention all in one place, at one time).

216 See PINKER, *HOW THE MIND WORKS*, *supra* note 10, at 191.

217 *Id.* at 191–92.

218 See *id.* at 191.

Linguists posit that vision also played a key role in the development of language.²¹⁹ According to this theory, the oldest form of communication was purely visual, based on a vocabulary of physical gestures that later became the grunts and groans of a proto-language before morphing into modern, spoken language.²²⁰ Thus, the caveman, not digital natives, was the “OG” visual learner, relying on observation and imitation for all communication.²²¹ Spoken language only came along much later, replacing the caveman pantomime routine, which had no doubt grown tiresome by then.²²² Of course, that’s when things got really interesting, because words allowed our forebears to communicate in abstract ideas. The rest, as they say, is history.

Some experts believe an ancient connection still exists between brain circuits devoted to language and physical movement.²²³ They argue it helps explain the research discussed in Section III.D–E that tangible media like books, which students must physically manipulate to use, can enhance learning compared to their electronic counterparts. It is also consistent with the theory of embodied cognition, which says that because the mind and body evolved together, with each heavily informing the design and function of the other, a profound connection still exists between them in all cognitive activity.²²⁴ In effect, we think with our mind *and* body.²²⁵

III. STRATEGIES FOR USING CLASSROOM TECHNOLOGIES EVEN A CAVEMAN WOULD LOVE

Based on the foregoing, this Part offers strategies informed by both history and learning science for using several popular classroom tools in ways that promote the skills needed to “think like a lawyer.” This includes suggestions for making better use of laptops, visual tools like PowerPoint, reading technologies, and

²¹⁹ See RICHEYSON & BOYD, *supra* note 82, at 144; *infra* p. 296 and notes 331–32.

²²⁰ See RICHEYSON & BOYD, *supra* note 82, at 144 (people might have been mute until relatively recent times); Michael C. Corbalis, *The Evolution of Language: From Hand to Mouth*, in *EVOLUTIONARY COGNITIVE NEUROSCIENCE* *supra* note 122, at 403, 413.

²²¹ See RICHEYSON & BOYD, *supra* note 82, at 136, 144.

²²² See Corbalis, *supra* note 220, at 413.

²²³ See *infra* p. 296 and notes 331–32.

²²⁴ See PINKER, *HOW THE MIND WORKS*, *supra* note 10, at 194; RATEY, *supra* note 76, at 178; SYLWESTER, *supra* note 49, at 57 (our skin is where the brain meets the outside world); FRANK R. WILSON, *THE HAND: HOW ITS USE SHAPES THE BRAIN, LANGUAGE AND CULTURE* 286, 289 (1998) (the clear message from biology to educators is that the most effective teaching techniques aim at uniting, not divorcing, mind and body); Brandon Keim, *The Science of Handwriting*, 24 *SCI. AM. MIND* 54, 56 (Sept./Oct. 2014), <http://www.scientificamerican.com/article/the-science-of-handwriting/> (the mind-body connection is paramount; we use our hands to access our thoughts).

²²⁵ See *infra* p. 278 and note 234; pp. 296–97 and notes 326–33.

writing technologies.²²⁶ Also included is a summary of two of the largest meta-studies to date that analyzed the overall effectiveness of classroom digital teaching technologies based on a review of thousands of independent studies. Before getting to the specifics of each of these discussions, however, the following are some general guidelines to consider whenever contemplating the use of a new classroom technology based on a synthesis of the many studies cited in this section.²²⁷

A. General Guidelines

Experience tells us that the best place to start whenever considering the use of a new classroom technology is to identify a good reason for using it and then ask whether it serves that purpose better than the alternatives.²²⁸ Forget learning styles—this is about trying to create a good match between the classroom tools available to us and our learning objectives.²²⁹ Experience also tells us that new technologies work best when used to fill a pedagogical niche not addressed by existing options.²³⁰ Conversely, they have a history of failing when the teacher

²²⁶ See Palfrey, *supra* note 7, at 109 (best practices for technology use in law school means knowing when *not* to use it).

²²⁷ This Article addresses only the use of classroom technology as a pedagogical tool, not the question of whether we should be teaching students the substantive technology skills they will need as lawyers. In this author's view, whenever the opportunity arises to use classroom technology in ways that also demonstrate legal practice skills, we should take it, as the importance of technological proficiency to the practice of law cannot be overstated. See Canick, *supra* note 35, at 681–85; Stephen M. Johnson, *Teaching for Tomorrow: Utilizing Technology to Implement the Reforms of MacCrate, Carnegie and Best Practices*, 92 NEB. L. REV. 46, 82–85 (2013); GENE KOO, NEW SKILLS, NEW LEARNING: LEGAL EDUCATION AND THE PROMISE OF TECHNOLOGY 12–15, 18–22 (The Berkman Ctr. for Internet & Soc'y at Harvard Law Sch., Research Publication No. 2007-4, March 2007), https://cyber.law.harvard.edu/publications/2007/New_Skills_New_Learning. However, the assumption made by this Article is that most technology, especially in first-year courses, is not used in that way, but instead as a teaching tool based on the belief that “digital natives” have a unique learning style which this Article challenges.

It should also be noted that while many of the studies discussed in this Part involved university students, I did not find any that focused solely on law students. This may matter only insofar as a reason exists why the results of these studies cannot be generalized to a law student population.

²²⁸ See STEVEN HIGGINS ET AL., THE IMPACT OF DIGITAL TECHNOLOGY ON LEARNING: A SUMMARY FOR THE EDUCATION ENDOWMENT FOUNDATION 4, 8 (2012) [hereinafter DURHAM STUDY]; PALFREY & GASSER, *supra* note 23, at 246 (the most successful strategy for using classroom technology is to first identify the pedagogical goal and then ask whether the technology in question can help; often times this means *not* using it); Palfrey, *supra* note 7, at 115 (“best practices” for law school means only using technology when it serves a specific pedagogical purpose); *supra* p. 253 and note 57.

²²⁹ See PALFREY & GASSER, *supra* note 23, at 246 (in legal education, one of the best ways to teach students critical thinking skills involves no technology at all but “old fashioned dialogue” between teacher and student).

²³⁰ See DURHAM STUDY, *supra* note 228, at 4, 8; Cuban, *Online Instruction-3*, *supra* note 39 (new classroom technology always finds a niche smaller than originally promised).

merely substitutes a new, more novel tool for one that is already serving its purpose well.²³¹

Related to this is the “more is better” fallacy of classroom technology; if adding a little is good, then adding more must be even better.²³² For example, visual technologies like film, video, and PowerPoint have become an indispensable part of every teacher’s classroom repertoire because they fill a niche that other tools cannot. Yet they have failed to replace textbooks, despite several efforts over the past 100 years, because print is often more compatible with many classroom objectives such as helping students develop critical thinking skills.²³³

As this suggests, the medium matters in assessing how well a particular technology promotes the teacher’s learning objectives. Part II tells us that the caveman, like Madonna, was built for a material world, not a virtual one, in which mind and body work together in all cognitive activity.²³⁴ Research on classroom technology is consistent with this insofar as tools that incorporate tactile, or “haptic,” characteristics like books, pens, and paper are effective multimodal learning tools that help promote critical thinking by more deeply engaging students both visually and physically.

Teaching students to “think like a lawyer” means that we must also consider whether our classroom tools promote important foundational skills like attention and focus.²³⁵ The relationship between the ability to pay attention and success in school is well established, as is the one between interferences with attention and weaker learning outcomes.²³⁶ Since wireless

²³¹ See DURHAM STUDY, *supra* note 228, at 4, 8; PALFREY & GASSER, *supra* note 23, at 246 (educators make a mistake when they scrap what works in favor of using the newest, coolest tools); *supra* p. 253 and notes 56–58.

²³² See DURHAM STUDY, *supra* note 228, at 6, 21; see also PALFREY & GASSER, *supra* note 23, at 246–47 (there is a tendency to over promote and fetishize the use of technology when it comes to digital natives; that instinct is wrong); *supra* Part I.

²³³ See CUBAN, TEACHERS AND MACHINES, *supra* note 16, at 58 (textbooks have endured because they are flexible); Palfrey, *supra* note 7, at 106 (at Harvard Law School, you’ll still see lots of old fashioned bound textbooks being used because they remain an effective technology for conveying information to students); *supra* pp. 247–48 and accompanying notes; *infra* Section III.D.

²³⁴ MADONNA, *Material Girl*, on IMMACULATE COLLECTION (Sire Records 1984); see POWERS, *supra* note 5, at 153–54 (physical tools are actually easier on the mind than electronic ones because they allow the brain to off-load some of the cognitive burden to the body); WILSON, *supra* note 224, at 286, 289; James Minogue & M. Gail Jones, *Haptics in Education: Exploring an Untapped Sensory Modality*, 76 REV. EDUC. RES. 317, 317–19 (2006); *supra* p. 276 and notes 223–25; *infra* p. 296 and accompanying notes.

²³⁵ See GALLAGHER, *supra* note 76, at 10, 67 (studies increasingly show we can cultivate deep attention through practice and discipline).

²³⁶ See MEDINA, *supra* note 67, at 74 (research spanning 100 years clearly shows that

devices are the chief source of unwanted disturbances in the classroom, we must continually weigh how well their use promotes our objectives against the distractions they cause. Sometimes this will tip in favor of using these devices, while other times we need to turn them off in favor of an alternative.

A primary rationale for using new technology in the first place has always been the assumption that it helps motivate students to learn. However, one of the largest meta-studies to date on the effectiveness of digital classroom technologies found no evidence to support that widely held belief.²³⁷ Rather, the researchers found that new technology may enhance initial student interest but that does not lead to better learning outcomes unless the teacher is also able to leverage it into more effortful work.²³⁸ This suggests that adopting a new technology solely for the purpose of better motivating students may actually be counterproductive if it is not otherwise well-suited to the particular learning objective.

B. “Should I Stay or Should I Go?”: What to Do About Laptops

Law schools began making laptops mandatory and installing wireless connections in the late 1990s as both were becoming increasingly popular outside the classroom.²³⁹ Some administrators saw the opportunity to brand their schools as “early adopters” which conferred instant status as innovators.²⁴⁰ The decision to install these technologies was also motivated by

better attentional abilities equals better learning); Megan M. McClelland et al., *Relations Between Preschool Attention Span-Persistence and Age 25 Educational Outcomes*, 28 EARLY CHILD. RES. Q. 314, 315–16 (2012) (attention span is especially relevant to doing well in school and academic attainment); Glenn, *supra* note 109 (strong attentional abilities produce stronger fluid intelligence); *infra* pp. 282–83 and accompanying notes.

²³⁷ DURHAM STUDY, *supra* note 228 at 20; see Thompson, *supra* note 54, at 20 (the assumption that technology motivates students to learn is often false because they neither love it, use it, nor are as proficient with it as many educators assume); *infra* notes 251, 266 (student surveys show they do not want technology in the classroom unless the teacher is making effective use of it).

²³⁸ DURHAM STUDY, *supra* note 228, at 4, 20; see Deborah B. McCabe & Matthew L. Meuter, *A Student View of Technology in the Classroom: Does It Enhance the Seven Principles of Good Practice in Undergraduate Education?*, 32 J. MARKETING EDUC. 149, 149, 154 (2011) (study concludes students enjoyed using many of the online tools tested but did not believe they enhanced their learning experience); Thompson, *supra* note 54, at 21 (student survey contradicts popular assumption that they demand constant use of technology in the classroom); Wang, *supra* note 54, at 640 (survey of university students found that technology is sometimes used because of teacher stereotyping rather than student demand).

²³⁹ See PALFREY & GASSER, *supra* note 23, at 237–38; Caron, *supra* note 56, at 555–56 (during the 1990s the “technology bandwagon” rolled virtually unchecked into law schools across the land).

²⁴⁰ See DeGross, *supra* note 56, at 206; *supra* pp. 250–51 and notes 39–42.

an “academic moral panic” over the supposedly changing learning styles of digital natives.²⁴¹ As the unintended consequences of these decisions came to light, it has led to more debate among law professors than any other technology issue in recent memory.²⁴²

The chief issue is whether students are misusing laptops during class in ways that interfere with their learning and what, if anything, professors should do about it. Some take a laissez-faire approach, believing that law students are adults who should make their own decisions about what they do in class.²⁴³ Others have responded by banning laptops altogether, including, ironically, the co-founder of Harvard’s Berkman Center for Internet and Society, Professor Jonathan Zittrain.²⁴⁴ Still others have invested considerable time and effort trying to figure out what exactly students are doing on their laptops before deciding on a policy.²⁴⁵ Finally, some have created laptop-free zones in an effort to accommodate each student’s preference.²⁴⁶

The variety of responses reflects the degree to which professors have earnestly struggled to find a good solution that balances all the interests involved. Nonetheless, each of these strategies has problems. Banning laptops altogether means giving up a great interactive, multimodal learning tool that lets students explore subjects on their own during class. Relying on student opinion to set classroom policy is problematic because at

241 See *supra* p. 243 and note 5; see also *supra* p. 247 and note 18.

242 A quick search in WestlawNext for articles discussing the use of laptops in law school turned up more than 100 results. Among the many, see DeGroff, *supra* note 56, at 206 (citing to several articles discussing these issues).

243 I have no cites to offer because professors who take a laissez-faire approach generally do not write articles extolling the virtues of doing nothing.

244 Tracy Jan, *Tangled in an Endless Web of Distractions*, BOSTON.COM (Apr. 24, 2011), http://www.boston.com/news/local/massachusetts/articles/2011/04/24/colleges_worry_about_always_plugged_in_students/ [<http://perma.cc/RLD6-R2K8>] (discussing Professor Zittrain’s decision to ban laptops); see Palfrey, *supra* note 7, at 108 (many Harvard law professors ban classroom laptops); see also DeGroff, *supra* note 55, at 207 (noting several top law schools, including the Universities of Chicago, Michigan, Virginia, as well as Vanderbilt, have installed mechanisms that allow professors to disable or block Internet access).

245 See Kristen E. Murray, *Let Them Use Laptops: Debunking the Assumptions Underlying the Debate over Laptops in the Classroom*, 36 OKLA. CITY L. REV. 185, 198–201 (2011); Jeff Sovern, *Law Student Laptop Use During Class for Non-class Purposes: Temptation v. Incentives*, 51 U. LOUISVILLE L. REV. 483, 484–86 (2011); see also Eric D. Ragan et al., *Unregulated Use of Laptops over Time in Large Lecture Classes*, 78 COMPUTERS & EDUC. 78, 84–85 (2014) (survey found that students who brought laptops to class engaged in off-task activities two-thirds of the time).

246 See Jana R. McCreary, *The Laptop-Free Zone*, 43 VAL. U. L. REV. 989, 997 (2009); see also Nancy M. Aguilar-Roca, *The Impact of Laptop-Free Zones on Student Performance and Attitudes in Large Lectures*, 59 COMPUTERS & EDUC. 1300, 1306 (2012) (discussing experiment with laptop free zones outside the law school context).

least one study found they dramatically underreport their off-task behavior.²⁴⁷ Students also overestimate their ability to learn while multitasking, so they might not even see it as a problem worthy of reporting.²⁴⁸ On the other hand, creating laptop-free zones may not protect non-laptop users from the distractions caused by their neighbors due to the contagion effect.²⁴⁹ It also fails to shield other laptop users who are trying to stay on task.²⁵⁰ The laissez-faire approach suffers from the same problems, but good luck convincing that guy to change.

Learning science makes the decision easy. Unless the professor is having students use their laptops as part of an in-class exercise or is otherwise actively managing their use, they should be closed or turned off. This is the only policy that strikes the right balance between the value laptops have as an

²⁴⁷ J.M. Kraushaar & David Novak, *Examining the Effects of Student Multitasking with Laptops During the Lecture*, 21 J. INFO. SYS. EDUC. 241, 248–50 (2010) (study compared student self-reporting of classroom multitasking to data gathered via spyware which showed they substantially underreported their off-task behavior); see Ravizza et al., *supra* note 115, at 112 (university students likely underreport their classroom use of wireless devices for off-task activities). In some surveys, however, students have volunteered that they use their laptops for off-task activities most of the time. See Ragan et al., *supra* note 245, at 81, 84–85. But see Miri Barak et al., *Wireless Laptops as Means for Promoting Active Learning in Large Lecture Halls*, 38 J. RES. TECH. EDUC. 245, 247–48, 251 (2006) (students enrolled in computer engineering course reported favorable experience using laptops in class for interactive exercises); Robin Kay & Sharon Lauricella, *Unstructured vs. Structured Use of Laptops in Higher Education*, 10 J. INFO. TECH. EDUC. 33, 38 (2011) (based on student self reporting, researchers found off-task use of laptops during class was less than expected).

²⁴⁸ See BROWN ET AL., *supra* note 178, at 121 (discussing the “Dunning-Kruger effect,” which is the phenomenon that recognizes unskilled students overestimate their abilities); Fang-Yi Flora Wei et al., *An Experimental Study of Online Chatting and Notetaking Techniques on College Students’ Cognitive Learning from a Lecture*, 34 COMPUTERS HUM. BEHAV. 148, 149 (2014) (college students do not believe multitasking interferes with learning); Ravizza et al., *supra* note 115, at 113 (and studies cited therein); Glenn, *supra* note 109 (students who multitask labor under the “illusion of competence” that they are performing well); *infra* p. 284 and note 262.

²⁴⁹ See Faria Sana et al., *Laptop Multitasking Hinders Classroom Learning for Both Users and Nearby Peers*, 62 COMPUTERS & EDUC. 24, 29 (2012) (students seated in view of multitasking peers had impaired comprehension); Emily Gasper et al., *Student Laptop Use in the Classroom and Its Impact on Student Learning* (May 6, 2013) (unpublished senior thesis, Ithaca State University) (on file with author) (student authored survey found that university students were disrupted during class due to the laptop contagion effect); Clay Shirky, *Why Clay Shirky Banned Laptops, Tablets and Phones from His Classroom*, MEDIASHIFT (Sept. 15, 2014), <http://www.pbs.org/mediashift/2014/09/why-clay-shirky-banned-laptops-tablets-and-phones-from-his-classroom/> [<http://perma.cc/6ZXD-87M6>]; see also Matt Richtel, *Attached to Technology and Paying a Price*, N.Y. TIMES (June 6, 2010) <http://www.nytimes.com/2010/06/07/technology/07brain.html?pagewanted=all> [<http://perma.cc/5MAZ-R6R6>] (Professor Shirky refers to this as the “second hand smoke” problem and is another reason why he decided to ban laptops). But see Aguilar-Roca, *supra* note 246, at 1306 (study found that students sitting in a no-laptop zone were not disturbed by laptop users though “spreading effect” did increase distraction among laptop users).

²⁵⁰ See Aguilar-Roca, *supra* note 246, at 1306; Sana et al., *supra* note 249, at 29.

interactive learning tool and our evolutionary programming, which makes it nearly impossible for the caveman brain to resist the distractions they cause.²⁵¹ This is especially true given that many wireless devices and websites are designed to distract users with a barrage of instant notifications, pop-ups, and links tailored to each user's personal interests.²⁵² Due to the contagion effect, it only takes a few students to succumb to the siren call of Facebook or online shopping to cause a distraction that interferes with the learning of many others.²⁵³

The relationship between the ability to pay attention and success in school is well established, as is the one between distractions caused by wireless devices and negative learning outcomes.²⁵⁴ One study tried to quantify the effect by finding that college students who multitask during class could expect their

251 Palfrey, *supra* note 7, at 109 (best practices for classroom technology use in law school means knowing when *not* to use it); see PALFREY AND GASSER, *supra* note 23, at 246 (surveys of digital natives show they prefer a moderate amount of technology use in the classroom); Kay & Lauricella, *supra* note 247, at 38 (structured use of laptops during class resulted in significantly more on-task behaviors than unstructured use); Ragan et al., *supra* note 245, at 81 (survey found that many students do not see significant value in bringing laptops to class unless the teacher makes active use of them); Shirky, *supra* note 249.

252 See Ragan et al., *supra* note 245, at 78, 85 (study conducted in large introductory college course found students used laptops for off-task activities approximately two-thirds of the time; on-task exploration of subject matter was "rare"); Shirky, *supra* note 249.

253 See *supra* note 249.

254 See GALLAGHER, *supra* note 76, at 146, 151–55; Aguilar-Roca, *supra* note 246 at 1304, 1306 (students who multitasked in class had "significantly" fewer A's than non-laptop users, even though the former group's SAT scores predicted they would outperform the non-laptop users); Flora Wei et al., *supra* note 248, at 149, 155 (multitasking during class had negative effect on quality of students' class notes); Carrie B. Fried, *In-Class Laptop Use and Its Effects on Student Learning*, 50 COMPUTER & EDUC. 906, 911 (2008) (finding correlation between in-class laptop use by college students and lower test scores); Reynol Junco & Sheila R. Cotton, *The Relationship Between Multitasking and Academic Performance*, 59 COMPUTERS & EDUC. 505, 512–13 (2012) (frequency of multitasking correlated with drop in college GPA); Lee et al., *supra* note 108, at 96–97 (noting several studies showing a negative correlation between multitasking during class and poor learning outcomes due to the strain it placed on working memory's ability to process information); Ravizza et al., *supra* note 115, at 112–13 (there is a significant association between classroom Internet use and poor test performance, which may have a greater adverse effect on the best students); Sana et al., *supra* note 249, at 30 (multitasking during class impaired complex learning of university students as well as "simple factual learning"); Maryellen Weimer, *Students Think They Can Multitask. Here's Proof They Can't*, FACULTY FOCUS (Sept. 26, 2012), <http://www.facultyfocus.com/articles/teaching-professor-blog/multitasking-confronting-students-with-the-facts/> [<http://perma.cc/3L89-DPEP>] (describing several empirical studies showing negative effect of multitasking on learning); see Ophir et al., *supra* note 113, at 15585 (the Ophir & Nass study is widely cited for the proposition that heavy multitaskers test poorly on several cognitive functions related to learning). *But see* Helene Hembrooke & Geri Gay, *The Laptop and the Lecture: The Effects of Multitasking in Learning Environments*, 15 J. COMPUTING HIGHER EDUC. 46, 59 (2003) (while multitasking had negative effect on student memory based on traditional testing, it did not impair their overall class performance).

grades to plummet from a “B” to a “D.”²⁵⁵ More eye-popping than that is a recent large-scale study by researchers at Carnegie Mellon who found a “strong” correlation over a four-year period between a high school’s broadband usage and declining student test scores.²⁵⁶ They also found that merely blocking a school’s access to YouTube caused grades to go up.²⁵⁷ And cognitive load theory tells us that multitasking may have an especially deleterious effect on students who are trying to learn new things in particular because of the heavy burden it places on working memory’s limited processing capabilities.²⁵⁸

Those defending classroom laptops argue that technology is not the problem; rather it is boring professors. If students are misusing laptops in class, the argument goes, it is no different than the off-task behaviors of a bygone era when bored students passed notes, read the newspaper, or stared out the window. The solution is not to ban technology but to better engage students. Part II exposes the fallacy of this argument since the caveman brain is programmed for distractibility and novelty-seeking, which the tech designers fully exploit.

No teacher, no matter how interesting, can simultaneously fight the Darwinian survival imperative served by a distracted brain *and* the evil minions of Silicon Valley.²⁵⁹ And even if you were “*the most interesting man in the world*,” it would not help, according to a new study that found distractions interfering with “high interest” lectures have a *greater adverse effect* on learning than those interfering with “low interest” ones.²⁶⁰ It is because

²⁵⁵ See Amanda C. Gingerich & Tara T. Lineweaver, *OMG! Texting in Class = U Fail* : (Empirical Evidence that Text Messaging During Class Disrupts Comprehension, 41 TCHR. PSYCHOL. 44, 49 (2014).

²⁵⁶ See Rodrigo Belo et al., *Broadband in School: Impact on Student Performance*, 60 MGMT. SCI. 265, 266, 274 (Feb. 2014) (four-year study of ninth grade students in large Portuguese school district found “robust” evidence of correlation between increase in broadband use and a negative effect on student grades regardless of gender and subject matter). The researchers chose ninth graders to study because that is the final year of compulsory schooling in Portugal. *Id.*

²⁵⁷ *Id.* at 266, 277–78; see also *Mobile Phone Bans Improve School Exam Results*, BBC NEWS (May 17, 2015), <http://www.bbc.com/news/education-32771253> [<http://perma.cc/UP5P-6KDR>] (study of four U.K. secondary school systems published by the London School of Economics found test scores increased an average of 6% following a cellphone ban, with low achieving students gaining the most).

²⁵⁸ See Lee et al., *supra* note 108, at 95–97, 101 (learning new tasks places an additional cognitive load on working memory and, thus, extraneous distractions that consume limited processing capacity can, and do, interfere with learning).

²⁵⁹ In an interview with the *Boston Globe*, Harvard Law Professor Zittrain described himself as an “entertaining teacher,” yet conceded that he could never compete with the Internet in holding student attention. See Jan, *supra* note 244.

²⁶⁰ See Natasha Gupta & Julie D. Irwin, *The Role of Facebook and Primary Learning Task*, COMPUTERS HUM. BEHAV. (2014), <http://www.sciencedirect.com/science/article/pii/>

the former diverts a greater quantum of each student's limited attentional capacity away from learning.²⁶¹ Students also overestimate their ability to learn while multitasking so they see no reason to curb their own behavior, meaning we must do it for them.²⁶²

Putting laptops in the classroom yet failing to manage their use is tantamount to creating an attractive nuisance that can negatively affect every student's learning.²⁶³ It is why, after allowing laptops for nearly two decades, Internet scholar Professor Clay Shirky of NYU recently decided to ban them, concluding "humans are incapable of ignoring" the distractions they cause.²⁶⁴ And it is why former Harvard Law Professor and author of *Born Digital* John Palfrey says that "best practices" for classroom technology use in law school is about knowing when to turn it off.²⁶⁵

The reason for putting laptops in the classroom in the first place was the belief they helped inculcate students into the expectations of law practice. That made sense back in the 1990s when everyone wore flannel and Ally McBeal was still on TV. But by now wireless devices have become so ubiquitous that the rationale no longer applies. In fact, because of their ubiquity, the more pressing need today is to teach students the importance of managing their technology use so they can learn to work better and smarter.²⁶⁶ Thinking like a lawyer will always require the

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"The Most Interesting Man in the World" refers to the long-running advertising campaign by Dos Equis beer in which an actor appears in a series of outrageous vignettes that always end with the tagline: "I don't always drink beer. But when I do, I prefer Dos Equis. Stay thirsty, my friends." *The Most Interesting Man in the World*, WIKIPEDIA, http://en.wikipedia.org/wiki/The_Most_Interesting_Man_in_the_World [http://perma.cc/C S34-JHLL].

²⁶¹ Gupta & Irwin, *supra* note 260; see GALLAGHER, *supra* note 76, at 9 (paying attention means spending one's limited cognitive currency, so it should be spent wisely).

²⁶² See BROWN ET AL., *supra* note 178, at 121 (discussing "Dunning-Kruger effect"); LEVITIN, *supra* note 113, at 306 (cognitive illusion, fueled by a dopamine-adrenaline feedback loop, makes multitaskers think they are doing much better than they really are); Ravizza et al., *supra* note 115, at 112; *supra*, p. 281 and note 248. Significantly, some research suggests that multitasking may have a greater adverse effect on the best students. See Ravizza et al., *supra* note 115, at 113.

²⁶³ See *supra* notes 249–50.

²⁶⁴ Shirky, *supra* note 249 (Stanford Professor Cliff Nass, an expert on human-computer interaction, has said that Internet distractions are like catnip that users cannot ignore).

²⁶⁵ See Palfrey, *supra* note 7, at 108.

²⁶⁶ See Jones & Shao, *supra* note 4, at 26 (survey of college students finds they want teachers to make only moderate use of technology); Kay & Lauricella, *supra* note 247, at 38 (research shows students want teachers to make structured use of laptops during class); Bernand McCoy, *Digital Distractions in the Classroom: Student Classroom Use of Digital Devices for Non-class Related Purposes*, 4 J. MEDIA EDUC. 5, 10 (2013) (majority of

ability to shut out distractions and focus on the task at hand.²⁶⁷ If constant exposure to digital technologies is undermining our students' ability to do that, as many believe, we should create more opportunities for them to practice these vital skills, not less.²⁶⁸

Recognizing this, some law professors have proposed that schools offer meditation and mindfulness training to counterbalance the negative effects of too much technology use.²⁶⁹ While these proposals are beyond the scope of this Article, suffice it to say that it is incumbent upon everyone, professors included, to develop strategies for maintaining a more balanced digital diet. When it comes to our students, a good place to start is by modeling that for them in the classroom.

C. Death by PowerPoint and Other Visual Crimes

One of the most popular assumptions about digital natives is that they are primarily visual learners who learn best with technologies like PowerPoint. That learning science confirms we are indeed highly visual creatures by design, and everyone already knows a picture is worth a thousand words, only reinforces the intuitive appeal of these beliefs.²⁷⁰ On the other hand, even if learning styles existed, learning science tells us

college students polled at six universities said they favor teacher-imposed limitations on laptop use).

²⁶⁷ See POWERS, *supra* note 5, at 76–77 (Google's CEO tells college students "turn off your computers" and "just disconnect" because it is not healthy to be plugged in all the time); Simon Baron-Cohen, *A Thousand Hours a Year*, in *IS THE INTERNET CHANGING THE WAY YOU THINK?*, *supra* note 3, at 173, 174 (persistent, frequent email threatens our capacity for real work—we need to restrict it to certain times of the day).

²⁶⁸ See GALLAGHER, *supra* note 76, at 10, 67 (mastering "focus" is a skill which, like any other, takes effort and practice to develop); POWERS, *supra* note 5, at 102 (in an always-connected world, the need to unplug and recharge is more urgent than ever); Baron-Cohen, *supra* note 267, at 174; Palfrey, *supra* note 7, at 114 (we must teach students to *unlearn* unproductive behaviors resulting from excessive technology use).

²⁶⁹ See R. Lisle Baker & Daniel P. Brown, *On Engagement: Learning to Pay Attention*, 36 U. ARK. LITTLE ROCK L. REV. 337, 357–58 (2014); Shailini Jandial George, *The Cure for the Distracted Mind: Why Law Schools Should Teach Mindfulness*, 53 DUQ. L. REV. 215, 217–20 (2015); Lauren A. Newell, *Redefining Attention (and Revamping the Legal Profession?) for the Digital Generation*, 15 NEV. L.J. 754, 793 (2015); see also GALLAGHER, *supra* note 76, at 73–74 ("focusing workouts" can, like meditation, increase the ability to focus); POWERS, *supra* note 5, at 219 (stating that forward thinking educators should develop quiet zones in school); Matt Richtel, *Silicon Valley Says Step Away from the Device*, N.Y. TIMES (July 23, 2012), <http://www.nytimes.com/2012/07/24/technology/silicon-valley-worries-about-addiction-to-devices.html> [<http://perma.cc/G6MM-FA5N>] (many Silicon Valley companies encourage employees to log-off; Google has even started a mindfulness program to help employees improve focus).

²⁷⁰ See CAREY, *supra* note 7, at 34; MEDINA, *supra* note 67, at 233 (stating that the more pictorial the sensory input, the more likely it will be remembered and recalled); *supra* pp. 275–76 and accompanying notes.

that we should pick methods and tools based on their compatibility with our classroom objectives, not what is most familiar or popular with students.²⁷¹ The subject matter we teach is complex and often does not lend itself to easy explanations, pictures, or bullet points.²⁷² If we sacrifice complexity and nuance for the sake of fitting the material onto a slide, we risk enabling lazy System 1 thinking instead of helping students build the intellectual muscles needed for System 2.

Critics of visual technologies like Professor Edward Tufte of Yale, a leading scholar on visual literacy, argue that PowerPoint undermines analytical thinking for these very reasons.²⁷³ Others argue that “PowerPoint is quintessentially designed for one-off,” shallow reading rather than deep engagement.²⁷⁴ Sure, students can download and study the slides later, but how many really do, and can a slide engage students like print, which they can attack with pen and highlighter in hand?²⁷⁵ There is also the temptation

271 See BROWN, ET AL., *supra* note 178, at 131–32 (stating that even if learning styles existed and students were indeed visual learners, to be effective teachers must still match instructional methods with their learning objectives); *supra* p. 274 and notes 205–08.

272 See April Savoy et al., *Information Retention from PowerPoint and Traditional Lectures*, 52 COMPUTERS & EDUC. 858, 866 (2009) (concluding that although students said they preferred PowerPoint, test results showed a lecture is the best method when information is more amenable to dialogue or explanation).

273 EDWARD R. TUFT, *THE COGNITIVE STYLE OF POWERPOINT* 4–6, 13, 26 (2003). The New York Times called Professor Tufte the “da Vinci of data.” Deborah Shapley, *The da Vinci of Data*, N.Y. TIMES (Mar. 30, 1998), <http://www.nytimes.com/1998/03/30/business/the-da-vinci-of-data.html> [<http://perma.cc/XYM7-NAV2>]; see MOROZOV, *supra* note 196, at 248 (stating that PowerPoint feeds the demand for clarity which is about “getting to the point,” but appeasing this demand sends the wrong message to students—that complex ideas can and should be crammed into bullet points); Delese Wear, *Perspective: A Perfect Storm: The Convergence of Bullet Points, Competencies, and Screen Reading in Medical Education*, 84 ACAD. MED. 1500, 1503 (2009) (postulating that the overuse of PowerPoint in medical school discourages the give and take between teacher and student by condensing knowledge and skills, “hiding nuances and complexities, simplifying relationships and flattening reflection”); Edward Tufte, *PowerPoint is Evil*, WIRED (Sept. 1, 2003, 12:00 PM), <http://archive.wired.com/wired/archive/11.09/ppt2.html> [<http://perma.cc/UVQ4-XF8L>]; Maryellen Weimer, *Does PowerPoint Help or Hinder Learning?*, FACULTY FOCUS (Aug. 1, 2012), <http://www.facultyfocus.com/articles/teaching-professor-blog/does-powerpoint-help-or-hinder-learning/> [<http://perma.cc/2F69-5TF5>] (arguing that PowerPoint oversimplifies material and encourages passivity in students).

274 See NAOMI S. BARON, *WORDS ON SCREEN: THE FATE OF READING IN A DIGITAL WORLD* 99 (2015); Ruth H. Moody & Michael Bobic, *Teaching the Net Generation Without Leaving the Rest of Us Behind: How Technology in the Classroom Influences Student Composition*, 39 POL. & POL’Y 169, 182–83 (2011) (researchers have known for decades that visual modalities do not engage students as deeply with respect to higher ordered thinking because visual stimuli do not work on the parts of the brain needed for the kind of thinking college professors expect); Wear, *supra* note 273, at 1501–03.

275 See BARON, *supra* note 274, at 99; Rim M. El Khoury & Dorine M. Mattar, *PowerPoint in Accounting Classrooms: Constructive or Destructive?*, 3 INT. J. BUS. & SOC. SCI. (SPECIAL ISSUE) 242 (2012) (discussing a survey that found many students are less likely to be engaged in class if they know they can download the PowerPoint slides later); Moody & Bobic, *supra* note 274, at 182–83; Daniel Sewasew et al., *A Comparative Study*

to overuse these tools to meet the expectations of students who may have grown accustomed to them as undergraduates.²⁷⁶

With those important caveats in mind, pictures can in fact be very effective teaching tools precisely because the brain is so visually oriented.²⁷⁷ But we need a strategy for deciding whether they are the best ones for the job to avoid the aforementioned risks.²⁷⁸ The best place to start is by asking whether a visual can adequately communicate the material in all its complexity and nuance compared to the alternatives. Related to that, we should ask whether a visual modality promotes the effortful engagement required by System 2 thinking rather than reinforcing facile caveman thinking.²⁷⁹ Remember too that pictures are often ambiguous, which is why they need captions, so we need to consider whether the ones we plan to use communicate the ideas with precision and clarity.²⁸⁰

To take an example from my own teaching, I use a visual to explain to my 1Ls the concept of inferential thinking because I believe it works better than the alternatives. I show students a picture of footprints in the sand and then ask whether we can all agree that someone was recently walking there, even though we never saw them nor do we have any eyewitnesses to ask. They instantly “get it” because the visual explains the idea more succinctly and clearly than I can with words.

In perhaps the definitive article on using PowerPoint in law school, Professor Deborah J. Merritt describes a torts class in which she teaches battery by showing students a picture of one child kicking another to illustrate the facts of *Vosburg v. Putney*.²⁸¹ She explains that a well-chosen visual embodying all elements of a claim can work as a chunking technique to help

on *PowerPoint Presentation and Traditional Lecture Method in Material Understandability, Effectiveness and Attitude*, 10 EDUC. RES. & REV. 234, 241–42 (2015) (noting a survey of foreign university students which found that the majority believe they learn less with PowerPoint compared to lectures).

²⁷⁶ See Wear, *supra* note 273, at 1501 (busy faculty are seduced by technology that offers an easy default to construct their lectures, but it is a format that does not easily encourage the give and take necessary to grapple with challenging material).

²⁷⁷ See MEDINA, *supra* note 67, at 233; *supra* note 270.

²⁷⁸ See Emerling, *supra* note 9 (unlike American educators, the Japanese take a meticulous, studied approach to deciding whether digital technology or the traditional chalkboard better serves the classroom goal).

²⁷⁹ See *supra* pp. 270–72 and accompanying notes.

²⁸⁰ See PINKER, *supra* note 10, at 297–98; Savoy, *supra* note 272, at 866 (concluding that dialogue and explanation are often better than pictures when teaching certain subjects).

²⁸¹ *Vosburg v. Putney*, 50 N.W. 403, 403 (Wis. 1891); see Deborah J. Merritt, *Legal Education in the Age of Cognitive Science and Advanced Classroom Technology*, 14 B.U. J. SCI. & TECH. L. 39, 52–53 (2008).

students process a larger volume of information that might otherwise overwhelm working memory.²⁸² An added benefit is that a visual can provide a vivid, memorable reference point to anchor further class discussion about any of the issues later in the semester.²⁸³

Assuming a visual is compatible with the teacher's objectives, the next step is to pick images that are both memorable and meaningful. The importance of using memorable visuals is obvious enough, but they should also be meaningful insofar as they serve as a familiar reference point for students.²⁸⁴ This will help students connect the material to their existing schemas.²⁸⁵ Thus, meaningful images can deepen understanding while those that merely grab attention may be counterproductive if they overshadow the underlying point.²⁸⁶

Next, designing good visuals is about keeping them simple.²⁸⁷ PowerPoint comes with lots of special effects like sounds and animation that can liven up a slideshow while also turning it into a multimodal learning tool.²⁸⁸ However, students say they get distracted by special effects unrelated to the content of the slides.²⁸⁹ And using too many special effects may also overwhelm working memory such that the underlying point is lost.²⁹⁰

282 See Merritt, *supra* note 281, at 51–52; *supra* pp. 259–60 and notes 110–12.

283 Merritt, *supra* note 281, at 53; see also CAREY, *supra* note 7, at 34 (stating that the human brain's recall for images is strong).

284 Merritt, *supra* note 281, at 50; see also CAREY, *supra* note 7, at 34; KAHNEMAN, *supra* note 71, at 322–23 (because the brain is so visually oriented, it makes images highly accessible); MEDINA, *supra* note 67, at 114.

285 Merritt, *supra* note 281, at 50; see also MEDINA, *supra* note 67, at 114–15; *supra* p. 255 and note 72; *supra* pp. 258–59 and accompanying notes.

286 Merritt, *supra* note 281, at 56–57; see also Ruth Colvin Clark & Richard E. Mayer, *Using Rich Media Wisely*, in TRENDS AND ISSUES IN INSTRUCTIONAL DESIGN AND TECHNOLOGY 311, 319 (Robert A. Reiser & John V. Dempsey eds., 2d ed. 2006) (citing research that interest-grabbing features in textbooks do more harm than good because students may remember those features yet fail to learn the material); Richard E. Mayer & Roxana Moreno, *A Split-Attention Effect in Multimedia Learning: Evidence for Dual Processing Systems in Working Memory*, 90 J. EDUC. PSYCHOL. 312, 312, 315–16 (1998).

287 Merritt, *supra* note 281, at 56; see also Jean-Luc Doumont, *The Cognitive Style of PowerPoint: Slides Are Not All Evil*, 52 TECH. COMM. 64, 68 (2005) (PowerPoint slides are often ineffective because they contain unnecessary clip art, sounds, colors, and other “noninformation” that is unrelated to the content).

288 See Merritt, *supra* note 281, at 47 (denoting several experiments that show students who simultaneously process information through visual and auditory channels learn better than those who process it only visually); *supra* p. 259 and note 102.

289 See Jennifer M. Apperson et al., *An Assessment of Student Preferences for PowerPoint Presentation Structure in Undergraduate Courses*, 50 COMPUTERS & EDUC. 148, 153 (2008) (citing a survey of college students that found they like sound effects when congruent with slide content but otherwise found them distracting).

290 Merritt, *supra* note 281, at 56; see Apperson et al., *supra* note 289, at 153; Doumont, *supra* note 287, at 68.

Keeping things simple also means minimizing text as it defeats the purpose of using visuals in the first place.²⁹¹ If it takes a lot of words to communicate the point, perhaps the whiteboard, lecture, or handout is a better alternative.²⁹² Similar to using too many special effects, research suggests that slides containing too much text can interfere with working memory because students tend to read the words to themselves while listening to the professor's explanation.²⁹³ Professor Merritt explains this can focus the brain on comparing the two narratives, which may overwhelm working memory and disrupt learning.²⁹⁴

Text-heavy slides can also undermine critical thinking skills for reasons alluded to by the critics.²⁹⁵ A key part of training students to "think like a lawyer" is helping them see complexity where others do not.²⁹⁶ Good lawyers take what at first seems like a straightforward legal issue and peel away the layers to expose additional issues and nuance. Reducing class material to a set of pithy bullet points by word and deed contradicts this vital lesson.²⁹⁷

Finally, keep in mind there are good reasons for the euphemism "death by PowerPoint." Standing behind the podium while clicking through slides that students can ignore for now

²⁹¹ See MEDINA, *supra* note 67, at 234, 238–39 (visuals work because they have cognitive processing advantages over text, so if you are going to use PowerPoint, burn your old slides and start over by substituting pictures for words); Doumont, *supra* note 287, at 68; Merritt, *supra* note 281, at 52; cf. Apperson, *supra* note 289, at 152 (noting that undergraduate students said they "strongly prefer" the teacher to use "key phrases" in their slides).

²⁹² Merritt, *supra* note 281, at 55; see *infra* p. 290 and notes 302–04.

²⁹³ See Merritt, *supra* note 281, at 57–58; Doumont, *supra* note 289, at 68; Slava Kalyuga et al., *When Redundant On-Screen Text in Multimedia Technical Instruction Can Interfere with Learning*, 46 HUM. FACTORS 567, 576–78 (2004) (finding that students who read description while listening to the teacher's explanation found it more challenging than students who simply listened); Savoy et al., *supra* note 272, at 866.

²⁹⁴ Merritt, *supra* note 281, at 47, 57–58; see also Richard E. Mayer, *Cognitive Theory of Multimedia Learning*, in THE CAMBRIDGE HANDBOOK OF MULTIMEDIA LEARNING 31, 46, 47 (Richard E. Mayer ed., 2005); Kalyuga, *supra* note 293, at 576–78; Savoy, *supra* note 272, at 866 (stating that teachers should avoid explaining material while showing PowerPoint slides because it can interfere with learning information that is best communicated through "dialogue or verbal explanation"); Doumont, *supra* note 287, at 68.

²⁹⁵ See TUFTE, *supra* note 273, at 4–6, 13, 26; El Khoury & Mattar, *supra* note 275, at 242, 254; Wear, *supra* note 273, at 1501, 1503.

²⁹⁶ See MOROZOV, *supra* note 196, at 248–49 (arguing that any learning enterprise that begins with the assumption that "ideas" have a "bottom line" does not turn out talented, creative thinkers).

²⁹⁷ See *id.* at 248 (clarity as a pedagogical goal is overemphasized; the demand for it by students should not come at the expense of helping them appreciate the complexity of ideas); Wear, *supra* note 273, at 1503 (stating that a medical school professor worries that overuse of PowerPoint eliminates complexity and nuance from the classroom).

and download later packs all the dynamism of watching paint dry.²⁹⁸ In fact, it can put bleary-eyed law students to sleep.²⁹⁹ Professor Merritt points out that when the lights are down low and all eyes are focused on the screen, student-teacher interaction grinds to a halt.³⁰⁰ Not surprisingly, some college students say PowerPoint turns them into passive observers who are less likely to interrupt the teacher to ask questions.³⁰¹

For all these reasons, never overlook the whiteboard as a better alternative. Just as PowerPoint can feel scripted and stiff, using the whiteboard more closely follows the natural rhythm of a conversation between teacher and students. A “chalk-talk” is also a multimodal learning experience because even watching physical activity like a teacher writing on the board is processed by the brain differently than looking at slides.³⁰² The former creates motor memories in addition to visual ones, which experts say may enhance retention and recall.³⁰³ It is consistent with surveys finding that students learn better and are more engaged watching a “chalk-talk” than PowerPoint.³⁰⁴ If nothing else, using

298 See El Khoury & Mattar, *supra* note 275, at 242 (noting surveys that find students are less likely to take notes, and more likely to skip class, if they know they can review slides later).

299 See *id.* (PowerPoint can make students sleepy due to the need to dim the lights to view it); see also Sewasew et al., *supra* note 275, at 239.

300 Merritt, *supra* note 281, at 58; see also Douglas L. Leslie, *How Not to Teach Contracts, and Any Other Course: PowerPoint, Laptops, and the Casefile Method*, 44 ST. LOUIS U. L.J. 1289, 1304 (2000) (noting that laptops and PowerPoint destroy teacher-student interaction); Maxwell, *supra* note 60, at 4 (classroom laptops in law school interfere with teacher-student interaction and rapport); El Khoury & Mattar, *supra* note 275, at 242; Sewasew et al., *supra* note 275, at 235. *But see* Apperson, *supra* note 289, at 153 (college students said they like the teacher to dim the lights because they can see the slides better).

301 El Khoury & Mattar, *supra* note 275, at 242; see also Emerling, *supra* note 9 (in tech-obsessed Japan, teachers often favor traditional chalkboards over visual aids because research shows it to be a modality that is better suited to certain subject matter, like math).

302 See Anne Mangen & Jean-Luc Velay, *Digitizing Literacy: Reflections on the Haptics of Writing*, in ADVANCES IN HAPTICS 385, 390, 394 (Mehrdad Hosseini Zadeh ed., 2010) [hereinafter Mangen & Velay, *Digitizing Literacy*]; Trond Egil Toft, *Better Learning Through Handwriting*, SCIENCE DAILY (Jan. 24, 2011), <http://www.sciencedaily.com/releases/2011/01/110119095458.htm> [<https://perma.cc/6D3Y-CST3?type=image>] (research shows merely watching physical activity lights up areas of the brain associated with sensorimotor functions, meaning the information is processed as both visual and physical sensory data leaving both kinds of memories).

303 See Mangen & Velay, *Digitizing Literacy*, *supra* note 302, at 394; Toft, *supra* note 302.

304 See El Khoury & Mattar, *supra* note 275, at 254 (citing a survey of foreign university students); Nozar Hashemzadeh & Loretta Wilson, *Teaching with the Lights out: What Do We Really Know About the Impact of Technology Intensive Instruction?*, 41 C. STUDENT J. 601, 608, 611 (2007) (analyzing a survey of U.S. college students); Sewasew et al., *supra* note 275, at 241 (noting that foreign university students say a chalk-talk has greater immediacy than looking at the screen in a darkened room); Krishna T. Vamshi et

the whiteboard also creates an incentive for students to pay attention and take good notes because unlike PowerPoint, what the teacher writes and says cannot be downloaded later.³⁰⁵

D. The King is Dead, Long Live the King: Books and Screens

Teaching students critical reading skills has always been a central goal of a legal education. Due to the falling credentials of entering law students because of the sharp drop in applications, along with a four-decade decline in national reading scores, this task has become even more challenging.³⁰⁶ The only technology issue this raises is whether to emphasize screens, print, or a combination of the two. The term “digital native” suggests this is a nonstarter since today’s students supposedly only read electronic media and consider print an antiquated format they won’t go near. Like other assumptions about digital natives, this may be more cliché than fact.

Numerous polls of university students find that the majority still prefers print for schoolwork believing it helps them learn better.³⁰⁷ Even surveys of tech-savvy teens show that some like

al., *Comparative Study on the Teaching Effectiveness of Chalk & Talk and Microsoft PowerPoint Presentation from the Student Perspective*, INT’L J. PHARMACY & PHARMACEUTICAL SCI., Jan.–Mar. 2011, at 191, 192 (containing a survey of foreign university students); see also Emerling, *supra* note 9.

305 See El Khoury & Mattar, *supra* note 275, at 242; *supra* p. 289 and note 297.

306 See Silver, *supra* note 11, at 387–89; Lyndsey Layton & Emma Brown, *SAT Reading Scores Hit a Record Four-Decade Low*, WASH. POST (Sept. 24, 2012), http://www.washingtonpost.com/local/education/sat-reading-scores-hit-a-four-decade-low/2012/09/24/7ec9c1e-0643-11e2-aff-d6c7f20a83bf_story.html [<http://perma.cc/ZK5N-L54Z>].

307 See BARON, *supra* note 274, at 80, 83, 171, 214 (stating that students “overwhelmingly” prefer traditional books for pleasure reading except for the news, which they read online); Sung Woo Ji et al., *Print vs. Electronic Readings in College Courses: Cost-Efficiency and Perceived Learning*, 21 INTERNET & HIGHER EDUC. 17, 22–23 (2014) (finding that college students prefer free electronic readings due to cost but vast majority say they study more and learn better with print); Diane Mizrahi, *Undergraduates’ Academic Reading Format Preferences and Behaviors*, 41 J. ACAD. LIBRARIANSHIP 301, 310 (2015) (containing a survey of UCLA undergrads which found they overwhelmingly prefer print for deep reading); M. Julie Tanner, *Digital vs. Print: Reading Comprehension and the Future of the Book*, 4 SCH. STUDENT RES. J., no. 2, 2014, at 1, 4 (claiming that digital natives report in survey after survey they prefer print for school work); William D. Woody et al., *E-Books or Textbooks: Students Prefer Textbooks*, 55 COMPUTERS & EDUC. 945, 947 (2010) (finding that tech savvy college students prefer print to e-text even though they are comfortable with and used to an electronic medium); Angela Chen, *Students Find E-Textbooks ‘Clumsy’ and Don’t Use Their Interactive Features*, CHRON. HIGHER EDUC. (Aug. 22, 2012), <http://chronicle.com/blogs/wiredcampus/students-find-e-textbooks-clumsy-and-dont-use-their-interactive-features/39082> [<http://perma.cc/HME8-SAWW>] (students polled at several universities said they like the cheaper cost of e-textbooks but prefer print for academic work); Ferris Jabr, *The Reading Brain in the Digital Age: The Science of Paper Versus Screen*, SCI. AM. (Apr. 11, 2013), <http://www.scientificamerican.com/article/reading-paper-screens/> [<http://perma.cc/J2LP-LRLL>]; Teri Tan, *College Students Still Prefer Print Textbooks*, PUBLISHERS WEEKLY (July 8, 2014), <http://www.publishersweekly.com/pw/by-topic/digital/>

print more than their parents.³⁰⁸ Only a short time ago it seemed certain e-books would do to print what the mp3 did to the music industry, yet sales have already plateaued or even declined, some sources believe.³⁰⁹ Technology stars like Bill Gates prefer print for deep reading, and Steve Jobs refused to let his own children use an iPad to read.³¹⁰ Silicon Valley top executives send their kids to a private school where print is king and computers are banned.³¹¹ And many people who read and think for a living, like

content-and-e-books/article/63225-college-students-prefer-a-mix-of-print-and-digital-text-books.html [http://perma.cc/VBC5-DNJZ]; Jeffery R. Young, *Students Remain Reluctant to Try E-Textbooks, Survey Finds*, CHRON. HIGHER EDUC. (Oct. 26, 2010), <http://chronicle.com/blogs/wiredcampus/students-remain-reluctant-to-try-e-textbooks-survey-finds/27866> [http://perma.cc/U9DX-L6CS] (vast majority of college students prefer print to e-books based on nationwide survey by National Association of College Stores); Mikayla Nicole Byars, *Printed Books Versus Digital Books* (June 2015) (unpublished senior thesis, California Polytechnic State University, San Luis Obispo), <http://digitalcommons.calpoly.edu/cgi/viewcontent.cgi?article=1147&context=grcsp> [http://perma.cc/LH M5-HEE6] (containing a survey of Cal Poly students which found 70% of students preferred print for classwork and over 80% preferred it for pleasure reading). *But see* Edward W. Walton, *Why Undergraduate Students Choose to Use E-books*, 46 J. LIBRARIANSHIP & INFO SCI. 263, 267 (2014) (containing a survey of undergraduate students that found “[s]tudents’ use of e-books was positively related to leisure reading and conducting research”).

³⁰⁸ *Don’t Judge a Book by Its Cover: Tech-Savvy Teens Remain Fans of Print Books*, NIELSEN (Dec. 9, 2014), <http://www.nielsen.com/us/en/insights/news/2014/dont-judge-a-book-by-its-cover-tech-savvy-teens-remain-fans-of-print-books.html> [http://perma.cc/Z7Q N-E7AF]; *see* Charlotte Eyre, *Nearly Three Quarters of Young People Prefer Print*, BOOKSELLER (Sept. 25, 2014), <http://www.thebookseller.com/news/nearly-three-quarters-young-people-prefer-print> [http://perma.cc/B23B-T5V2] (survey of sixteen to twenty-four year old British youths find 73% prefer print to e-books). *But see* Åse Kristine Tveit & Anne Mangen, *A Joker in the Class: Teenage Readers’ Attitudes and Preferences to Reading on Different Devices*, 36 LIBR. & INFO. SCI. RES. 179, 182–83 (2014) (stating that tenth grade Norwegian students who are not “devoted readers” prefer e-books).

³⁰⁹ *See* BARON, *supra* note 274, at 191–92 (stating that although e-book sales figures are a well-kept trade secret, the author estimates they comprise approximately 20% of the total book market and may have already peaked); Tanner, *supra* note 307, at 1; *BookStats: Ebooks Flat in 2013*, DIGITALBOOKWORLD (June 26, 2014), <http://www.digitalbookworld.com/2014/bookstats-ebooks-flat-in-2013/> [http://perma.cc/VV6 Y-6WVJ]; Andrew Trotman, *Kindle Sales Have ‘Disappeared,’ Says UK’s Largest Book Retailer*, THE TELEGRAPH (Jan. 6, 2015), <http://www.telegraph.co.uk/finance/newsbysector/retailandconsumer/11328570/Kindle-sales-have-disappeared-says-UKs-largest-book-retailer.html> [http://perma.cc/87NE-T5T3].

³¹⁰ *See* Robert Darnton, *THE CASE FOR BOOKS: PAST, PRESENT, AND FUTURE* 69 (2009) (Bill Gates states screens are “vastly inferior” to print); Nick Bilton, *Steve Jobs Was a Low-Tech Parent*, N.Y. TIMES (Sept. 10, 2014), http://www.nytimes.com/2014/09/11/fashion/steve-jobs-apple-was-a-low-tech-parent.html?_r=0 [https://perma.cc/5W7N-CG3H] (Jobs telling interviewer he never let his kids use the iPad).

³¹¹ Matt Richtel, *A Silicon Valley School that Doesn’t Compute*, N.Y. TIMES (Oct. 22, 2011), http://www.nytimes.com/2011/10/23/technology/at-waldorf-school-in-silicon-valley-technology-can-wait.html?pagewanted=all&_r=0 [https://perma.cc/433V-BHCS] (stating that at Silicon Valley’s Waldorf School students read books, write with pen and paper, and are even discouraged from using computers at home).

researchers, scientists, and scholars, prefer books for deep reading and screens for everything else.³¹²

A small but growing body of research so far confirms the anecdotal evidence that print is more compatible with the higher-ordered, critical thinking and reading skills we teach in law school.³¹³ Studies show that students reading print

³¹² See BARON, *supra* note 274, at xi, 146; Esther de Groot, *Problematic Screen Reading: Is It Caused by Our Brain?*, TXTLEIDEN, <http://www.txtleiden.org/2014/problematic-screen-reading> [<http://perma.cc/EF4F-2G3H>] (noting that expert readers like print so they can “study” it, flick the text back and forth, highlight, and annotate it); Terje Hillesund, *Digital Reading Spaces: How Expert Readers Handle Books, the Web and Electronic Paper*, FIRST MONDAY (Apr. 5, 2010), <http://firstmonday.org/article/view/2762/2504> [<http://perma.cc/VE2J-G9MF>]; Ziming Liu, *Reading Behavior in the Digital Environment: Changes in Reading Behavior over the Past Ten Years*, 61 J. DOCUMENTATION 700, 704–09 (2005) (finding that thirty to forty-five-year-old professional readers use screens to browse but print for deep reading); Julie Waters et al., *A Comparison of E-book and Print Book Discovery, Preferences, and Usage by Science and Engineering Faculty and Graduate Students at the University of Kansas*, ISSUES SCI. & TECH. LIBRARIANSHIP (Winter 2014), <http://www.istl.org/14-winter/refereed3.html> [<http://perma.cc/E3XT-CCMM>] (survey of science and engineering faculty that found preference for print over screen varies from 52% to 80% depending on department); Panayiotis Tryphonopoulos, *From the Screen to the Page: A Qualitative Study of Reading Experiences of University Faculty* 75, 87 (April 2015) (unpublished master thesis, University of New Brunswick), <https://unbscholar.lib.unb.ca/islandora/object/unbscholar%3A6593> [<https://perma.cc/X3Y2-KVM8>] (survey of “professional readers” that found they prefer a hybrid approach that makes use of screens for short texts and skimming and print for deep reading).

³¹³ See BARON, *supra* note 274, at 165, 213 (summarizing learning-related advantages of print over screens); Rakefet Ackerman & Tirza Lauterman, *Taking Reading Comprehension Exams on Screen or on Paper? A Metacognitive Analysis of Learning Texts Under Time Pressure*, 28 COMPUTERS HUM. BEHAV. 1816, 1826 (2012) (finding that print has metacognitive advantages over screens leading to stronger test scores for comprehension and retention); Rakefet Ackerman & Morris Goldsmith, *Metacognitive Regulation of Text Learning: On Screen Versus on Paper*, 17 J. EXPERIMENTAL PSYCHOL. APPLIED 18, 28–30 (2011) (finding that screens can hurt comprehension by leading to overconfidence in reading ability); Anne Mangen et al., *Reading Linear Texts on Paper Versus Computer Screen: Effects on Reading Comprehension*, 58 INT’L J. EDUC. RES. 61, 65, 67 (2013) (finding that print readers performed “significantly better” in each of the two reading genres tested); Jabr, *supra* note 307 (citing numerous studies showing cognitive advantages of print over screens); see also Ji et al., *supra* note 307, at 23 (reporting that students say they study and learn more using print rather than screens).

On the other hand, some studies have found no difference between the formats. See Sara J. Margolin et al., *E-readers, Computer Screens, or Paper: Does Reading Comprehension Change Across Media Platforms?*, 27 APPLIED COGNITIVE PSYCHOL. 512, 517–18 (2013) (finding no difference in reading comprehension between formats in a study that tested college students on ten short passages); Kaveri Subrahmanyam et al., *Learning from Paper, Learning from Screens: Impact of Screen Reading and Multitasking Conditions on Reading and Writing Among College Students*, INT’L J. CYBER BEHAVIOR, PSYCHOL. & LEARNING, Oct.–Dec. 2013, at 1, 24 (finding no difference in reading comprehension between print and screens). To the extent these studies appear to conflict, experts say it may be due to significant differences between them with respect to the length of the reading passages used, their difficulty, the time constraints placed on students, whether they were tested immediately after they read the material or days later, the genres used, whether students were asked to read for pleasure or for school as well as a host of other factors. See Anne Mangen & Jean-Luc Velay, *Cognitive*

outperform those reading screens on tests that measure both comprehension and retention.³¹⁴ In some cases, the differences were significant.³¹⁵ Some experts characterize the difference as those who read print *understand* what they have read, while those reading screens merely remember it.³¹⁶

Other studies find that print is a more immersive experience compared to screens and even dedicated e-reading devices.³¹⁷

Implications of New Media, in THE JOHNS HOPKINS GUIDE TO DIGITAL MEDIA 72, 75 (Marie-Laure Ryan et al. eds., 2014). Further, some of these studies found no differences in the formats by relying on students' final course grades as a proxy for learning rather than more objective forms of assessment or evaluation.

In comparison, Professor Mangen, one of the leading authorities on reading technologies, has studied the differences between print and screens on learning using longer, more substantial texts that may be closer to approximating the reading assignments used in law school. See Mangen & Kuiken, *supra* note 4, at 157, 164–67 (finding print has cognitive advantages compared to screens when subjects tested on five- to seven and one-half-page literary short stories); Alison Flood, *Readers Absorb Less on Kindles than on Paper, Study Finds*, GUARDIAN (Aug. 19, 2014), <http://www.theguardian.com/books/2014/aug/19/readers-absorb-less-kindles-paper-study-plot-e-reader-digitisation> [<http://perma.cc/33SA-NCQX>] (reporting on research by Professor Mangen finding that print has cognitive advantages compared to screens when subjects were tested on a twenty-eight page mystery story).

³¹⁴ See BARON, *supra* note 274, at 83, 170–71, 217; Ackerman & Lauterman, *supra* note 313, at 1826 (print has metacognitive advantages over screens leading to better comprehension and retention); Mangen et al., *supra* note 313; Tanner, *supra* note 307, at 4–5; Flood, *supra* note 313 (reporting results of 2014 study finding print readers performed better than Kindle readers when tested on recall of a twenty-eight-page story); Jabr, *supra* note 307; cf. Guang Chen et al., *A Comparison of Reading Comprehension Across Paper, Computer Screens, and Tablets: Does Tablet Familiarity Matter?*, 1 J. COMPUTER EDUC. 214, 220, 222 (2014) (containing a study comparing comprehension scores of students asked to read short passages that found those reading print scored “significantly” better on “shallow” comprehension, but no difference in “deep” comprehension, leading researchers to surmise that the test was not adequately designed to measure deep understanding and, thus, the results are unreliable); Subrahmanyam et al., *supra* note 313, at 24 (finding no difference between formats when students tested on “simple, familiar, or low-stakes” reading). But see Margolin et al., *supra* note 313, at 514, 517–18 (discovering no difference in reading comprehension scores when students tested on ten short passages); Amanda J. Rockinson-Szapkiw et al., *Electronic Versus Traditional Print Textbooks: A Comparison Study on the Influence of University Students’ Learning*, 63 COMPUTERS & EDUC. 259, 264 (2013) (observing no difference between screens and print based on student self reporting and a review of their course grades). For an explanation on reconciling these results, see *supra* note 313.

³¹⁵ See Mangen et al., *supra* note 313, at 67; Flood, *supra* note 313; cf. Chen et al., *supra* note 314, at 220, 222. But see Jordan T. Schugar et al., *A Nook or a Book?: Comparing College Students’ Reading Comprehension Levels, Critical Reading, and Study Skills*, 7 INT’L J. TECH. TEACHING & LEARNING 174, 183–84 (2011) (finding in a study of freshman university students there was no difference in comprehension and recall scores between e-readers and print, but researchers acknowledged that overall student test results reflected poor aptitude, a general failure to critically evaluate the reading, and low motivation suggesting the results may be unreliable).

³¹⁶ BARON, *supra* note 274, at 170; Tanner, *supra* note 307, at 6; de Groot, *supra* note 312; Jabr, *supra* note 307.

³¹⁷ See BARON, *supra* note 274, at 165, 169–70 (summarizing studies); Mangen et al., *supra* note 313, at 67; Mangen & Kuiken, *supra* note 4, at 160, 162–63 (studying university students reading a non-fiction story in print format versus on an iPad and

Thus, students reading print show more empathy and are more transported by the material, which are both indications of deeper engagement.³¹⁸ Another study found that students reading a print version of a twenty-eight-page story performed significantly better when tested about its chronology compared to those who read it on a Kindle.³¹⁹ Particularly significant is research suggesting students who read screens may be less likely to finish the material and even if they do, they may be less likely to re-read it.³²⁰ The implication is that screens are for one-off reading while we linger over print and engage with it more deeply.³²¹

Experts explain these results by saying that print is processed by the brain as both a visual and haptic, or physical, experience, making it a multimodal learning tool.³²² In comparison, screen reading is processed primarily as a visual experience.³²³ Even dedicated e-reading devices that are held like a book and have other features designed to replicate print such as the ability to turn pages, highlight, and write margin notes do not provide the same haptic experience as books.³²⁴

finding that they had more narrative coherence, transportation, and sympathy when using the former); Jabr, *supra* note 307.

318 See BARON, *supra* note 274, at 149, 213; Mangen & Kuiken, *supra* note 4, at 153 (being transported by a fictional or nonfictional narrative means a reader is more immersed in it); Flood, *supra* note 313.

319 See Flood, *supra* note 313 (discussing a 2014 study by Professor Mangen); cf. Mangen & Kuiken, *supra* note 4, at 162–64; Jabr, *supra* note 307.

320 See BARON, *supra* note 274, at 82–83, 108; de Groot, *supra* note 312 (citing a study which found that screen readers take short cuts); Jabr, *supra* note 307; Ji et al., *supra* note 307, at 23 (stating that students say they study and learn more reading print than screens); Reynol Junco & Candrianna Clem, *Predicting Course Outcomes with Digital Textbook Usage Data*, 27 INTERNET & HIGHER EDUC. 54, 59 (2015) (discussing research showing that university students spend little time reading their digital textbooks). This is a highly significant point given a recent study finding that the amount of time students spend engaged in their class reading assignments may be the best predictor of course outcomes, even more so than their prior grades. See Junco & Candriana, *supra*, at 57–58 (discussing a study analyzing student reading practices using data from a CourseSmart e-textbook, the first commercially available product to offer user reading analytics).

321 See BARON, *supra* note 274, at 82–83, 108; de Groot, *supra* note 312; Jabr, *supra* note 307; Ji et al., *supra* note 307, at 23.

322 See Mangen et al., *supra* note 313, at 66; Flood, *supra* note 313 (the haptic characteristics of a Kindle do not support the same mental reconstruction of a story's chronology as print); Andrew Piper, *Out of Touch: e-Reading Isn't Reading*, SLATE (Nov. 15, 2012, 5:22 AM), http://www.slate.com/articles/arts/culturebox/2012/11/reading_on_a_kindle_is_not_the_same_as_reading_a_book.single.html [<http://perma.cc/2BJ7-Q9XM>] (“Reading isn’t only a matter of our brains; it’s something that we do with our bodies.”).

323 See Mangen et al., *supra* note 313, at 62, 66–67 (even comparing visual characteristics, screens are still inferior to print); Jabr, *supra* note 307 (despite the name “touch screen,” e-text is ephemeral and lacks the tactile qualities of print).

324 Mangen & Velay, *supra* note 313, at 74–75; Flood, *supra* note 313; Jabr, *supra* note 307.

The field of educational haptics, which examines how touch affects cognition and learning, has been largely overlooked by learning science.³²⁵ This is odd because haptics plays a major role in learning, in some contexts more than vision.³²⁶ Touch is the only sense that interacts with the physical world, and can even manipulate or change it, in comparison to passive senses like hearing and vision.³²⁷ Haptics relates to the theory of embodied cognition by recognizing a mind-body connection in all cognitive activity leading some experts to advise that teaching tools incorporating physical characteristics, like books, can promote deeper engagement and understanding than purely visual ones.³²⁸

Haptics explains why books provide the reader with a better sense of chronology and organization than screens because they afford both a physical and visual sense of moving through the story.³²⁹ This creates sensorimotor memories in addition to visual ones that may enhance understanding compared to a screen.³³⁰ The physicality of books may also activate ancient brain circuitry devoted to language from the time when our ancestors communicated via gestures.³³¹ Thus, the caveman brain may process print in ways that connect it to language, which improves retention and recall making it a completely different experience than reading a screen.³³²

³²⁵ Mangen & Velay, *supra* note 302, at 392; Minogue & Jones, *supra* note 234, at 317–19, 326.

³²⁶ See RATEY, *supra* note 76, at 180 (extensive links exist between physical movement and learning); SYLWESTER, *supra* note 49, at 56–57 (stating that the skin is where the brain meets the outside world); WILSON, *supra* note 224, at 286, 289; Mangen & Velay, *supra* note 302, at 394–95; Minogue & Jones, *supra* note 234, at 317–19, 326, 331–32 (showing that haptics is superior to vision in some contexts and is involved in all learning).

³²⁷ Minogue & Jones, *supra* note 234, at 318.

³²⁸ See WILSON, *supra* note 224, at 286, 289; Mangen & Velay, *supra* note 302, at 392–95; Minogue & Jones, *supra* note 234, *passim* (including haptic considerations in teaching methodologies can improve learning); see also Tanner, *supra* note 307, at 9; Flood, *supra* note 313; Jabr, *supra* note 307.

³²⁹ BARON, *supra* note 274, at 170; Mangen et al., *supra* note 313, at 66; de Groot, *supra* note 312; Flood, *supra* note 313; Jabr, *supra* note 307.

³³⁰ Anne Mangen & Theresa S. Schilhab, *An Embodied View of Reading: Theoretical Considerations, Empirical Findings, and Educational Implications*, in SKRIV! LES! 285, 292–93 (Synnøve Matre & Atle Skaftun eds., 2012) (finding that our physical, sensorimotor interactions with e-books are very different than the way we interact with traditional print books); Mangen & Velay, *supra* note 302, at 393–95. See generally Minogue & Jones, *supra* note 234.

³³¹ See Hillesund, *supra* note 312; see also RATEY, *supra* note 76, at 180, 270; Keim, *supra* note 224, at 58 (citing studies where researchers tested children learning to write and found a relationship between the physical aspects of writing and brain activity related to language); *supra* p. 176 and accompanying notes.

³³² See Hillesund, *supra* note 312; *supra* notes 310–14.

Print is also a more immersive experience because it lacks the distractions of electronic media such as hyperlinks and email that pull the reader away from the text.³³³ One neuroscientist leading a “slow reading” movement says that because of this, reading a book for just thirty to forty-five minutes a day can restore the loss of attentional abilities due to digital devices.³³⁴ That alone is reason enough to emphasize print more often as a training tool to help students strengthen these key skills. Apart from the haptic advantages, some experts believe that the greater visual focus, concentration, and eye-hand coordination needed to highlight, write margin notes, and turn pages are further reasons why books engage us as a visual medium more so than screens.³³⁵

This is not to say we should eliminate electronic text from the classroom, as if that were even feasible. To the contrary, screens are the best, most efficient tools for reviewing large volumes of material quickly, such as when doing legal research. E-books in particular also have great potential to provide analytical data on student reading practices that could help inform our teaching, course design, and predict learning outcomes.³³⁶ On the other hand, going paperless is not a good classroom strategy either given print’s superiority as a reading medium. And despite initial predictions to the contrary, it is unlikely print is going to disappear anytime soon.³³⁷ For all these reasons, this Article recommends adopting the same hybrid reading style used by other professional readers by emphasizing

333 See BARON, *supra* note 274, at 88–89, 211, 214 (discussing studies that have repeatedly shown that if an e-reading device has an Internet connection, it is more challenging to read than a book); LEVITIN, *supra* note 113, at 98 (deciding whether to open e-messages while reading depletes cognitive energy); Mangen & Velay, *supra* note 313, at 74 (stating that many studies show that navigating hyper-texted documents causes cognitive overload). Experts tell us that each time a hyperlink is encountered, the reader must evaluate it; a problem solving task that is extraneous to the content and thus saps cognitive energy. Even if the reader chooses not to follow it, making that decision still expends cognitive energy that would otherwise be directed toward the text. See Tanner, *supra* note 307, at 5.

334 See Rachel Grate, *Science Has Great News for People Who Read Actual Books*, MIC (Sept. 22, 2014), <http://mic.com/articles/99408/science-has-great-news-for-people-who-read-actual-books> [<http://perma.cc/YAZ9-23XK>].

335 See Hillesund, *supra* note 312.

336 See Junco & Clem, *supra* note 320, at 54–55; see also Yungwei Hao & Kathy Jackson, *Student Satisfaction Toward e-Textbooks in Higher Education*, 5 J. SCI. & TECH. POLY MGMT. 231, 242 (2014) (stating that with improved design, e-books could have great potential as powerful, interactive learning tools).

337 See BARON, *supra* note 274, at 222; DARTON, *supra* note 310, at xiv (looking at the history of technology suggests books will coexist with electronic media); POWERS, *supra* note 5, at 147–50 (discussing “buggy whip” trope that new technology makes old instantly obsolete rarely happens; more often old and new co-exist because the old serves some purposes better than the new).

print for deep reading and screens for everything else.³³⁸ It is a strategy that will also help students develop better media literacy through an understanding of different forms and the advantages and disadvantages of each.

E. “That’s Not Writing, That’s Typing”³³⁹

Like reading technologies, the only issue here is whether to encourage the use of laptops or pen and paper for note-taking and other writing tasks. Common sense says students cannot write as fast as they type, so having them take notes by hand forces them to slow down and become more selective in what they record.³⁴⁰ In theory this should help students focus on better understanding the material because out of necessity they will need to summarize it in their own words. One learning expert takes this to the extreme by forbidding students in his class from taking any notes at all in the belief that they will learn more by devoting their full attention to the discussion rather than splitting it between listening and writing.³⁴¹

The prevailing assumption about students using laptops to take class notes is that they mindlessly type away trying to capture the teacher’s every word.³⁴² Thus, they listen for accuracy like a stenographer instead of understanding. On the other hand, perhaps laptop-savvy students take better quality notes than we think. And if they prefer to use a laptop, who are we to judge?

Research on note-taking styles is still emerging and, therefore, limited, but so far it supports the view that taking notes by hand improves learning compared to using a laptop.³⁴³

³³⁸ See BARON, *supra* note 274, at 222–28.

³³⁹ See Ewin Ritchie Elmont, *What Capote Said About Kerouac*, N.Y. TIMES (Oct. 25, 1992), <http://www.nytimes.com/1992/10/25/nyregion/1-what-capote-said-about-kerouac-670892.html> [<http://perma.cc/288E-EY9B>] (quoting Truman Capote).

³⁴⁰ See Mangen & Velay, *supra* note 302, at 389; Toft, *supra* note 302.

³⁴¹ See Glenn, *supra* note 109.

³⁴² See Pam A. Mueller & Daniel M. Oppenheimer, *The Pen Is Mightier than the Keyboard: Advantages of Longhand over Laptop Note Taking*, 25 PSYCHOL. SCI. 1159, 1160 (2014) (noting that studies show most students type significantly faster than they write suggesting laptop use facilitates a transcription-like note-taking style); cf. Keim, *supra* note 224, at 59 (stating that the text manipulation powers of a word processor could aid complex thought and its speed might feel to some more true to the mind than writing by hand).

³⁴³ See Mangen & Velay, *supra* note 313, at 76 (summarizing studies involving children that compare typing to writing while acknowledging that research is still sparse); Mueller & Oppenheimer, *supra* note 342, at 1166; Hannah Seehafer, *Effects of Learning Style on Paper Versus Computer Based Reading Comprehension*, RED RIVER PSYCHOL. J. 1, 5–6 (2014), http://www.mnstate.edu/uploadedFiles/Internal/Content/Academics/Psychology/Red_River_Psychology_Journal/HSeehafer2014.1.pdf [<http://perma.cc/4DCY-ZE3Y>] (college students had higher test scores when they read and wrote answers on paper compared to computers); Timothy J. Smoker et al., *Comparing Memory for Handwriting Versus*

As a preliminary matter, researchers have found that note-taking style correlates with academic success.³⁴⁴ Among all students using laptops, those who transcribe class discussion do more poorly on tests measuring conceptual understanding than those employing a more selective note-taking style.³⁴⁵ Research also shows that the majority of laptop users default to the less effective transcribing style even *after* the teacher warns them against it and explains why.³⁴⁶ Thus, even when students use laptops for their intended purpose rather than to multitask, they have a deleterious effect on learning by encouraging a counterproductive note-taking style.³⁴⁷

By comparison, studies show that the physical act of writing things down, like making “to do” lists, enhances memory.³⁴⁸ Another study found students who take notes by hand had better comprehension and recall than laptop users.³⁴⁹ Even when both

Typing, PROC. HUM. FACTORS & ERGONOMICS SOC'Y, ANN. MEETING, Oct. 2009, at 1744, 1746, http://teacherinquiryboard.weebly.com/uploads/2/6/4/1/26418271/comparing_memory_for_handwriting_versus_typing.pdf [<http://perma.cc/2J5G-69U2>] (recall and recognition of words were better for those writing by hand compared to typing); Tiffany O'Callaghan, *The Writings on the Screen*, NEW SCIENTIST, at 43 (Nov. 1, 2014), <http://www.newscientist.com/article/mg22429930.500-goodbye-paper-what-we-miss-when-we-read-on-screen.html> (separate studies have found learning is enhanced in both young children and adults when we write things down by hand because doing so recruits brain circuits devoted to physical movement which seems to enhance memory).

To date, I have found only one study comparing the cognitive effects of note-taking on a tablet to taking them by hand. See Anne Mangen et al., *Handwriting Versus Keyboard Writing: Effect on Word Recall*, J. WRITING RES. 299, 299, 312 (2015) [hereinafter Mangen et al., *Handwriting Versus Keyboard Writing*] (containing a study comparing word recall and recognition between college students writing words down by hand, typing them on a laptop, and using a tablet that partly replicated Smoker's study, *supra*, by finding that handwriting improved recall though no differences were found in word recognition).

³⁴⁴ See Matthew E. Barrett et al., *Technology in Note Taking and Assessment: The Effects of Congruence on Student Performance*, INT'L J. INSTRUCTION, Jan. 2014, at 51, 52 (discussing relationship between note-taking style and learning); Wei et al., *supra* note 248, at 148, 153 (articles cited therein); Toft, *supra* note 302.

³⁴⁵ See Mueller & Oppenheimer, *supra* note 342, at 1162, 1166 (verbatim note-taking style correlates with shallow understanding).

³⁴⁶ *Id.* at 1162–63, 1167.

³⁴⁷ *Id.* at 1166.

³⁴⁸ See BARON, *supra* note 274, at 143; Smoker et al., *supra* note 343, at 1744; Anna Mikulak, *Getting It in Writing*, OBSERVER, Sept. 2014, <http://www.psychologicalscience.org/index.php/publications/observer/2014/september-14/getting-it-in-writing.html> [<http://perma.cc/6NGD-DY8Q>]; O'Callaghan, *supra* note 343, at 43; Toft, *supra* note 302.

³⁴⁹ Mueller & Oppenheimer, *supra* note 342, at 1166 (stating that researchers found students taking notes by hand have better recall of facts than laptop users when there is a delay between the lesson and follow-up testing, but no difference when testing is done immediately afterwards); see Aguilar-Roca et al., *supra* note 246, at 1304 (finding that students who took notes by hand had a “significantly” higher number of “As” than laptop users); Mangen et al., *Handwriting Versus Keyboard Writing*, *supra* note 343, at 312; Subrahmanyam et al., *supra* note 313, at 21–22 (finding that students at a large California university who took notes by hand produced better written reports that

groups reviewed their notes a week later before a follow-up test, students who took notes by hand had better conceptual understanding and even superior factual recall compared to those who took “verbatim”-style notes on their laptops.³⁵⁰ In yet another study, college students taking notes by hand did “significantly” better on a final exam, including earning more As, than those using laptops.³⁵¹ The researchers found this particularly surprising since the SAT scores of the laptop users predicted they would outperform the other group.³⁵²

The explanation for all these results is much the same as those used to explain the cognitive advantages of print over e-text.³⁵³ Just like books, writing by hand is a multimodal learning experience that engages brain circuitry devoted to both visual and physical processing.³⁵⁴ Typing also has multimodal characteristics, but writing takes greater eye-hand coordination since students must, in effect, draw the shape of each letter.³⁵⁵ And because writing requires greater focus and concentration

reflected superior critical thinking skills compared to laptops users when working under “real world” conditions); O’Callaghan, *supra* note 343, at 43; Toft, *supra* note 302 (adults who took notes by hand and were then tested on the material several weeks later had better scores than the laptop users).

³⁵⁰ Mueller & Oppenheimer, *supra* note 342, at 1166 (finding no difference between groups with respect to factual recall when test administered right after the lesson). The Mueller and Oppenheimer study compiles the results of three independent studies the researchers conducted at Princeton and UCLA. *Id.*; see also SARA C. BROADERS & MICHAEL SMUTKO, INTERNET USAGE DURING CLASS ASSOCIATED WITH LOWER COURSE GRADES (2015), <http://www.weinberg.northwestern.edu/discover/news/2015/documents/electronic-devices-impact-classroom-broaders-smutko.pdf> [<http://perma.cc/ZN34-U57W>] [hereinafter BROADERS & SMUTKO, INTERNET USAGE DURING CLASS] (noting a study by Northwestern researchers which finds college students taking notes by hand obtain the highest grades); Sara C. Broaders & Michael Smutko, *Internet Use Decreases Student Lecture Comprehension*, poster for 25th Annual Convention, ASS’N POL. SCI. (May 25, 2013), http://aps.psychologicalscience.org/convention/program_2013/search/viewProgram.cfm?Abstract_ID=28978&AbType=&AbAuthor=&Subject_ID=&Day_ID=all&keyword [<http://perma.cc/52WA-WRZ9>] [hereinafter Broaders & Smutko, *Internet Use Decreases Comprehension*] (showing a poster presentation reporting results of research that found students taking notes by hand had better test scores).

³⁵¹ Aguilar-Roca et al., *supra* note 246, at 1304 (finding, however, no difference in the number of F’s between the groups); see BROADERS & SMUTKO, INTERNET USAGE DURING CLASS, *supra* note 350; see also Broaders & Smutko, *Internet Use Decreases Comprehension*, *supra* note 350; Subrahmanyam et al., *supra* note 313, at 21–22 (stating that college students taking notes by hand wrote better reports).

³⁵² Aguilar-Roca et al., *supra* note 246, at 1304, 1306.

³⁵³ See BARON, *supra* note 274, at 142–43 (stating that writing is a tactile, or haptic, experience); Mangen & Velay, *supra* note 313, at 75; Mangen & Velay, *supra* note 302; Tanner, *supra* note 307, at 9 (taking notes by hand is the cognitive equivalent of reading a book, while typing is the equivalent of reading a screen).

³⁵⁴ Mangen & Velay, *supra* note 302, at 389; Keim, *supra* note 224, at 56–57 (the linkage between body and mind when we write by hand is intimate and profound—hands help us see); Mikulak, *supra* note 348; Toft, *supra* note 302.

³⁵⁵ Mangen & Velay, *supra* note 302, at 385–86, 389.

than typing, it may even promote more precision in the expression of thought in addition to deeper engagement.³⁵⁶ The greater physicality of writing appears to promote linkages in the brain between visual, tactile, motor, and spatial neural circuits, which means it is processed differently than typing in ways that seem to enhance recall and comprehension.³⁵⁷

While typing is a physical act too, some aspects of it are decoupled from the visual part, making it a “radically” different cognitive experience than writing by hand.³⁵⁸ Even the visual aspects of writing by hand require more engagement and concentration than typing which eventually becomes so automated that students can do it without even looking at the keypad or screen.³⁵⁹ As with print, pen and paper also promote deeper engagement, and thus better learning, because the medium lacks the interferences and distractions associated with wireless devices.³⁶⁰

That taking notes by hand has demonstrable advantages over typing them on a laptop has been suggested as reason enough to ban laptops.³⁶¹ But if the teacher is making good use of them in class, to the extent student notes suffer it may still be an acceptable trade-off. If the professor is not making active use of laptops during class, they should be closed anyway which is a great opportunity to talk with students about the advantages of adopting a hybrid note-taking and drafting style. Share with students the research discussed here that taking notes by hand

³⁵⁶ Writing by hand is like “thinking with a pencil.” Mangen & Velay, *supra* note 313, at 75 (noting that draftsmen practiced in the use of CAD software still draw preliminary sketches by hand because it is “thinking with a pencil”); *see also* WILSON, *supra* note 224, at 158 (writing and drawing are strongly related to other skills requiring precision); WOLF, *supra* note 5, at 65–66 (stating that the process of writing changes our thoughts and helps us express them with more precision); Keim, *supra* note 224, at 56 (citing an educational psychologist who notes that we use our hands to access our thoughts).

³⁵⁷ *See* BARON, *supra* note 274, at 143; Wei et al., *supra* note 248, at 148–49; Mangen & Velay, *supra* note 302, at 389–90. Experts also believe an advantage of writing by hand is that it engages spatial circuitry in the brain which encodes the location of words and paragraphs on the page, providing a structure and organization for our thoughts that is lacking when we type on a screen. Keim, *supra* note 224, at 59.

³⁵⁸ *See* Mangen & Velay, *supra* note 302, at 389–90; Keim, *supra* note 224, at 56 (“What our hands do with a keyboard is very different than with pen and paper.”); Toft, *supra* note 302.

³⁵⁹ *See* Mangen & Velay, *supra* note 302, at 389–90, 395; Keim, *supra* note 224, at 56 (stating that a central property of handwriting is that it unifies hand, eye, and attention at a single place and time in the brain).

³⁶⁰ *See* POWERS, *supra* note 5, at 216; Wei et al., *supra* note 248, at 148, 155 (finding that students using laptops to take notes while multitasking had poor quality class notes and weaker recall of the material).

³⁶¹ Steven Eisenstat, *A Game Changer: Assessing the Impact of the Princeton/UCLA Laptop Study on the Debate of Whether to Ban Law Student Use of Laptops During Class*, 92 U. DET. MERCY L. REV. 83 (2015).

can improve memory and comprehension, which is why even Silicon Valley technophiles prefer pen and paper to note-taking apps.³⁶² It is consistent as well with surveys of college students that show some still prefer a pen and paper to the keyboard for the same reasons.³⁶³ When it comes to drafting, encourage students to experiment with each writing technology while reflecting on how it affects the writing process.³⁶⁴ As a metacognitive exercise, some students may discover they do their best work composing on a keyboard while editing with a pen and paper insofar as it helps them better visualize how all the pieces fit together. Others may find that outlining by hand sharpens their analysis and organization in ways that a keyboard does not.³⁶⁵ As with reading technologies, the key thing is to put aside clichés about how “digital natives” learn best and instead help students understand the importance of choosing the right tool for the job based on what works best for them and its compatibility with the particular objective at hand.

As a practice skill, there are times when lawyers need to put away technology and pick up a pen and pad of paper instead.³⁶⁶ In depositions, interviews, and similar situations lawyers must be fully present to observe and record their impressions of the

³⁶² See LEVITIN, *supra* note 113, at 67–68 (stating that a large number of successful professionals, including techies, still prefer pen and paper for some purposes); Lee Gomes, *Why Computers Can't Kill Post-Its*, FORBES (Jan. 22, 2009), http://www.forbes.com/2009/01/21/postits-digital-tools-tech-intel-cz_lg_0122postits.html [<http://perma.cc/9HGL-XPXD>] (MIT study found “Post-Its” are near perfect data storage tool that techies love because it is more efficient than note-taking apps by leveraging the brain’s ability to remember information based on spatial and physical properties); see also POWERS, *supra* note 5, at 216 (pen and paper are arguably more useful today because they give us what we desperately need—disconnectedness).

³⁶³ See Ragan et al., *supra* note 245, at 81 (containing a survey of university students enrolled in a large lecture class that found many preferred to take notes by hand); Julie Berkovatz & Erica de Guzman, *The Evolution of Note Taking: A Study on Traditional Hard Copy Methods vs the Emerging Soft Copy Method*, SJSU SCHOLAR WORKS, Oct. 24, 2011, at 3–5 (citing a student-authored study finding a majority of college students surveyed preferred handwritten notes to the computer); Subrahmanyam et al., *supra* note 313, at 20–21 (containing a survey of college students which finds they prefer note-taking by hand).

³⁶⁴ See generally Helen A. Soter, *Learning How to Learn: Incorporating Metacognition in the Business Writing Classroom*, in STUDENT SUCCESS IN WRITING CONF. (Apr. 17, 2015), <http://digitalcommons.georgiasouthern.edu/cgi/viewcontent.cgi?article=1077&context=sswc> [<http://perma.cc/8ZHW-TKJH>].

³⁶⁵ Some students may find the best advantage to shutting off technology in favor of a pen and paper is that it creates a distraction-free work environment, which can improve the quality of their work for that reason alone. See BARON, *supra* note 274, at 164 (discussing the practice of successful writers who shut off technology when they work).

³⁶⁶ See Sam Glover, *Lawyers Should Take Notes by Hand*, LAWYERIST (June 17, 2014), <https://lawyerist.com/74436/lawyers-take-notes-hand/> [<https://perma.cc/D2WX-A7U9>] (giving several reasons why lawyers should take notes by hand including promoting active listening skills when meeting with clients).

others in the room. In other contexts, like meetings with clients and partners, putting away technology in favor of pen and paper communicates engagement, rapport, and warmth.³⁶⁷ The caveman brain was designed to excel at these so-called “soft skills” which, ironically, may become increasingly important as they may be one of the few legal practice skills that remains beyond the reach of the lawyer-bots.³⁶⁸ Encouraging students to develop a hybrid note-taking style, therefore, promotes not only better learning and media literacy, but also gives students a chance to practice some other essential lawyering skills.

F. “Survey Says!”: Meta-Analyses of Digital Teaching Tools

Two recently published meta-studies are among the largest to date assessing the overall effectiveness of digital teaching technologies.³⁶⁹ They did so by examining the impact of these tools on student learning outcomes in a variety of classroom contexts from kindergarten to post-graduate training.³⁷⁰ Though neither study focused on specific classroom tools like laptops, they are still valuable insofar as having distilled data from thousands of independent studies into some general principles and guidelines that we can use to help inform our own decisions about how best to use technology in the law school classroom.

The first of these studies is a meta-analysis commissioned by the U.S. Department of Education (“DOE Study”) in 2010 that reviewed more than 1100 independent studies conducted between 1996 and 2008 for reliable data on the effectiveness of online instructional tools.³⁷¹ The second study was published in 2012 by Durham University in the U.K. (“Durham Study”) involving an analysis of forty-eight separate meta-studies from

³⁶⁷ See *id.*; Travis Bradberry, *The Real Harm in Multitasking*, INC. (Jan. 6, 2015), <http://www.inc.com/travis-bradberry/the-real-harm-in-multitasking.html> [<http://perma.cc/B6T9-LUQ6>] (multitasking during business meetings shows low emotional intelligence skills which is sure to undermine career success).

³⁶⁸ See *supra* note 12.

³⁶⁹ See DURHAM STUDY, *supra* note 228; U.S. DEP’T OF EDU., EVALUATION OF EVIDENCE-BASED PRACTICES IN ONLINE LEARNING: A META-ANALYSIS AND REVIEW OF ONLINE LEARNING STUDIES (2010), <https://www2.ed.gov/rschstat/eval/tech/evidence-based-practices/finalreport.pdf> [<https://perma.cc/XL9F-KYUS>] [hereinafter DOE STUDY].

³⁷⁰ See DOE STUDY, *supra* note 369, at xii–xiii (noting that although the purpose of study was to determine the effectiveness of online education for K–12 students, the majority of data analyzed involved community college, college, and grad students); DURHAM STUDY, *supra* note 228, at 5 (involving an analysis of forty-eight independent meta-analyses that examined the effectiveness of classroom technology on five- to eighteen-year-old students).

³⁷¹ DOE STUDY, *supra* note 369, at 11–14 (stating that the meta-analysis eliminated all but forty-five out of the 1132 studies it began with due to methodological issues).

around the globe that examined the general effectiveness of digital classroom tools in K–12 schools.³⁷²

In sum, the DOE Study found that online tools work best when combined with face-to-face classroom teaching as part of a hybrid approach to instruction.³⁷³ To the extent any correlation was found between the use of technology and better learning outcomes, the study's authors cautioned against attributing it to the technology itself rather than the extra hours of instruction students received in the blended programs.³⁷⁴ The Durham Study reached a similar conclusion with respect to digital classroom tools finding that they generally work best when supplementing existing teaching practices rather than replacing them.³⁷⁵ The authors of the Durham Study also cautioned against assuming a causal connection between classroom technology and better learning outcomes because of methodological problems with the underlying studies.³⁷⁶ Consequently, both meta-studies came to the unremarkable conclusion that although technology may help, it is ultimately the teacher using it that matters most to student success.³⁷⁷

Nonetheless, the authors of each study identified a few teaching practices they found to be especially effective. For instance, the DOE Study concluded that instructor-led and collaborative online learning opportunities often worked better than independent, self-directed ones.³⁷⁸ Technologies that let students control the pace of their own learning like podcasts also worked well, as did ones that encouraged students to monitor their learning.³⁷⁹ The authors of the Durham Study found the use of digital technologies that promote collaborative learning among small groups of students are effective along with tools that extend learning opportunities outside classroom walls like video simulations.³⁸⁰

While none of these conclusions are especially earth-shattering given what we already know about good pedagogy, they tend to confirm the work of educational

³⁷² DURHAM STUDY, *supra* note 228, at 5, 10–11.

³⁷³ DOE STUDY, *supra* note 369, at xviii.

³⁷⁴ *Id.*

³⁷⁵ See DURHAM STUDY, *supra* note 228, at 4–5 (noting that the authors of the meta-study observed a lack of controls in the underlying independent research studies regarding teacher quality, instructional methods, curriculum, etc., which compromised the validity of the results).

³⁷⁶ *Id.* at 3.

³⁷⁷ *Id.*; see also DOE STUDY, *supra* note 369, at 52.

³⁷⁸ DOE STUDY, *supra* note 369, at xv.

³⁷⁹ *Id.* at xvi.

³⁸⁰ DURHAM STUDY, *supra* note 228, at 3–5.

technology historians like Professor Cuban by finding that digital technologies are most effective when combined with established teaching practices as part of a hybrid approach to classroom instruction.³⁸¹

CONCLUSION

The term “digital native” is misleading because it suggests a sharp divide between today’s law students and their predecessors. It encourages inaccurate stereotypes and clichés that can have a detrimental effect on their legal education. The erroneous belief that all students are tech savvy, for instance, means we may mistakenly jump to the conclusion that it is unnecessary to provide training in basic technology skills. The assumption that multitasking is part of a new “learning style” means we may neglect to teach students the important mental discipline needed to single-task.

This Article argues that classroom practices informed by an understanding of how the brain learns will always be more successful than approaches based on observations about students’ changing technology habits. Technology and forms of media are always changing, but the fundamentals of teaching students to be good critical thinkers have not changed much at all over time. Whether writing an appellate brief, synthesizing a line of cases, or solving a complex problem for a client, it will always demand an ability to shut out distractions and focus deeply on that task at hand.

Of course we need to prepare students to work in a digital environment. But teaching them how to use the latest law practice app will never get them a job—anyone can learn to do that. Teaching them, instead, to be good thinkers is the gift that keeps on giving. To maximize our effectiveness as teachers, history and learning science both tell us that the most successful strategy is a hybrid approach that combines the best of established classroom practices with new technologies that fill a niche better than existing options.

381 See DOE STUDY, *supra* note 369, at xi–xvi; DURHAM STUDY, *supra* note 228, at 3–5; *supra* p. 253 and notes 57–60; *supra* pp. 277–78 and notes 230–33.

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Taking a Byte out of International Tax Evasion: Combating Base Erosion and Profit Shifting

Rachel J. Greenberg*

INTRODUCTION

Benjamin Franklin said that nothing is certain except death and taxes. However, this popular slogan must not ring true; in today's economy, some of the world's largest multinational companies have found loopholes in the tax system and manage to evade paying billions of dollars worth of taxes in various jurisdictions.¹ Obviously, to the common folk, the ability of companies to evade this surety of life is troublesome.

International efforts, led by the Organisation for Economic Co-operation and Development (OECD), have been undertaken in an attempt to combat the issue of base erosion and profit shifting (BEPS). Erosion of the tax base occurs when multinational companies shift profits from high-tax jurisdictions to low-tax jurisdictions, so companies pay significantly lower taxes than they otherwise would.² The OECD enacted its Action Plan in 2013,³ and a number of countries have been working to implement facets of the plan since that time. While the Action Plan is an important attempt to create social justice by allowing governments to regain corporate taxes generated by multinational entities, this will require ameliorating actions by

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¹ Jim Edwards, *Here's How Much Money Apple Avoids Paying in Taxes by Pretending It's Based in Ireland*, BUSINESS INSIDER (June 11, 2014, 12:59 PM), <http://www.businessinsider.com/how-much-money-apple-avoids-paying-in-taxes-2014-6> [perma.cc/P7T9-EKUJ] (stating that between 2011 and 2012, Apple was able to avoid paying \$12.5 billion in U.S. taxes).

² *About Base Erosion and Profit Shifting*, OECD, <http://www.oecd.org/ctp/beps-about.htm> [perma.cc/B3SZ-UMYQ].

³ OECD, ACTION PLAN ON BASE EROSION AND PROFIT SHIFTING (2013), <http://www.oecd-ilibrary.org/docserver/download/2313331e.pdf?expires=1447316590&id=id&accname=guest&checksum=024E863CD25458C99B042F1F03A46A16> [hereinafter ACTION PLAN].

all involved parties and cooperative rather than competitive behavior. However, until the goals of the Action Plan align with those of the individual countries affected by BEPS, it is unlikely that the Action Plan will accomplish its stated objectives.

This Comment will provide a background of the problem of BEPS, from the time of its inception through the present day. It will then explore the economic problems of selected countries that represent the spectrum of the parties involved in addressing this problem and certain unilateral solutions they are undertaking. Specifically, it will examine the United States as a high-tax jurisdiction, which is the home of most of the offending companies, the United Kingdom as a relatively high-tax jurisdiction, which is a European Union member, India as a developing source country, and Bermuda as a tax haven. The United States and the United Kingdom are OECD members, India is a non-member observer country, and Bermuda has no OECD affiliation.⁴ Finally, this Comment will focus on several recommendations which could be implemented multilaterally to accomplish the goals of the OECD's Action Plan.

I. BACKGROUND

In order to have a comprehensive understanding of the issue of BEPS and make suggestions which could reasonably be integrated into the international tax regime, it is necessary to consider the evolution of the dilemma and the actions that have already been attempted. This Part will cover the formation of the OECD, a focused history of the issue of BEPS, and a factual overview of the OECD's recently published Action Plan.

A. Formation of the OECD

In the early 1900s, most businesses were located within the borders of a single country.⁵ Although firms occasionally operated across national borders, company wealth and property were generally bundled within a single country where the firm was subject to taxation.⁶ Each country created its own domestic laws regarding taxation of corporations.⁷ As industrialization continued, companies began to do business in multiple countries, and, eventually, multinational corporations developed. Questions arose as to how to allocate profits to different countries so each

⁴ *About the OECD: Members and Partners*, OECD, <http://www.oecd.org/about/membersandpartners/> [http://perma.cc/KNT6-HFRW].

⁵ Steven A. Bank, *The Globalization of Corporate Tax Reform*, 40 PEPP. L. REV. 1307, 1307 (2013).

⁶ *Id.*

⁷ ACTION PLAN, *supra* note 3, at 7, 9.

country could share in taxing the company. However, sometimes the independent rules for different countries conflicted, causing friction, and potential double taxation, defined as taxation of the same income in both countries in which the company does business.⁸ In the 1920s, the League of Nations recognized that double taxation would slow economic growth and recovery, and international tax laws were designed to limit this friction and to support global economic growth.⁹ “International co-operation has resulted in shared principles and a network of thousands of bilateral tax treaties that are based on common standards and that therefore generally result in the prevention of double taxation on profits from cross-border activities.”¹⁰ Bilateral treaties have been formulated to encourage foreign companies to engage in businesses, which will generate income in the home country, and domestic companies to earn revenue in foreign countries, by creating tax laws which are favorable to all entities.

Conflicts frequently occur between residence and source countries regarding taxable income. The residence country is where the company is formed or managed and controlled (frequently the United States or another highly developed country), and the source country is one in which the company does business, in terms of having factories, research and development, or sales.¹¹ Through the application of bilateral tax treaties and local source country tax law, residence countries have maintained principal taxing jurisdictions for income earned in source countries.¹² As a result, source countries have retained minimal (or no) tax jurisdiction, which creates friction between the source and residence countries, because the source countries believe they are entitled to a portion of the taxes.¹³ This enables multinational entities (MNEs) to operate in other countries but pay tax in those countries to the extent they operate through a separate entity located in the source country or through a permanent establishment (PE) in the source country.¹⁴ “This

⁸ *Id.* at 9.

⁹ *Id.* at 7.

¹⁰ *Id.* at 9–10.

¹¹ *Source and Residence Taxation*, TAX JUST. NETWORK, http://www.taxjustice.net/cms/upload/pdf/Source_and_residence_taxation_-_SEP-2005.pdf [perma.cc/7QNW-7645].

¹² See Lee A. Sheppard, *Twilight of the International Consensus: How Multinationals Squandered Their Tax Privileges*, 44 WASH. U. J.L. & POL’Y 61, 62 (2014).

¹³ See *id.*

¹⁴ See *id.* In the United States, a “PE generally is defined as a fixed place of business.” PRICEWATERHOUSECOOPERS, WORLDWIDE TAX SUMMARIES: CORPORATE TAXES 2014/15, at 2117 (2014), <http://www.pwc.com/gx/en/tax/corporate-tax/worldwide-tax-summaries/assets/pwc-worldwide-tax-summaries-corporate-2014-15.pdf> [http://perma.cc/8TVB-MRSR] [hereinafter TAX SUMMARIES]. The definition of a PE may vary in other countries. For example, in the United Kingdom, the definition of a PE is partially based

limitation of tax jurisdiction is key to the OECD model treaty,”¹⁵ because it prevents double taxation and encourages commerce between treaty countries.

After World War II, the Organisation for European Economic Co-operation (OEEC) was established to implement the Marshall Plan, financed by the United States, with the goal of boosting the economy.¹⁶ It was at this juncture that the collective governments acknowledged the “interdependence of their economies, [which] paved the way for a new era of cooperation that was to change the face of Europe.”¹⁷ The OECD was created on September 30, 1961,¹⁸ representing over thirty countries, whose members include the United States and many European countries,¹⁹ as well as observers like India and China.²⁰ With globalization, a shift has occurred from country-specific models to global operating models, and, with the advent of a greater service component and digital products, it is “much easier for businesses to locate many productive activities in geographic locations that are distant from the physical location of their customers.”²¹ However, multinational corporations are currently manipulating tax rules set forth in the OECD model treaty, allowing them to pay taxes in low-tax jurisdictions while making large profits in other countries.²² This is harmful for a number of reasons. Governments receive lower corporate tax payments than they should, individual taxpayers have a greater tax burden to make up the difference, and domestic companies are placed at a competitive disadvantage.²³ Also, public awareness of low tax payments can damage a company’s reputation.²⁴

on the OECD model, and a non-resident company can have a PE if it “has a fixed place of business in the United Kingdom through which the business of the company is wholly or partly carried on, or an agent acting on behalf of the company has and habitually exercises authority to do business on behalf of the company in the United Kingdom.” *Id.* at 2093.

¹⁵ Sheppard, *supra* note 12.

¹⁶ *About the OECD: History*, OECD, <http://www.oecd.org/about/history/> [<http://perma.cc/45QP-GVL7>].

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See Tracy A. Kaye, *The Offshore Shell Game: U.S. Corporate Tax Avoidance Through Profit Shifting*, 18 CHAP. L. REV. 185, 187–88 n.19 (2014).

²⁰ Sheppard, *supra* note 12, at 64.

²¹ ACTION PLAN, *supra* note 3, at 7.

²² See Sheppard, *supra* note 12, at 61–63.

²³ Foreign companies can lower their profits based on local taxes and international treaties, which reduce withholding tax on royalties and/or interest payments, while domestic companies cannot decrease their tax burden in this way. See *id.*

²⁴ See ACTION PLAN, *supra* note 3, at 8.

B. History of BEPS

The main cause of base erosion, or erosion of the tax base which determines tax liability, is profit shifting. "Profit shifting allows U.S. multinationals to maintain their actual investments in high-tax countries that have the appropriate infrastructure and labor forces necessary for actual business operations but report profits in tax havens or low-tax jurisdictions."²⁵ Various studies estimate that the United States loses between \$10 billion and \$90 billion annually from profit shifting, which has brought the enormity of the issue to public scrutiny.²⁶ International tax rules allow loopholes which, while exempting companies from double taxation, enable them to avoid taxation completely and enjoy "double non-taxation."²⁷

Profit shifting is particularly easy for intellectual property (IP) income, because there is no production location and consumers can be anywhere.²⁸ A number of multinational technology companies have moved assets like IP "to Ireland, whose low 12.5% corporate income tax rate allowed it to attract major corporations and become a center of high technology jobs in Europe."²⁹ To avoid incurring higher taxes, some companies employ the "Double Irish" tax structure.³⁰ For example, an American company forms two subsidiary companies in Ireland, but one of them has its management center in Bermuda or a similar tax haven. The company based in Bermuda pays the parent company a fee to allow it to sublicense its IP to the other Irish subsidiary, which can then sell the products internationally.³¹ "The Bermuda-based company is an Irish company for U.S. purposes, which presumably aids in the approval of the transfer pricing arrangement because of the presence of a U.S.-Ireland tax treaty, but is a Bermuda company for Irish purposes, which allows it to avoid Irish taxes."³² Therefore, the American company has low taxable U.S. income, and the Bermuda-based company has no income subject to Irish

²⁵ Kaye, *supra* note 19, at 185–86.

²⁶ *Id.* at 187; see also Yariv Brauner, *What the BEPS?*, 16 FLA. TAX REV. 55, 57–58 (2014).

²⁷ See Kaye, *supra* note 19, at 187.

²⁸ See *id.*; see also Bank, *supra* note 5, at 1310.

²⁹ Bank, *supra* note 5, at 1310.

³⁰ *Id.* at 1310–11.

³¹ *Id.* The licensing fee paid to the parent company will be based on the fair market value of the license (using an arm's length standard). However, this fee may be a relatively small amount compared to what the parent company would otherwise pay in taxes. See *id.* at 1311.

³² *Id.* The Bermuda-based company is an Irish non-resident company under Irish law. Ireland only requires "resident" companies to pay standard corporate taxes. TAX SUMMARIES, *supra* note 14, at 886–87.

tax, because Irish law uses the location where the company is controlled and managed (i.e. Bermuda) to determine tax residency.³³ So, most of the income is attributed to Bermuda, with no corporate tax.³⁴

Three popular mechanisms for accomplishing profit shifting are hybrid mismatches, special purpose entities (SPE), and transfer pricing.³⁵ Hybrid mismatches create double non-taxation or long-term tax deferral when different countries have tax rules that are domestically logical but incompatible with the other country's rules.³⁶ This can occur when the MNE deducts twice for the same borrowing, claims deductions without matching income, or uses differences between countries' rules related to foreign tax credits or exemptions.³⁷ SPEs are defined as companies with minimal physical presence in a host country and a small number of employees.³⁸ Their core business involves holding activities or group financing, and their assets and liabilities are investments in or from other countries.³⁹ Transfer pricing allows intangibles to be taxed in a lower-tax jurisdiction than the United States.⁴⁰ According to the IRS rules for transfer pricing, MNEs must utilize an arm's length standard when determining the pricing of transactions among members of the group, based on the risks and functions of each entity.⁴¹ This is designed to protect the tax base by preventing the shifting of income that otherwise would be taxed in the United States to another country.⁴² The arm's length standard for transfer pricing is regulated in the United States under Section 482 of the Internal Revenue Code, and in the 2010 OECD transfer-pricing guidelines, so "the prices charged in transactions between commonly controlled parties must be consistent with the consideration in, or results of, similar transactions between uncontrolled taxpayers."⁴³ Transfer prices divide the profits of a MNE among countries based on risks and functions to determine

³³ Bank, *supra* note 5, at 1311 n.30.

³⁴ *Id.* at 1311.

³⁵ Patrick Love, *What is BEPS and How Can You Stop It?*, OECD INSIGHTS (July 19, 2013), <http://oecdinsights.org/2013/07/19/what-is-beps-how-can-you-stop-it/> [<http://perma.cc/9Q27-URPA>].

³⁶ See Brauner, *supra* note 26, at 79.

³⁷ ACTION PLAN, *supra* note 3, at 15.

³⁸ Patrick Love, *BEPS: Why You're Taxed More than a Multinational*, OECD INSIGHTS (Feb. 13, 2013), <http://oecdinsights.org/2013/02/13/beps-why-youre-taxed-more-than-a-multinational/> [<http://perma.cc/U98A-EWCA>].

³⁹ *Id.*

⁴⁰ Brauner, *supra* note 26, at 96.

⁴¹ Kaye, *supra* note 19, at 186.

⁴² *Id.*

⁴³ ROBERT T. COLE & WILLIAM H. BYRNES, PRACTICAL GUIDE TO U.S. TRANSFER PRICING § 1.02 (3d ed. 2014). Most countries have enacted similar transfer pricing rules. *Id.*

how much income is taxed in each country. Over the past twenty years, transfer-pricing rules have become stricter in the United States and in foreign countries, but some observers believe that “MNEs are still using transfer pricing to improperly shift income from the jurisdictions where they function (developed countries and developing countries) to low-tax jurisdictions, significantly eroding the tax base.”⁴⁴ However, due to transfer pricing and profit shifting, in 2008, American multinational companies claimed to earn 43% of overseas profits in Ireland, Bermuda, the Netherlands, Luxembourg, and Switzerland (all considered tax havens), while only 7% of their international investments and 4% of foreign employees were located there.⁴⁵

It has been calculated that “[a]round 60% of world trade actually takes place within multinational enterprises.”⁴⁶ This large percentage accounts for the billions of dollars lost each year to the governments of various jurisdictions where these companies avoid the payment of taxes, “undermin[ing] voluntary compliance by all taxpayers” and threatening the foundation of modern tax administration.⁴⁷ The OECD itself admits that there must be cooperative, international efforts implemented, because unilateral efforts made by individual countries will likely lead to the troubling alternative of double-taxation, which treaties years ago were created to avoid.⁴⁸ A number of issues need to be resolved, including how to divide taxes between source and residence countries, how to tax IP, and how to deal with havens and enablers, who may have no incentive to change.

C. Current Status of the Plan

A number of countries have expressed concern regarding the way tax rights are allocated between countries.⁴⁹ “The G20 finance ministers called on the OECD to develop an action plan to address BEPS issues in a co-ordinated and comprehensive manner.”⁵⁰ In February 2013, the OECD released its Action Plan, designed to aid countries struggling to increase tax revenues and suffering from companies evading tax payments in high-tax

⁴⁴ *Id.*

⁴⁵ Kaye, *supra* note 19, at 186.

⁴⁶ Love, *supra* note 38.

⁴⁷ *Id.*

⁴⁸ *Id.* The chairman of the Business and Industry Advisory Committee to the OECD feels that “if the project does not come up with multilateral agreed solutions which match the needs of many countries, then many countries are going to act unilaterally, and that is going to be worse for business than any multilateral solution that you can envisage.” Katy O'Donnell, *OECD Seeks to Curb Corporate Tax Avoidance*, CQ ROLL CALL, Sept. 17, 2014, 2014 WL 4628469.

⁴⁹ ACTION PLAN, *supra* note 3, at 11.

⁵⁰ *Id.*

jurisdictions.⁵¹ “The OECD BEPS Action Plan seeks to realign taxation with the relevant economic substance and ensure that taxable profits cannot be artificially shifted.”⁵² Simply put, everyone should pay their fair share of taxes. The goal of the plan is to create equity by making corporate taxation more coherent, transparent, cooperative, and beneficial on an international scale.⁵³

With a timeline for completion in 2015, the plan includes five general categories and fifteen action items.⁵⁴ The broad categories can be divided into: 1) identifying the tax challenges of the digital economy, 2) creating international coherence of taxation, 3) restoring the effects and advantages of international standards, 4) increasing transparency, and 5) implementing the actions in a timely manner.⁵⁵

The first category includes only the first action item, Action 1, which advocates forming a task force to identify options relating to tax concerns associated with e-commerce and the digital economy.⁵⁶ The second category includes Actions 2–5, relating to neutralizing the effects of hybrid mismatch, strengthening controlled foreign corporation (CFC)⁵⁷ rules, limiting base erosion via interest deductions and other financial payments, and countering harmful tax practices more effectively, taking into account transparency and substance.⁵⁸ The third category involves Actions 6–10, setting international standards for tax systems through updates in defining PE status and making sure that transfer-pricing outcomes are consistent with value creation,

⁵¹ See *OECD Urges Stronger International Co-operation on Corporate Tax*, OECD (Dec. 2, 2013), <http://www.oecd.org/tax/oecd-urges-stronger-international-co-operation-on-corporate-tax.htm> [<http://perma.cc/N5SN-T526>].

⁵² Kaye, *supra* note 19, at 188.

⁵³ Sean Rosenthal, Note, *The OECD's International Tax Proposal: The Action Plan*, 33 REV. BANKING & FIN. L. 20, 23 (2013).

⁵⁴ *Base Erosion and Profit-Shifting (BEPS): OECD and Ways & Means Start Taking Action*, PRICEWATERHOUSECOOPERS: U.S. OUTBOUND NEWSALERT (Aug. 2, 2013), http://www.pwc.com/en_US/us/tax-services-multinationals/newsletters/us-outbound-tax/assets/pwc-beps-oecd-wm-start-taking-action.pdf [<http://perma.cc/Q79N-34GQ>] [hereinafter *Ways & Means*].

⁵⁵ *Id.* at 2.

⁵⁶ ACTION PLAN, *supra* note 3, at 14–15. There are no specific suggestions regarding this action item; it is merely an acknowledgement of the fact that the current rules are unable to encompass the challenges intangibles present. See *id.*

⁵⁷ CFCs are foreign subsidiaries in which U.S. shareholders own at least 50%, by value or vote. TAX SUMMARIES, *supra* note 14, at 2120.

⁵⁸ ACTION PLAN, *supra* note 3, at 15–18. Recommendations to limit hybrid mismatch include disallowing the exemption of deductible payments, double deductions, or deductions without corresponding income. *Ways & Means*, *supra* note 54, at 3. The plan suggests limiting the deduction of interest expenses when the related interest income is not being fully taxed. ACTION PLAN, *supra* note 3, at 17; *Ways & Means*, *supra* note 54, at 3. Action 5 involves reviewing domestic tax regimes of member and non-member countries, and evaluating harmful tax practices. ACTION PLAN, *supra* note 3, at 18.

especially relating to intangibles.⁵⁹ The fourth category deals with transparency in Actions 11–14, with the collection and analysis of data, requirement to disclose aggressive tax planning arrangements, documentation of transfer pricing, and improvement in dispute resolution.⁶⁰ The fifth category is limited to Action 15,⁶¹ which suggests forming a multilateral instrument to facilitate these changes because the OECD has no legal standing to enforce its recommendations, and any adopted changes must be enacted by all involved parties.⁶² Various aspects of several of these actions will be discussed, but they tend to overlap, so it is difficult to evaluate them individually.

The quick implementation time for the OECD Action Plan implies that a number of the actions are underway and have been set for completion. The OECD released a discussion draft identifying issues raised by the digital economy and possible actions to address them in March 2014, and the deadline for completion of Action 1 was set for September 2014.⁶³ The OECD intended that the Model Tax Convention would be updated with changes, and by September 2014, “recommendations regarding the design of domestic rules” would be finalized.⁶⁴ Comparatively,

⁵⁹ ACTION PLAN, *supra* note 3, at 19–20. The goal is to “ensure that entities and locations earning income have sufficient substance to justify that income.” *Ways & Means*, *supra* note 54, at 4–5.

⁶⁰ ACTION PLAN, *supra* note 3, at 21–23.

⁶¹ *Id.* at 24.

⁶² *Ways & Means*, *supra* note 54, at 6.

⁶³ See ACTION PLAN, *supra* note 3, at 29. The committee met again in April 2014. See generally BEPS Action 1: Address the Tax Challenges of the Digital Economy, 24 March 2014–14 April 2014, OECD, <http://www.oecd.org/ctp/tax-challenges-digital-economy-discussion-draft-march-2014.pdf> [perma.cc/P2CR-BES3]. The OECD issued a 2015 Final Report on Action Plan 1 with the recommendations and conclusions of the Task Force on the Digital Economy (TFDE). This included recommendations to modify the definition of and list of exceptions to PEs, transfer-pricing guidelines, the definition of CFC income, and collection of VAT/GST (value added tax/goods and services tax) in cross-border transactions. OECD, *Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report*, OECD/G20 BASE EROSION AND PROFIT SHIFTING PROJECT (Oct. 5, 2015), <http://dx.doi.org/10.1787/9789264241046-en> [perma.cc/3Y9C-HKKH]. It may be several years before the full effects of any changes made can be seen, as such policies take time to implement. The OECD plans to re-evaluate the tax challenges regarding the digital economy, and the progress made through the Action Plan, by 2020. See *id.* at 149.

⁶⁴ ACTION PLAN, *supra* note 3, at 30 (noting also that Action 2’s effort to neutralize the effects of hybrid mismatch arrangements should be completed by September 2014). The OECD released a preliminary report in September 2014. In addition, the recently completed 2015 Final Report recommends changes to domestic law and the OECD Model Tax Convention, which “will neutralise hybrid mismatches, by putting an end to multiple deductions for a single expense, deductions without corresponding taxation or the generation of multiple foreign tax credits for one amount of foreign tax paid. [This] . . . will prevent these arrangements from being used as a tool for BEPS without adversely impacting cross-border trade and investment.” OECD, *Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2 - 2015 Final Report*, OECD/G20 BASE EROSION AND PROFIT SHIFTING PROJECT, at 11 (Oct. 5, 2015), <http://dx.doi.org/10.1787/>

the strengthening of the CFC Rules and the related recommendations were not to be completed until September 2015.⁶⁵ However, aspects of the BEPS plan have been initiated, and one observer notes that “the first part of the OECD’s ambitious package has been delivered on time and intact. The scale and scope of change surpasses what many people had anticipated at the outset.”⁶⁶

II. EVALUATION OF REPRESENTATIVE COUNTRIES

Every country seeks to maximize its income—through taxation or providing tax incentives for foreign companies—but what helps one country may hurt another. A “game theory approach” illustrates that the maximum payoff occurs when both countries exchange information and cooperate.⁶⁷ Any country can be a source country or residence country at different times, so its interests are best protected by exchanging information. If a country acts unilaterally to protect its tax base at the expense of another country, one will always lose, and the total payoff for the countries combined will be lower than if they exchange information and work cooperatively.⁶⁸ In this Comment, four countries will be presented as examples of the range of concerns and viewpoints involved in BEPS. The tax systems and problems faced by the United States as a high-tax jurisdiction, the United Kingdom as a relatively high-tax jurisdiction and European Union (EU) member, India as a source country, and Bermuda as a tax haven will be discussed, along with some innovations which may further the BEPS plan.

A. The United States

The United States can be seen as the principal perpetrator and victim of BEPS. Many of the world’s largest companies, which are central in the BEPS debate, including Google, Amazon, Apple, Facebook, and Microsoft, were founded and incorporated in the United States. For decades, the defining characteristics that associated a company with a specific country were the

9789264241138-en [perma.cc/6TSW-9HA9].

⁶⁵ ACTION PLAN, *supra* note 3, at 30.

⁶⁶ Richard Collier, *OECD and BEPS: The Most Significant Change in Modern Times*, PRICEWATERHOUSECOOPERS: TAX BLOG (Sept. 16, 2014), <http://pwc.blogs.com/tax/2014/09/oecd-and-beps-the-most-significant-change-in-modern-times.html> [https://perma.cc/T333-XJWT]. In October 2015, the OECD released final reports on each of the fifteen actions. *BEPS 2015 Final Reports*, OECD, <http://www.oecd.org/ctp/beps-2015-final-reports.htm> (last visited Jan. 9, 2016).

⁶⁷ See Carlo Garbarino, *The Use of Cross-Border Corporate Profits and Losses and “Global Corporate Tax Information”: A Game Theory Approach*, 5 COLUM. J. TAX L. 133, 153 (2014).

⁶⁸ *Id.*

location of incorporation and its principal place of business.⁶⁹ However, a Harvard Business School professor explains that the modern business corporation is experiencing a globalization process which he describes as “decentering”; “[n]ational identities [are] mutat[ing] with remarkable ease and firms are unbundling critical headquarters functions and reallocating them worldwide.”⁷⁰ This “decentering” has contributed to a significant decline in U.S. corporate tax revenue, which is lower than a number of other OECD countries.⁷¹ The United States has a corporate tax rate of 35% for high-earning corporations,⁷² one of the highest in the world, yet in the United States today, “[c]orporate tax receipts as a share of profits are at their lowest level in at least 40 years.”⁷³ With such a high tax rate imposed on the worldwide income of resident corporations,⁷⁴ even with a number of deductions available, it is not surprising that these companies have sought to shift their profits to jurisdictions with lower tax rates in an effort to maximize their profits.⁷⁵

The Obama Administration recognizes that U.S. taxation laws of MNEs must change, and the IRS has reported a gap of up to \$345 billion between what taxpayers actually pay and what they should pay.⁷⁶ Senator Max Baucus, the former Senate Finance Committee Chair, acknowledged, “In the past two decades, the number of U.S.-based companies on the Fortune Global 500 list has declined by 20 percent. . . . When it comes to international tax rules, [the United States has] the worst of all worlds.”⁷⁷ Congress is also in support of working to find reasonable solutions that can be implemented in accordance with the OECD Action Plan. Congress has considered options such as

69 Mihir A. Desai, *The Decentering of the Global Firm*, 32 WORLD ECON. 1271, 1272 (2009).

70 *Id.*

71 Bank, *supra* note 5, at 1308–09; see also Mihir A. Desai, *A Better Way to Tax U.S. Businesses*, HARV. BUS. REV., July–Aug. 2012, at 135, 137–38.

72 TAX SUMMARIES, *supra* note 14, at 2116.

73 Damian Paletta, *With Tax Break, Corporate Rate Is Lowest in Decades*, WALL ST. J. (Feb. 3, 2012, 1:02 PM), <http://online.wsj.com/article/SB10001424052970204662204577199492233215330.html>. However, the recent recession may have contributed to the lowering of taxable income, by enabling companies to offset profits with previous losses. *Id.*

74 TAX SUMMARIES, *supra* note 14 (defining a domestic corporation as a company organized under the laws of the United States (or any state within the United States) and stating that a domestic corporation qualifies as a resident corporation even if the company does not conduct any business or own any property within the United States).

75 See generally TAX SUMMARIES, *supra* note 14, at 2120–25 (discussing various deductions that companies may use to maximize their profits).

76 CYM H. LOWELL & MARK R. MARTIN, TRANSFER PRICING STRATEGIES ¶ 2.04 (2013).

77 Senator Max Baucus, Chairman, Senate Fin. Comm., Keynote Address at the Bipartisan Policy Center: A Tax Code for the 21st Century (June 11, 2012), <http://www.finance.senate.gov/newsroom/chairman/release/?id=7f75cb4c-d83f-405b-8063-b1d7c1d2ea88> [<http://perma.cc/P9NU-6M7K>].

a structural reformation to a “purer” worldwide system of taxation, or options as drastic as converting to a territorial system (only taxing income earned domestically).⁷⁸ However, a number of economists believe that changing to a territorial system will only enhance the problems.⁷⁹ These economists acknowledge that IP is one of the primary assets and sources of income of the global technology companies, and this income-producing asset can easily be “shifted” to a low-tax jurisdiction. This is a prime example of where companies take advantage of the “Double Irish” structure,⁸⁰ in which a large multinational company incorporates a subsidiary in Ireland, with management and control in a country such as Bermuda. That subsidiary can incorporate a sales principal in Ireland that is licensed by the first Irish company. Although the parent company remains in the United States, it is difficult for the United States to collect taxes on the profit made by the subsidiaries.

President Obama has also proposed a “one-off 14% tax on U.S. profits stashed overseas, as well as a 19% tax on any future profits,” but it is still unclear as to whether Congress will approve the proposal.⁸¹ Under U.S. corporate law, companies are not required to pay taxes on profits which are earned by a foreign subsidiary, so long as they are not brought back to the United States through dividends, leading many of these companies to leave earnings abroad rather than reinvest them in the U.S. economy.⁸² As a result, the United States may not be able to tax the profits of these foreign subsidiaries, which may facilitate further base erosion.⁸³

78 CONG. BUDGET OFFICE, OPTIONS FOR TAXING U.S. MULTINATIONAL CORPORATIONS 1 (2013), http://www.cbo.gov/sites/default/files/43764_MultinationalTaxes_rev02-28-2013..pdf [<http://perma.cc/YEC5-388W>]; see also Bank, *supra* note 5, at 1309.

79 See Lee A. Sheppard, *News Analysis: Why Do We Need Treaties?*, 137 TAX NOTES 825, 825–26 (2012).

80 See *supra* notes 27–34 and accompanying text; see also J. Bryan Lowder, *The Double Irish and the Dutch Sandwich: The Explainer's Field Guide to Exotic Tax Dodges*, SLATE (Apr. 14, 2011, 6:00 PM), http://www.slate.com/articles/news_and_politics/explainer/2011/04/the_double_irish_and_the_dutch_sandwich.html [<http://perma.cc/MJm6-53Y6>].

81 *Obama Plans Tax on US Firms Overseas to Fix Roads at Home*, BBC NEWS (Feb. 2, 2015), <http://m.bbc.com/news/business-31085912> [<http://perma.cc/25RM-N3VE>].

82 *Id.* The United States is alone in taxing worldwide income; many other countries will only tax money earned inside the residence country, in an effort to encourage the company to bring the money back to the host country and reinvest it in the economy. Mihir A. Desai, *Tax Only Corporate Income Earned in the United States*, N.Y. TIMES (May 30, 2013), <http://www.nytimes.com/roomfordebate/2013/05/30/how-multinationals-can-best-be-taxed/tax-only-corporate-income-earned-in-the-united-states> [<http://perma.cc/NTL3-NLKC>].

83 The U.S.-Ireland tax treaty and the use of the “Double Irish” technique facilitate lower tax payments by the U.S. parent company. The subsidiary in Ireland claims it has little profit which can be taxed in Ireland, and most of the profit earned is attributed to

A number of economists believe that it might be in the best interest of the United States to lower its corporate tax rates, finding that the current rates are hurting smaller companies, individuals, and the overall economy of the United States.⁸⁴ While campaigning in 2012, both Obama and Romney proposed lowering the corporate tax rate to 28% and 25% respectively.⁸⁵ The corporate tax rate is a sliding scale based on income; there is also an alternative minimum tax (AMT) of 20% over \$40,000, with fewer deductions.⁸⁶ Lowering the corporate tax rate would presumably encourage companies to do business in the United States and pay taxes.

While many U.S. corporations use foreign tax havens, some observers note that the United States can also be a haven for foreign corporations.⁸⁷ Although the United States can act as a source or a residence (parent) country, many of the U.S. government approaches to base erosion (e.g. a minimum tax) address the residence-country problem, while most other countries are focusing on the source-country problems.⁸⁸ CFC rules in the United States have been weakened because of the check-the-box rules, “which permit elective inconsistent treatment or even non-recognition of entities for tax purposes.”⁸⁹ This means the taxpayer can choose whether it wants to be a corporation, a partnership, or a “disregarded entity” for tax purposes.⁹⁰ While this is helpful for the taxpayer (to reduce taxable income), it makes it more difficult for the government to collect any taxes.⁹¹ Strengthening the CFC rules along with

the non-resident Irish subsidiary in Bermuda, which pays no taxes in Bermuda and owes no taxes to Ireland. There will be no taxation unless these funds are repatriated into the United States. Bank, *supra* note 5, 1311–12; see also Kyle Pomerleau, *How Much Do U.S. Multinational Corporations Pay in Foreign Income Taxes?*, TAX FOUND. (May 19, 2014), <http://taxfoundation.org/article/how-much-do-us-multinational-corporations-pay-foreign-income-taxes> [<http://perma.cc/CT6W-7MMM>].

⁸⁴ See Desai, *supra* note 82 (“In a world of highly mobile capital and products, economic theory and empirical evidence indicate that the least mobile factor – labor – will bear the corporate tax. In short, lower investment leads to less productive workers and lower wages.”).

⁸⁵ Bank, *supra* note 5, at 1324.

⁸⁶ TAX SUMMARIES, *supra* note 14, at 2116.

⁸⁷ Colloquium, *Conceptualizing a New Institutional Framework for International Taxation*, 44 WASH. U. J.L. & POL’Y 7, 28 (2014) [hereinafter *Conceptualizing*].

⁸⁸ *Id.* at 32–33.

⁸⁹ Sheppard, *supra* note 12, at 71–72. Inconsistent entity treatment between the United States and a foreign country does not reduce foreign taxation; it is more likely the result of a hybrid instrument, which lowers the tax in one country without a compensatory increase in another country.

⁹⁰ *Conceptualizing*, *supra* note 87, at 22.

⁹¹ *Id.*; see also Sheppard, *supra* note 12, at 72 (“These [check-the-box] rules have been called the single stupidest administrative gesture in the history of the income tax.”). However, Congress has made the check-the-box rules less relevant, as it has extended a rule that exempts from Subpart F treatment certain dividends, interest, and royalties

lowering corporate taxes could help limit BEPS. In March 2014, the Obama Administration released some proposals for fiscal year 2015, such as:

the current taxation of excess returns associated with transfers of intangibles offshore, the creation of a new category of Subpart F income for transactions involving digital goods or services, as well as deferral of the interest expense deduction related to the deferred income of the foreign subsidiaries of U.S. multinational corporations.⁹²

Another unilateral undertaking by the United States is the Foreign Account Tax Compliance Act (FATCA) of 2010.⁹³ This is designed to eliminate offshore tax evasion by providing the IRS information about U.S. taxpayer bank accounts outside the United States, but does not require the United States to supply any information to other governments.⁹⁴ Numerous treaties exist between the United States and other countries to decrease the percentage of withholding and avoid double taxation. However, "FATCA mandates that multinational businesses evaluate entity payees differently, engage in withholding on certain gross proceeds transactions[,] . . . [and] report different information to the IRS."⁹⁵ Beginning in July 2014, this required new intergovernmental agreements between the U.S. Treasury and foreign governments to provide this information.⁹⁶ While FATCA has been called a "hammer," other countries have agreed that they also need information, so "the inevitable result of FATCA [will be] a multilateral system."⁹⁷ This has the same effect as the transparency requirements of the BEPS plan, to provide reciprocal information exchange to all governments involved. While there are a number of issues relating to BEPS that the United States is unilaterally considering in terms of CFC rules, lowering corporate taxes, transparency, structural changes in the tax laws, and rules governing intangibles, there are few suggestions being implemented at this time specifically relating to the Action Plan. The only current action that the United

from one foreign subsidiary to another foreign subsidiary. See generally Kenan Mullis, *Check-the-Box and Hybrids: A Second Look at Elective U.S. Tax Classification for Foreign Entities*, TAX ANALYSTS (Nov. 4, 2011), <http://www.taxanalysts.com/www/features.nsf/Articles/58D8A3375C8ECCD18525793E0055EB9B?OpenDocument> [perma.cc/Z6Q8-NMYD].

⁹² Kaye, *supra* note 19, at 190. Subpart F income refers to a type of undistributed foreign income from CFCs; it can be "easily transferred to a low-tax jurisdiction." TAX SUMMARIES, *supra* note 14, at 2120.

⁹³ TAX SUMMARIES, *supra* note 14, at 2134.

⁹⁴ *Conceptualizing*, *supra* note 87, at 14.

⁹⁵ TAX SUMMARIES, *supra* note 14, at 2135.

⁹⁶ *Id.*

⁹⁷ *Conceptualizing*, *supra* note 87, at 27–29 (reporting that the United States already has intergovernmental agreements with Canada, Germany, the United Kingdom, France, Spain, and Italy).

States has considered is moving to adopt country-by-country reporting under BEPS.⁹⁸ While the end results of the U.S. and OECD plans may be similar, the goals are really not in line, as the United States is trying to capture more income domestically, and the OECD is trying to create social justice and equity.

B. The United Kingdom

Similar to the United States, the United Kingdom has attempted to cut its corporate tax rate over the past decade to maintain business competitiveness; the United Kingdom had the sixteenth lowest OECD tax rate in 2006.⁹⁹ The tax rate has continued to decrease, with the main rate of corporate taxation set at 21% in April 2014,¹⁰⁰ and 20% in April 2015.¹⁰¹ Recently, a plan to move to 19% in 2017 was announced.¹⁰² The effective corporate rate is lower than most households and small businesses are paying.¹⁰³ Unlike the United States, the United Kingdom falls under the jurisdiction of the EU and must follow tax guidelines set out by the EU. The EU is attempting to pressure its member states to stay within certain boundaries and work harmoniously to avoid major disparities.¹⁰⁴ However, the United Kingdom is trying to position itself as a favorable tax jurisdiction, with revised CFC rules and rules concerning cross-border transactions, understanding that this will significantly decrease the amount of corporate tax it collects. Since the United Kingdom does not want its companies moving operations to Ireland, with its very low tax rate, or to other offshore havens, it has increased individual tax rates to offset the loss of corporate tax income.¹⁰⁵

While the United Kingdom has been actively involved with the BEPS project, the government decided to unilaterally initiate a new Diverted Profits Tax (DPT), which was enacted in April

⁹⁸ There has been a lack of support from the CEOs of various U.S. multinational companies regarding the idea that their companies should have to disclose tax and financial information. See *U.S. CEOs Resist Country-by-Country Tax Reporting -Survey*, REUTERS (May 1, 2014, 2:26 PM), <http://www.reuters.com/article/2014/05/01/usa-tax-survey-idUSL2N0NN0PG20140501> [<http://perma.cc/SF5M-Y5BR>].

⁹⁹ Bank, *supra* note 5, at 1321.

¹⁰⁰ TAX SUMMARIES, *supra* note 14, at 2090.

¹⁰¹ *Corporation Tax: Main Rate*, GOV.UK (July 8, 2015), <https://www.gov.uk/government/publications/corporation-tax-main-rate> [perma.cc/C8TQ-RDJF].

¹⁰² *Id.*

¹⁰³ Bank, *supra* note 5, at 1322.

¹⁰⁴ *Id.* at 1310, 1318 (noting that the EU has pressured Ireland to raise its tax rate of 12.5%, especially in light of the need for the EU bailout of the Irish government in 2010). Several EU members, including Ireland, the Netherlands, and Luxembourg are considered tax havens. Sheppard, *supra* note 12, at 75–76.

¹⁰⁵ *Conceptualizing*, *supra* note 87, at 34–35 (commenting that raising the personal income tax rate while lowering corporate taxation will maintain equivalent total tax income for the government).

2015.¹⁰⁶ The U.K. government is concerned that “current rules allow foreign businesses contracting with domestic customers to pay less tax on the profits generated by those sales.”¹⁰⁷ Since its e-commerce spending is the highest among the surveyed major nations, and it has the “highest proportion of online spending,” this particularly concerns the United Kingdom.¹⁰⁸ This tax is an interim fix that will become irrelevant when BEPS is eliminated, but is consistent with the Action Plan and may be more in line with the OECD’s goals than other legislation.¹⁰⁹ “The tax rate of the DPT at 25% is 5% higher than [the] normal corporation tax and this is indicative of it being a move intended to change behaviour; ie to get businesses to change the way they operate to anticipate the new world.”¹¹⁰ As a unilateral tax, it may backfire if other countries enact similar laws, taxing profits now allocated to the United Kingdom. However, it is an attempt to tax income locally, where the customer is located, targeting foreign companies which otherwise might not incur tax on these profits.

The United Kingdom already has anti-hybrid arbitrage rules to prevent hybrid instrument mismatches, such as double deductions, or a deduction in one territory without taxing it in another territory. The BEPS plan recommends more stringent rules, however, with several key differences. First, the U.K. rules have a “business purpose get-out” so they only apply if the main purpose of the scheme is a U.K. tax advantage.¹¹¹ There is no business purpose test or get-out in OECD rules.¹¹² Second, in the United Kingdom, the anti-hybrid rules are only enacted if Her Majesty’s Revenue and Customs (HMRC) department issues a notice, while the OECD rules apply to any hybrid entity or instrument.¹¹³ This is one example of a change that the United Kingdom is committed to make, but these few differences can make a big difference in what types of hybrid instruments will still be allowed.

¹⁰⁶ John Steveni, *UK Brings in Digital Tax as Ofcom Report Identifies UK Shoppers as the Most Prolific Online*, PRICEWATERHOUSECOOPERS: TAX BLOG (Dec. 16, 2014), <http://pwc.blogs.com/tax/2014/12/uk-brings-in-digital-tax-as-ofcom-report-identifies-uk-shoppers-as-the-most-prolific-online.html> [<http://perma.cc/CD65-82JD>].

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ It is not clear whether the DPT was actually enacted with the same social justice goals as the Action Plan or, simply, as a mechanism to increase the tax profits earned by the United Kingdom. It can likely be argued that both goals influenced the U.K.’s decision to act preemptively.

¹¹⁰ As of April 2015, the normal corporate tax rate is 20%. Steveni, *supra* note 106.

¹¹¹ *BEPS: Financing and Hybrid Mismatches*, PRICEWATERHOUSECOOPERS: U.K. (2014), <http://www.pwc.co.uk/tax/issues/beps-financing-and-hybrid-mismatches.html> [<http://perma.cc/8LCH-8U22>].

¹¹² *Id.*

¹¹³ *Id.*

C. India

India is not a member of the OECD, but is one of the enhanced engagement countries (observers);¹¹⁴ these developing countries are known by the acronym BRICS.¹¹⁵ In March 2012, the Indian government criticized the OECD's *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, claiming that the guidelines treat developing source countries unfairly.¹¹⁶ In January 2013, the Heads of Revenue of the BRICS countries issued a statement that "they confirmed their agreement to develop a cooperative approach on issues relating to international taxation, transfer pricing, exchange of information, and tax evasion and avoidance."¹¹⁷

In India, non-resident (foreign) companies are taxed on income received in India at a rate of 40%, plus various surcharges; there is also a minimum alternative tax of about 20%.¹¹⁸ Indian companies are taxed at 30% plus surcharges,¹¹⁹ but this will be lowered over the next four years to 25%.¹²⁰ India states that tax residency "include[s] the concept of place of effective management."¹²¹ India's economy is driven by transfer pricing, which aims to create economically fair transactions. It uses the arm's length price, which is consistent with OECD guidelines, and it has recently enacted safe harbour provisions to decrease litigation in transfer-pricing disputes.¹²² Although India has claimed that the arm's length standard has negatively impacted developing countries, the United Nations has continued to accept it.¹²³ The Indian government is also utilizing advance pricing agreement (APA) rules to cooperatively resolve transfer-pricing disputes, making transfer pricing less of an issue.¹²⁴

¹¹⁴ The other enhanced engagement non-member countries are Brazil, China, Indonesia, and South Africa, and Russia is an accession candidate. *About the OECD: Members and Partners*, *supra* note 4.

¹¹⁵ BRICS refers to Brazil, Russia, India, China, and South Africa. David Spencer, *BRICS, BEPS, and the U.N. Transfer Pricing Manual (Part 1)*, J. INT'L TAX'N, May 2013, at 29, 29.

¹¹⁶ *Id.* at 30–31.

¹¹⁷ *Id.* at 30.

¹¹⁸ TAX SUMMARIES, *supra* note 14, at 836–37 (noting that 2013–2014 surcharge is 2% for smaller and 10% for larger companies, plus an additional educational charge of 3%).

¹¹⁹ *Id.* at 836.

¹²⁰ PRICEWATERHOUSECOOPERS, LOOKING AT A NEW HORIZON: BUDGET ANALYSIS 2015, at 1 (2015), http://www.pwc.in/en_IN/in/assets/pdfs/budget/2015/pwc-budget-flash-2015.pdf [<http://perma.cc/KUJ8-TQ4Z>].

¹²¹ *Id.* at 4.

¹²² TAX SUMMARIES, *supra* note 14, at 836, 849–50.

¹²³ COLE & BYRNES, *supra* note 43.

¹²⁴ TAX SUMMARIES, *supra* note 14, at 836 (commenting that multilateral APAs will better prevent double taxation).

Economists observe that India¹²⁵ is unhappy that the U.S. multinationals do not pay what India considers to be appropriate taxes to the source countries, believing that the source countries should have the first claim on the tax money.¹²⁶ Emerging economies like India's have pushed the OECD to increasingly allow source taxation, leveraging their increased power base.¹²⁷ The OECD needs India to cooperate with the BEPS plan because its economy is too large and "important to the functioning of Western multinationals to ignore."¹²⁸ Though it is not a full member, India is an equal partner in the OECD's plan, and "[t]he BEPS project is an attempt to get these countries back on the reservation."¹²⁹ The consequence of India's dissatisfaction with the results of the plan will be that it will "take creative license with the OECD model treaties" and "continue to undermine international consensus from within."¹³⁰ India is concerned with the value added by its market and the correct way to attribute the worth of research and development when allocating profits.¹³¹ The Indians "believe IP value is created where the IP is developed,"¹³² and they are not collecting the appropriate taxes. While India is portraying its discontent with the status quo as a social issue (powerful entities taking advantage of developing countries), transfer pricing is primarily an economic issue. Driven by objective, economic analysis, transfer pricing has no social justice element, and India's current system of revenue generation (based on transfer pricing) does not lend itself to a BEPS fix. Although the OECD and India both wish to promote social justice, the OECD's goal is to prevent companies from evading taxation in countries in which they generate a lot of income. This is not the case in India, where the income is based on cross-border support and R&D.

D. Bermuda

Bermuda is not affiliated by any means with the OECD.¹³³ Bermuda has no corporate taxes.¹³⁴ "Bermuda [is] a paradigm of

¹²⁵ The following comments about India also apply to China.

¹²⁶ *Conceptualizing*, *supra* note 87, at 26–27.

¹²⁷ Brauner, *supra* note 26, at 63.

¹²⁸ Sheppard, *supra* note 12, at 64.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Conceptualizing*, *supra* note 87, at 17.

¹³² Jason W. Klimek, *A Big Data Approach to Formulary Apportionment*, CORP. TAX'N, May–June 2014, at 3, 6.

¹³³ See *About the OECD: Members and Partners*, *supra* note 4 (identifying that other tax havens such as Ireland, Luxembourg, and the Netherlands are OECD member countries and subject to adherence to and promulgation of the BEPS Action Plan).

¹³⁴ TAX SUMMARIES, *supra* note 14, at 217. See generally Warren Cabral, *Bermuda: A Paradigm for Offshore e-Commerce*, E-COMMERCE L. REP., Nov. 2000, at 1.

what is available for the e-commerce trader to maximize profit and opportunity and to minimize regulatory interference.”¹³⁵ There are no capital gains taxes, VAT, sales taxes, excise taxes, transfer taxes, or stamp taxes imposed on exempt companies (those owned by non-Bermudans).¹³⁶ Multinational corporations are only considered to be resident companies if they have resident employees who fall under the Bermuda payroll tax.¹³⁷ Also, the government has “extended the tax exemption granted to Bermuda companies under the Exempt Undertakings Act of 1976 from 28 March 2016 until 2035.”¹³⁸ Existing companies must apply for the extension of tax exemption, which protects them from any new income or capital gains taxes through 2035. Clearly, Bermuda must get something out of having so many multinationals incorporated in their country; the companies pay a yearly fee. Every year, the company files a report with the Registrar of Companies, noting its assessable capital, and pays a sliding scale fee based on its net worth, with a maximum rate of \$31,120.¹³⁹ As a country, Bermuda’s income is derived primarily from its function as a maximum tax haven. There is no incentive for it to change, work with OECD, or support the BEPS plan, and it has extended its tax haven status for the next twenty years.

III. RECOMMENDATIONS

Clearly, BEPS is a huge issue with a plethora of interlocking factors. Not surprisingly, there are an equally large number of recommendations by industry experts analyzing the plan, regarding how to address its problems, some of which are contradictory or mutually exclusive. The largest difficulty is how to convince all of the countries involved to agree on a multilateral plan and enforce its various parts. Evaluating the issues and their potential resolutions in terms of the individual countries discussed is not particularly useful, since only multilateral agreements will solve the problems. Also, until the motivations of the countries involved are aligned with those of the OECD (social justice rather than income generation), the Action Plan is at risk for failure. Some of the most promising measures to combat BEPS include a byte tax, a shift from arm’s length to formulary apportionment, the common consolidated corporate tax base, and

¹³⁵ Cabral, *supra* note 134 (noting that Bermuda is an excellent offshore tax haven that permits a business to avoid the heavy-handed restrictions of a government like the United States).

¹³⁶ TAX SUMMARIES, *supra* note 14, at 217–21.

¹³⁷ *Id.* at 217–18 (stating that resident employees must work four consecutive weeks in a calendar year).

¹³⁸ *Id.* at 217.

¹³⁹ *Id.* at 219.

a multilateral entity that would have some actual authority over international taxation.

A. Applying a Byte Tax to Intangibles

While this is not directly addressed in the OECD Action Plan (since there are no recommendations specifically about the digital economy), a byte¹⁴⁰ tax appears to be one of the most objectively fair solutions for each country to earn the taxes they feel they are owed. Some countries are evaluating the byte tax as a method to gain “non-income tax jurisdiction over digital economy companies having no physical presence there.”¹⁴¹ They present the reasonable argument that intangibles should be taxed in the country in which the customer lives, because the product is changed when it is used by the customer.¹⁴² For example, France wants to tax Google for selling information on French customers to its advertisers (looking at where the income-generating information is being created). However, they do not want French companies to pay taxes when foreigners buy French merchandise (looking at where the customer is located).¹⁴³

The United States has expressed no interest in applying a byte tax, but this may not be the best decision. It has addressed the problem in the Internet Tax Freedom Act,¹⁴⁴ and has recently struck down the consideration again in the “Net Neutrality” decisions.¹⁴⁵ The justification appears to be that the United States does not want the MNEs principally based in its jurisdiction to have to pay byte taxes to other countries, even if taxes cannot be collected in the United States either.¹⁴⁶ This reticence in taxing the Internet stems from a resistance to doing so when it was formed; there was a concern that taxation would hinder the presented opportunities for expansion and innovation. Over the past decades, the Internet has exponentially expanded, and every other industry of its size and influence faces taxation.

¹⁴⁰ “Byte” and “bit” both refer to digital data (a byte is a sequence of bits), and can be used interchangeably regarding the tax. *Byte*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/byte> [<http://perma.cc/Y3UB-ZKKU>].

¹⁴¹ Sheppard, *supra* note 12, at 69 (mentioning that France believes a byte tax would be an ideal solution).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ See Internet Tax Freedom Act, 47 U.S.C. § 151 (2012).

¹⁴⁵ *FCC Adopts Strong, Sustainable Rules to Protect the Open Internet: Rules Will Preserve the Internet as a Platform for Innovation, Free Expression and Economic Growth*, FCC (Feb. 26, 2015), https://apps.fcc.gov/edocs_public/attachmatch/DOC-332260A1.pdf [<http://perma.cc/C6UF-EJLD>] [hereinafter *FCC Rules*] (“Broadband service will remain exempt from state and local taxation under the Internet Tax Freedom Act. This law, recently renewed by Congress and signed by the President, bans state and local taxation on Internet access regardless of its FCC regulatory classification.”).

¹⁴⁶ Sheppard, *supra* note 12, at 69–70.

“If governments choose to tax consumption in general—and most of them do, through value-added or sales taxes—it’s logical to tax data consumption, too.”¹⁴⁷ It is no longer reasonable to believe that taxation would present a substantial obstacle to the Internet’s expansion or its utilization. However, the United States does not have any federal sales or value-added taxes, so this would be a major change. Also, this could be seen as a regressive tax, which would disproportionately burden consumers, creating a greater tax burden for those lower-income individuals who spend a larger percentage of their income.

It is impractical to tax individuals using the Internet based on the bytes they utilize, because that would be disproportionately cumbersome on individuals and the government. Assessment, collection, enforcement, and payment would all be exceedingly complex.¹⁴⁸ In addition, this tax might actually present a deterrence to Internet use and development, which is not the purpose of a tax.¹⁴⁹ Rather, corporations should incur a tax based on where the bytes originate. If a person on the Internet purchases a product on Amazon in the United States, the United States will recognize the profit, and Amazon will face taxation in the United States. Although this is bad news for the multinational companies that would quickly begin to accumulate varying taxes in each jurisdiction where a byte tax is implemented, it seems to be an equitable method to assess taxes. This increased tax might, however, just be passed on to the consumer via an increased price, but it presents an opportunity for the countries to act in a reasonable, consistent manner that is beneficial to each, rather than taking unilateral actions which will only cause turmoil. The recent “Net Neutrality” decisions promote transparency; this will better allow for a monitoring of individuals purchasing goods online and a determination of where multinational companies should incur taxes.¹⁵⁰ There are quite a number of issues that would need to be addressed before a byte tax could be practically implemented, including the amount of contact a country would need to have with a transaction before it could claim the right to tax the revenue, and how Internet transactions should be taxed.

¹⁴⁷ A.L., *Hungary’s Internet Tax: A Bit of Protest*, *ECONOMIST* (Oct. 30, 2014, 10:44 AM), <http://www.economist.com/node/21629492> [<http://perma.cc/B6S9-74CY>].

¹⁴⁸ E.g., Annette Nellen, *Internet Usage or Bit Tax?*, *21ST CENTURY TAX’N* (Mar. 18, 2010), 21stcenturytaxation.blogspot.com/2010/03/internet-usage-or-bit-tax.html [<http://perma.cc/RF8N-MFKG>].

¹⁴⁹ *Id.*

¹⁵⁰ *FCC Rules*, *supra* note 145.

B. Replacing Arm's Length with Formulary Apportionment

Another area that has been addressed is the value of replacing the arm's length principle with formulary apportionment, and this appears to be a particularly promising area of reform.¹⁵¹ Alternatively, a combination of arm's length and formulary apportionment could be most successful for companies with a significant IP component.¹⁵² The Action Plan requires an allocation of profits associated with intangibles to be in accordance with value creation, which is essentially formulary apportionment without calling it that.¹⁵³ The OECD's problem with formulary apportionment has been its rejection of a "one-size-fits all" principle, and the traditional factors of property, sales, and payroll are not relevant to the digital economy.¹⁵⁴ However, "a hybrid approach using big data would allow countries to identify relevant factors to a given industry to accurately capture the value generated by that industry."¹⁵⁵ While arm's length works for material goods, intangibles have "an intrinsic value that simply cannot be captured by a comparable uncontrolled price."¹⁵⁶ Many technology companies, such as Apple, Google, and Microsoft, are collecting and analyzing data ("big data") about users, such as location, which could be utilized to determine what profits should be associated with which country. These statistics could easily be modified to determine the relevant factors useful for formulary apportionment, as it entails no extra expense (companies are already collecting it) and is more transparent.¹⁵⁷ "Further, value creation attributable to location based data collection is also attributable to that country's contribution to the firm's collection activities."¹⁵⁸ Combining sales information and data collection, one can obtain a clear picture of the value that can be allocated to each country. Using this type of formulary apportionment would address the transfer-pricing manipulations, which allow IP companies to avoid taxes so well, and a hybrid approach could work for IP or traditional manufacturing companies.¹⁵⁹

¹⁵¹ See generally COLE & BYRNES, *supra* note 43. Lee Sheppard agrees, noting that she does not believe the BEPS plan will be successful. Sheppard, *supra* note 12, at 62–63 ("In the long run, we already know what the outcome will be—apportionment of multinationals' profits based on sales.").

¹⁵² Klimek, *supra* note 132, at 3.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 3–4.

¹⁵⁵ *Id.* at 3.

¹⁵⁶ *Id.* at 4 (defining a comparable uncontrolled price as the best way to determine the arm's length transfer price for material goods).

¹⁵⁷ *Id.* at 4–6.

¹⁵⁸ *Id.* at 5.

¹⁵⁹ See generally *id.*

C. Utilizing a Common Consolidated Corporate Tax Base

Another type of formulary apportionment with significant potential to combat BEPS, the common consolidated corporate tax base (CCCTB), is being evaluated in Europe.¹⁶⁰ The CCCTB would involve computing and consolidating tax results in the EU based on sharing Global Corporate Tax Information.¹⁶¹ The "CCCTB model treats the group as a single entity for tax purposes," and "can be viewed as a multilateral method for the exchange of Global Corporate Tax Information at the EU level."¹⁶² The EU has already introduced the legal Europe entity, which is not an entity of any particular EU country, but issues still exist concerning the appropriate amount of profit to be allocated to each country. The CCCTB has several tax-neutralizing effects on groups in member countries. Cross-border transfers within the group do not generate taxable capital gains or losses (only relevant outside the group). Intra-group cross-border dividends are exempt to prevent double taxation, and aggressive transfer pricing and profit shifting would be unnecessary, since there would be no high- or low-tax jurisdictions within the group.¹⁶³ The larger the group of countries consolidating, the more advantageous to BEPS. While an EU directive would require the consent of all twenty-seven EU states (which is unlikely), approval though enhanced cooperation would only require nine.¹⁶⁴ The United States could voluntarily join the EU members to exchange information and consolidate its tax base, because if the United States acts as a high-tax residence country and does not exchange information, it cannot protect its tax base.¹⁶⁵ Along with information exchange such as FATCA, this level of cooperation could substantially improve BEPS.

D. Creating a Multilateral Instrument

A multilateral instrument, one with the power to enforce the OECD's recommendations, would alleviate the greatest difficulties in implementing the Action Plan. Executing the plan will require unprecedented amounts of cooperation by many different countries and multilateral agreements, which will not always benefit those countries. "In the realm of taxation, where tax revenues are used to provide governmental services, in the

¹⁶⁰ Sheppard, *supra* note 12, at 63.

¹⁶¹ Garbarino, *supra* note 67, at 137–38, 157.

¹⁶² *Id.* at 158.

¹⁶³ *Id.* at 159.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 165.

end, everyone loses if no one cooperates.”¹⁶⁶ By cooperating, the winner wins a little less, but no one loses, and the countries get equal benefit. For the BEPS plan to succeed, a collaborative-based paradigm must replace competition, a holistic and comprehensive approach is needed, and some necessary innovations may be outside the traditional area of tax policies.¹⁶⁷ Companies must cooperate with governments, and countries must cooperate with each other. This is, of course, the ultimate challenge for the OECD, since it is in each company’s best interest to pay as little in taxes as they legally can. Also, there is little incentive for a country, like the United States, to have its corporate taxpayers pay any more to other countries,¹⁶⁸ or for Bermuda to start charging taxes or change its policies. However, to overcome these obstacles, and for the BEPS plan to work, all of the countries involved need to be motivated to cooperate in ways which will allow for equitable taxation of multinational corporations. The OECD countries could require that all profits be subject to some form of taxation, decreasing the value of low-tax jurisdictions, and incentivizing countries like Bermuda to raise their taxes. A multilateral regulatory body would certainly aid this process. Unfortunately, without any power to enforce its regulations, the OECD can only make suggestions and hope for implementation of its Action Plan.

CONCLUSION

Multinational corporations have found a means by which to avoid paying taxes, and have mastered the ability to shift their profits to low-tax jurisdictions and erode the tax base of those jurisdictions with higher corporate tax rates. This problem has only been exacerbated in recent years with the ever-increasing presence and influence of the Internet on the economy. The top technological companies have masked billions of dollars worth of taxes by cleverly manipulating the tax laws to elicit double non-taxation.

The OECD’s BEPS Action Plan provides a comprehensive analysis of the current issues faced by governments in their international taxing policies, with measures designed to ameliorate the problems. However, the OECD faces the issue that there is no way for it to effectively implement its plan, as the

¹⁶⁶ Klimek, *supra* note 132, at 6.

¹⁶⁷ Brauner, *supra* note 26, at 112.

¹⁶⁸ Sheppard, *supra* note 12, at 68–70 (“The trouble is that the Americans don’t appear to want Google to be paying byte taxes or income taxes to other countries. Most of the big digital players are American, and few of them pay tax anywhere, including the United States.”).

organization as a whole has no actual authority. Another obstacle to the OECD plan involves its ultimate motivation for change. The goal of the Action Plan is to promote social justice for all countries. Member countries, such as the United States and the United Kingdom, who are suffering from lost tax revenues, hope that the BEPS plan will aid their tax collections, but are less concerned with equity. While the United States has considered implementing unilateral actions, there has not been a great deal of change to the corporate tax rate in recent years, nor has the government considered adopting a measure other than the arm's length standard. The U.S. Congress is ambivalent about changing tax laws, which will make their big business constituents unhappy. Additionally, a serious hindrance to the plan is a country like Bermuda. Bermuda, a tax haven for those companies burdened with hefty taxes in their residence jurisdiction, entices these multinational businesses and offers the opportunity to pay zero taxes. The presence of these companies helps Bermuda's economy, and they are able to self-regulate, leaving very little incentive for Bermuda to change its ways.

Thus, the countries facing BEPS must find a way to track taxes due from these companies, despite the obstacles of tax havens. Ultimately, this means that a new system of taxation must be implemented, and countries must adopt a cooperative paradigm to work for the betterment of all, rather than the colossal wealth of the few. A byte tax could allocate taxes associated with the digital economy in an equitable fashion. Formulary apportionment could replace the arm's length standard, which has outgrown its usefulness. A CCCTB could combat BEPS by eliminating some of its causal mechanisms (such as variable tax jurisdictions). While everyone agrees that a multilateral instrument is needed to facilitate change, this requires Congress to stand up to corporate lobbyists, governments to agree, and corporations to play by the rules.

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Desirable Restraint: Freeing Employers and Employees from the Blanket Prohibition of California Business and Professions Code Section 16600

*Jeremy Talcott**

INTRODUCTION

In California, the conventional wisdom has been essentially settled for over fifteen years. As first hypothesized by AnnaLee Saxenian, the success of Silicon Valley—and relative decline of Route 128—is due to the “culture of mobility” present in Silicon Valley, leading to a “high velocity labor market” and “knowledge spillovers,” as compared to the more traditional, vertically-integrated structure and long-term employment found in Route 128 businesses.¹ Ronald Gilson later attributed that “culture of mobility” to California Business and Professions Code section 16600, which has been read as a near-total ban on covenants not to compete.² However, new research suggests that the time is right to revisit this assumption, and to consider a legislative relaxation of section 16600.

Whether by deliberate intent of the drafter, mere oversight, or by its later strict judicial interpretation, section 16600 establishes California as the state with the least legal enforcement of covenants not to compete.³ Although most other jurisdictions have long provided some enforcement of covenants not to compete, using variations on the English “rule of reason” as a limiting factor, California has adopted a broad public policy against any restraints on the ability of citizens to engage in trade, and the ban on enforcement is almost total.⁴

* J.D., Chapman University Fowler School of Law, May 2016. I wish to thank Professor Tom W. Bell for his guidance with this Comment.

¹ Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 608–09 (1999); see also ANNALEE SAXENIAN, REGIONAL ADVANTAGE: CULTURE AND COMPETITION IN SILICON VALLEY AND ROUTE 128 (1994).

² Gilson, *supra* note 1.

³ See generally Sheri Wardwell, *Invalidity of Covenants Not to Compete in California Affects Employers Nationwide*, 5 SHIDLER J.L. COM. & TECH. 22 (2009).

⁴ The exceptions are the sale of goodwill of a business and any covenant involving the sale or dissolution of a corporation, partnership, or limited liability company. CAL.

The arguments for and against enforcement of covenants not to compete have presented problems for courts for more than 500 years.⁵ Employers—and, in some cases, employees—have many reasons to desire post-employment restrictions such as covenants not to compete. Covenants not to compete are generally seen as the most effective means of preventing the loss of trade information to a direct competitor.⁶ Further, these protections are thought to promote more efficient operation internally within businesses.⁷ Finally, post-employment restrictions may stimulate internal research and improvement, rather than “employee poaching” with the goal of accumulating competitors’ intellectual property.⁸

Covenants not to compete are often criticized, however, as “contracts of adhesion rising out of the perceived inequality in bargaining power between employers and employees.”⁹ Covenants not to compete also limit the economic mobility of employees, and restrict their ability to work within their chosen field.¹⁰ Allowing employees to leave and form their own similar businesses can lead to increased competition within a field.¹¹ Encouraging the flow of information and ideas among businesses may also improve efficiency across multiple competitors in an industry by limiting duplicative research and development among similar competitors.¹² Covenants not to compete can also restrict employers from hiring the most qualified employees, potentially limiting—or even preventing—human capital from reaching its most effective or efficient use.¹³

In arguing for the benefits of section 16600 with regards to Silicon Valley, Ronald Gilson contends that section 16600 has corrected the failure of the market to reach the most economically rational solution in economic development communities.¹⁴ If the benefit of the “knowledge spillovers” gained from employees hired away from competitors creates a net

BUS. & PROF. CODE § 16601 (West 2015). Agreements preventing the use of trade secrets are also enforceable, so long as they do “not restrain [a party] from engaging in a lawful profession, trade or business within the meaning of section 16600 of the Business and Professions Code.” *Gordon v. Landau*, 321 P.2d 456, 459 (Cal. 1958).

⁵ See Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 626 (1960).

⁶ *Id.* at 627.

⁷ *Id.*

⁸ See Norman D. Bishara et al., *An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants*, 68 VAND. L. REV. 1, 37 (2015).

⁹ *Id.* at 6.

¹⁰ Blake, *supra* note 5, at 627.

¹¹ See *id.*

¹² See *id.*

¹³ See *id.*

¹⁴ See Gilson, *supra* note 1.

positive benefit for the company when compared to the value of the intellectual property similarly lost to competitors, then section 16600 has forced the most economically rational position onto the community, even if that position is contrary to the desire of each individual company to protect its intellectual property and any associated market advantage over competitors.¹⁵

There are, of course, other associated costs to be weighed, consistent with Bastiat's idea of the "seen and the unseen."¹⁶ Even if the costs and benefits are roughly balanced, it is important to note that section 16600 has one further cost—a significant reduction in both employer and employee freedom to contract. California will not enforce a voluntarily entered restriction on one's employment, creating a restriction on the ability of employees to knowingly bargain for a covenant not to compete with their employers—and receive consideration accordingly—whether in terms of increased compensation or firm-sponsored training.

Courts have long looked critically at covenants not to compete, finding that often there was unequal bargaining power, and as such, the covenant was not truly bargained for.¹⁷ Most jurisdictions have adopted some variation of the English "rule of reason," requiring the restraint to be "both reasonable in scope and necessary to protect a legitimate interest of the employer."¹⁸ Unfortunately, the inconsistent interpretation of what is a "reasonable" restraint on trade has left the law of covenants not to compete in a "state of near chaos."¹⁹ Accordingly, some commentators in other jurisdictions have suggested similar prohibitions to California as the only means to protect employees while maintaining consistency and predictability.²⁰

This Comment proposes that California should consider creating an additional exception to section 16600 for covenants voluntarily entered into, but allowing only legal—not equitable—remedies. Rather than subjecting California to the "chaos" of the "rule of reason," California should enforce covenants not to compete—so long as they were knowingly bargained for—by

¹⁵ *Id.* at 609.

¹⁶ See generally FRÉDÉRIC BASTIAT, *What Is Seen and What Is Not Seen*, in SELECTED ESSAYS ON POLITICAL ECONOMY (1995). See *infra* Part III.

¹⁷ Blake, *supra* note 5, at 647–48.

¹⁸ Rachel Arnow-Richman, *Noncompetes, Human Capital, and Contract Formation: What Employment Law Can Learn from Family Law*, 10 TEX. WESLEYAN L. REV. 155, 156 (2003).

¹⁹ *Id.* at 155; see also *Arthur Murray Dance Studios of Cleveland v. Witter*, 105 N.E.2d 685, 687 (Ohio Ct. Com. Pl. 1952) ("[Noncompete law] is a sea—vast and vacillating, overlapping and bewildering. One can fish out of it any kind of strange support for anything, if he lives so long.").

²⁰ Arnow-Richman, *supra* note 18, at 169.

applying a “formation analysis” to all such agreements to look for assent and unconscionability.²¹ By also legislating that all such contracts shall remain renegotiable and limiting remedies to only legal damages, California can prevent the total restraint of trade by allowing the employee—or interested potential employers—to “buy out” the covenant from the previous employer.

The time has never been better to call into question the myriad ways that California is overly restrictive of employers under the guise of protecting the rights of employees (of which the interpretation of section 16600 is but one) as California has found growth lagging behind that of other states. Indeed, in 2013, California lost its position as the number one state-exporter of technology, falling behind Texas.²² The technology industry is critical to California’s economy as the single largest category of state exports, accounting for 27.7% of exports during 2012.²³ In 2014, that percentage declined to 24.5%.²⁴

Relaxing the ban on covenants not to compete in California would benefit employers through increased protection of intellectual property and internal efficiency, and would benefit employees through increased firm investment in human capital—such as firm-sponsored training. Employers would be assured the benefit of their investment, either through matching employee offers or from receiving legal damages for the value of the information the employee will be taking. Both parties—and, therefore, the State of California as a whole—would benefit from increased liberty. However, California would retain the certainty of a black-letter prohibition, with limited and enumerated statutory exceptions.

I. THE HISTORY OF CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTION 16600

California’s Business and Professions Code section 16600 has its origins in the work of David Dudley Field, drafter of the New York “Field Code” of civil procedure. New York’s Constitution of 1846 called for a code commission “to reduce into a written and systematic code the whole body of the law of this state, or so

²¹ A similar solution was suggested as a reform for Texas by Rachel Arnow-Richman. *Id.* at 165.

²² Press Release, TechAmerica Foundation, California is Second Largest Tech Exporting State (Feb. 11, 2014), http://s3.amazonaws.com/siteninja/site-ninja1-com/1407957293/original/California_Is_Second_Largest_Tech_Exporting_State.pdf [<http://perma.cc/AWU4-5LW2>].

²³ *Id.*

²⁴ *Trade Statistics*, CAL. CHAMBER COM., <http://www.calchamber.com/international/trade/pages/tradestatistics.aspx> [<http://perma.cc/ERV2-3JR7>].

much and such parts thereof as to the said commissioners shall seem practicable and expedient.”²⁵ After Field’s code was adopted by New York in 1848, Field was appointed to the Code Commission in 1857.²⁶ Along with William Curtiss Noyes and Alexander Bradford, Field drafted a political code, a penal code, and a civil code.²⁷ Although Field published the final draft of his civil code in 1865, it was never enacted in New York.²⁸

Field’s draft codes were attractive to the newly admitted states in the West, especially California. The “chaotic legal environment” of California—where the common law of England had been adopted to replace pre-statehood Spanish and Mexican law, while nonetheless preserving elements of the Mexican land grant system, as well as federal exceptions from the Treaty of Guadalupe Hidalgo—had limited the Legislature’s ability to abolish and repeal all prior law in California.²⁹ Consequently, codification was urged by a series of California Governors throughout the 1860s.³⁰ In 1868, a first effort was made by appointing a commission to “revise and compile” the laws of the State of California.³¹ When its report was submitted in 1870, it included a recommendation to abolish the grand jury system.³² Seemingly uncomfortable with the recommendation, the California Legislature chose to allow the first commission to dissolve, instead creating a new commission empowered to use or discard any work previously accomplished.³³ This second commission was appointed in 1870, and fairly quickly chose to adopt Field’s New York draft codes almost in full, with changes made where necessary to adapt it to previous California legislation.³⁴ The Civil Code was enacted (along with the Penal Code, Political Code, and Code of Civil Procedure) in 1872.³⁵ In 1873, a commission was selected to review the codes, and amendments were proposed where the codes were found to conflict with previously settled California law.³⁶ Interestingly,

²⁵ See CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM* 190 (1981) (quoting N.Y. CONST. art. I, § 17 (1846)).

²⁶ *Id.* at 191.

²⁷ See Mildred V. Coe & Lewis W. Morse, *Chronology of the Development of the David Dudley Field Code*, 27 CORNELL L.Q. 238, 243–45 (1942).

²⁸ See Mathias Reimann, *The Historical School Against Codification: Savigny, Carter, and the Defeat of the New York Civil Code*, 37 AM. J. COMP. L. 95, 100–01 (1989).

²⁹ Gilson, *supra* note 1, at 615–16.

³⁰ *Id.* at 615.

³¹ Rosamond Parma, *The History of the Adoption of the Codes of California*, 22 L. LIBR. J. 8, 14 (1929).

³² *Id.*

³³ *Id.* at 15.

³⁴ *Id.* at 18.

³⁵ *Id.* at 19.

³⁶ *Id.* at 15–17.

the commission included Stephen J. Field, brother of David Dudley Field and an Associate Justice of the United States Supreme Court.³⁷

Regardless of David Dudley Field's true intent while writing his New York draft codes, it seems clear that California's intent and understanding upon adopting them was that they did not significantly alter the common law, but instead codified it and made it accessible to the general public.³⁸ According to the Commission:

The primary object of its chief author and advocate, David Dudley Field, was to restate in systematic and accessible form the common law as it has been modified to suit American conditions, to settle questions upon which disputes had arisen and to introduce such reforms as might seem necessary to make the legal system harmonious and free from anachronism.³⁹

Even if David Dudley Field had intended to make significant alterations to the common law, it is not clear that the California Code Commission would have then had the authority to adopt those significant changes. As was also noted by the Commission itself: "It must be borne in mind that *this Act does not provide for the adoption of any new system of law, but simply reenacts the existing law*, with some few modifications, amendments, and additions."⁴⁰

Section 1673 in the 1872 California Civil Code copied verbatim the language of section 882 of Field's draft New York Civil Code. The section read as follows:

Section 1673. Every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections, is to that extent void.⁴¹

Those two exceptions, which had previously been sections 884 and 885 of Field's draft New York Civil Code, provided the following:

Section 1674. One who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or a part thereof, so long as the buyer, or any person deriving title to the good will from him, carries on a like business therein.⁴²

³⁷ *Id.* at 17.

³⁸ *Id.*

³⁹ Maurice E. Harrison, *The First Half-Century of the California Civil Code*, 10 CAL. L. REV. 185, 186 (1922).

⁴⁰ W.W. Pendegast et al., *First Report of the Joint Committee to Examine the Codes*, in CALIFORNIA CODE COMMISSION, REPORTS 1868-1874 (1907) (emphasis in original).

⁴¹ CAL. CIV. CODE § 1673 (1872) (current version at CAL. BUS. & PROF. CODE § 16600).

⁴² *Id.* § 1674.

Section 1675. Partners may, upon or in anticipation of a dissolution of the partnership, agree that none of them will carry on a similar business within the same city or town where the partnership business has been transacted, or within a specified part thereof.⁴³

At the time that Field wrote the draft code, the courts in England and most states applied the rule of reason to contractual restrictions on the conduct of a trade or business.⁴⁴ In America, however, from very early on there was heavier emphasis placed on the protection of the employee.⁴⁵ Nonetheless, American courts generally did not apply a *per se* rule of invalidity on post-employment restraints.⁴⁶ The comment to section 833 of the draft New York Civil Code noted that “contracts in restraint of trade have been allowed, by modern decisions, to a very dangerous extent.”⁴⁷ However, the two cases referred to within that comment both involved noncompetition covenants associated with the sale of a business.⁴⁸ It is impossible to know if Field intended these sections to function as a complete ban on post-employment covenants not to compete.⁴⁹ These sections did not appear in the preliminary draft of the New York Civil Code, and were added sometime late in the process.⁵⁰ The comments to Field’s draft New York Civil Code, the California Code Commissioner’s 1871 draft, and the 1872 official California Civil Code make no mention of post-employment covenants not to compete.⁵¹ These codes would eventually be moved to the California Business and Professions Code when it was adopted in 1937, where they were relabeled sections 16600 and 16601.

Whether it was intended or not, California courts subsequently read section 16600 as broadly as it is written.⁵² Though the earliest cases only discussed anticompetitive arrangements between businesses, by the 1930s, California courts began using the statute to void employment agreements and similar contracts that sought to restrict former employees from using knowledge gained while employed or engaging in

⁴³ *Id.* § 1675.

⁴⁴ Blake, *supra* note 5, at 643.

⁴⁵ *Id.* at 643–44.

⁴⁶ See generally Blake, *supra* note 5.

⁴⁷ COMM’RS OF THE CODE, THE CIVIL CODE OF THE STATE OF NEW YORK 255, at § 833 (1865).

⁴⁸ See *id.* (citing *Dunlop v. Gregory*, 10 N.Y. 241 (1851) and *Whittaker v. Howe*, 49 Eng. Rep. 150 (M.R. 1841)).

⁴⁹ Gilson, *supra* note 1, at 617–18.

⁵⁰ *Id.* at 618.

⁵¹ *Id.* at 618–19.

⁵² See Tait Graves, *Nonpublic Information and California Tort Law: A Proposal for Harmonizing California’s Employee Mobility and Intellectual Property Regimes Under the Uniform Trade Secrets Act*, UCLA J.L. & TECH. 1, 11 (2006).

competitive business.⁵³ It has since become the stated strong policy of California courts to disfavor any restraints on trade.⁵⁴ Accordingly, covenants not to compete in employment agreements are per se illegal unless a clear statutory exception exists.⁵⁵

The public policy aims regularly cited by California courts are the protection of both California citizens' right to pursue "the profession, trade or business of his or her choosing," as well as the "employer's ability to compete for skilled employees."⁵⁶ California's reading comports with the words of the statute, and it seems almost certain that any change to the interpretation of section 16600 will have to be made legislatively.⁵⁷

The vast majority of states, however, enforce covenants not to compete so long as such restraints are reasonable.⁵⁸ Even

⁵³ *Id.* at 6.

⁵⁴ See *Tiedje v. Aluminum Taper Milling Co.*, 296 P.2d 554, 556 (Cal. 1956) (holding that any agreement contrary to public policy or the express meaning of a statute cannot serve as the foundation for any action in California).

⁵⁵ See *Edwards v. Arthur Andersen LLP*, 189 P.3d 285, 297 (Cal. 2008).

⁵⁶ *Wardwell*, *supra* note 3, at ¶ 4.

⁵⁷ *Arthur Andersen LLP*, 189 P.3d at 293 ("[We] leave it to the Legislature, if it chooses, either to relax the statutory restrictions or adopt additional exceptions to the prohibition-against-restraint rule under section 16600.").

⁵⁸ *Wardwell*, *supra* note 3, at ¶ 1 n.2 (listing states that apply some version of the common law "rule of reason" as follows: "Alaska (*Data Mgmt., Inc. v. Green*, 757 P.2d 62, 65 (Alaska 1988)); Arizona (*Am. Credit Bureau, Inc. v. Carter*, 462 P.2d 838, 840 (Ariz. Ct. App. 1969)); Arkansas (*Dawson v. Temps Plus, Inc.*, 987 S.W.2d 722, 727 (Ark. 1999)); Connecticut (*Van Dyck Printing Co. v. DiNicola*, 648 A.2d 898, 902 (Conn. Super. Ct. 1993)); Delaware (*Faw, Casson & Co. v. Cranston*, 375 A.2d 463, 467 (Del. Ch. 1977)); District of Columbia (*Ellis v. James V. Hurson Assocs.*, 565 A.2d 615, 617 (D.C. Cir. 1989)); Florida (FLA. STAT. § 542.335); Georgia (*Sysco Food Servs. of Atlanta, Inc. v. Chupp*, 484 S.E.2d 323, 325 (Ga. Ct. App. 1997). *But see* Ga. Const. Art. III, Sec. VI, Par. V(c)). See *Hawaii* (*Technicolor, Inc. v. Traeger*, 551 P.2d 163 (Haw. 1976); *see also* *The 7's Enters., Inc. v. Del Rosario*, 143 P.3d 23, 36 (Haw. 2006)); Idaho (*Dick v. Geist*, 693 P.2d 1133, 1135 (Idaho Ct. App. 1985)); Illinois (*Lawrence & Allen, Inc. v. Cambridge Human Res. Group, Inc.*, 685 N.E.2d 434, 441 (Ill. App. Ct. 1997)); Indiana (*Norlund v. Faust*, 675 N.E.2d 1142, 1153 (Ind. Ct. App. 1997)); Iowa (*Revere Transducers, Inc. v. Deere & Co.*, 595 N.W.2d 751, 762 (Iowa 1999)); Kansas (*Weber v. Tillman*, 913 P.2d 84, 89 (Kan. 1996)); Kentucky (*Hall v. Willard & Woolsey, P.S.C.*, 471 S.W.2d 316, 317 (Ky. 1971)); Maine (*Brignull v. Albert*, 666 A.2d 82, 84 (Me. 1995)); Maryland (*Ecology Servs., Inc. v. Clym Env't Servs., LLC*, 952 A.2d 999, 1007 (Md. Ct. Spec. App. 2008)); Massachusetts (*Boulanger v. Dunkin' Donuts Inc.*, 815 N.E.2d 572, 577 (Mass. 2004)); Michigan (*St. Clair Medical, P.C. v. Borgiel*, 715 N.W.2d 914, 918-19 (Mich. Ct. App. 2006)); Minnesota (*Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 799 (Minn. Ct. App. 1993)); Mississippi (*Empiregas, Inc. of Kosciusko v. Bain*, 599 So.2d 971, 975 (Miss. 1992)); Missouri (*Cont'l Research Corp. v. Scholz*, 595 S.W.2d 396, 400 (Mo. Ct. App. 1980)); Nebraska (*Chambers-Dobson, Inc. v. Squier*, 472 N.W.2d 391, 397 (Neb. 1991)); Nevada (*Camco, Inc. v. Baker*, 936 P.2d 829, 833 (Nev. 1997)); New Hampshire (*Smith, Batchelder & Rugg v. Foster*, 406 A.2d 1310, 1312 (N.H. 1979)); New Jersey (*Solari Indus. v. Malady*, 264 A.2d 53, 57 (N.J. 1970)); New Mexico (*Lovelace Clinic v. Murphy*, 417 P.2d 450, 453-54 (N.M. 1966)); New York (*Morris v. Schroder Capital Mgmt. Int'l*, 7 N.Y.3d 616, 620 (N.Y. 2006)); North Carolina (*Chemimetals Processing, Inc. v. McEneny*, 476 S.E.2d 374, 376 (N.C. Ct. App. 1996)); Ohio (*Raimonde v. Van Vlerah*, 325 N.E.2d 544, 546-47 (Ohio 1975)); Pennsylvania (*Hess v. Gebhard & Co.*, 808 A.2d 912, 920 (Pa. 2002)); Rhode Island

states that adopted civil codes similarly based on Field's draft code—and containing identical language—have instead interpreted their statutes to enact the common law ban on “unreasonable” covenants.⁵⁹ While California's reading of the language admittedly seems more correct, the case law appears to support the idea that most jurisdictions find value in at least some enforcement of covenants not to compete. It is worth considering, then, whether the near-total ban on covenants not to compete has served as a net benefit to California employees and employers, or if some enforcement of these types of post-employment restrictions might lead to a more economically beneficial outcome.

II. PREVIOUS RESEARCH OF SILICON VALLEY AND SECTION 16600

In her book *Regional Advantage: Culture and Competition in Silicon Valley and Route 128*, AnnaLee Saxenian famously attributed the success of Silicon Valley—and relative decline of Route 128—to the “culture of mobility” present in Silicon Valley, leading to a “high velocity labor market” and “knowledge spillovers,” as compared to the more traditional, vertically-integrated structure and long-term employment found in Route 128 businesses.⁶⁰ Silicon Valley had a “regional network-based industrial system that promotes collective learning and flexible adjustment [due to its] dense social networks and open labor markets”⁶¹

In his 1999 article *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, Ronald Gilson undertook to explain the differing business cultures of Silicon Valley and Route 128 near Boston.⁶² Gilson contended that section 16600 directly led to the optimal collective economic strategy in Silicon Valley, overcoming the desire of each individual firm to act in their own

(Durapin, Inc. v. Am. Prods, Inc., 559 A.2d 1051, 1053 (R.I. 1989)); South Carolina (Cafe Assocs., Ltd. v. Gerngross, 406 S.E.2d 162, 164 (S.C. 1991)); Tennessee (Vantage Tech., LLC v. Cross, 17 S.W.3d 637, 644 (Tenn. Ct. App. 1999)); Texas (Tex. Bus. & Com. Code §§15.50-.52 (2001)); Utah (Kasco Servs. Corp. v. Benson, 831 P.2d 86, 95 (Utah 1992)); Vermont (Roy's Orthopedic, Inc. v. Lavigne, 454 A.2d 1242, 1244 (Vt. 1982)); Virginia (New River Media Group, Inc. v. Knighton, 429 S.E.2d 25, 26 (Va. 1993)); Washington (Knight, Vale & Gregory v. McDaniel, 680 P.2d 448, 451-52 (Wash Ct. App. 1984)); West Virginia (Reddy v. Cmty. Health Found. of Man, 298 S.E.2d 906, 915 (W. Va. 1982)); Wisconsin (WIS. STAT. ANN. § 103.465 (2009)); Wyoming (Hopper v. All Pet Animal Clinic, Inc., 861 P.2d 531, 543 (Wyo. 1993))”; see also BRIAN M. MALSBERGER, COVENANTS NOT TO COMPETE: A STATE-BY-STATE SURVEY (5th ed. 2006).

⁵⁹ See Wardwell, *supra* note 3, at ¶ 1 n.4 (noting that Montana and Oklahoma have both interpreted nearly identical statutes as adopting the common law rule of reason).

⁶⁰ Gilson, *supra* note 1, at 579.

⁶¹ SAXENIAN, *supra* note 1, at 2.

⁶² Gilson, *supra* note 1, at 593-94.

self-interest by benefitting from the knowledge spillover of other firms while restricting any knowledge lost through mobility of their own employees.⁶³

Fundamental to Gilson's argument is the idea that high-velocity employment creates an ecosystem in which the per-firm benefit of innovation and growth will exceed the per-firm cost of intellectual property dilution caused by the inability to retain employees.⁶⁴ However, even Gilson admits that a blanket prohibition may only be beneficial to particular industries, and discourage innovation and investment in others.⁶⁵

As noted above, California remains relatively unique in its almost complete prohibition on post-employment covenants not to compete.⁶⁶ Other jurisdictions appear hesitant to adopt a similar strategy with regards to post-employment covenants not to compete in the hope of replicating the success of Silicon Valley. It is possible that even very large costs incurred by Silicon Valley companies through intellectual property dilution have so far been outweighed by other regional advantages.⁶⁷ Indeed, there were many other factors that led to the growth of Silicon Valley, such as government investment, partnerships with universities, and the culture of the region.⁶⁸ Additionally, the sheer size of the agglomeration economy that formed in Silicon Valley may be difficult to replicate elsewhere, allowing it to retain an advantage in attracting investment.⁶⁹ In *Working in Silicon Valley*, Alan Hyde called it "hardly plausible" that section 16600 could have been enough to explain the success of Silicon Valley over Route 128.⁷⁰

III. UNINTENDED EFFECTS OF SECTION 16600 ON BUSINESS AND EMPLOYEE TRAINING

The competing values involved in enforcing covenants not to compete (as with all the common law "restraints of trade") have long been debated.⁷¹ For employers, covenants not to compete represent what is perhaps the most effective method of protecting valuable trade information and consumer relationships from

⁶³ *Id.* at 596.

⁶⁴ *Id.* at 609.

⁶⁵ *See id.* at 627.

⁶⁶ *See supra* Part I.

⁶⁷ *See* Norman D. Bishara, *Covenants Not to Compete in a Knowledge Economy: Balancing Innovation from Employee Mobility Against Legal Protection for Human Capital Investment*, 27 BERKELEY J. EMP. & LAB. L. 287, 309 (2006).

⁶⁸ *See* ALAN HYDE, *WORKING IN SILICON VALLEY: ECONOMIC AND LEGAL ANALYSIS OF A HIGH-VELOCITY LABOR MARKET* 33 (2003).

⁶⁹ Bishara, *supra* note 67.

⁷⁰ HYDE, *supra* note 68.

⁷¹ Blake, *supra* note 5.

being easily appropriated by competitors.⁷² This protection provides incentives to improve internal operations and stimulate research, and allows companies to “achieve the degree of freedom of communication” that leads to the highest internal efficiency.⁷³ On the other hand, covenants not to compete reduce employee mobility and freedom to pursue a chosen trade.⁷⁴ Much of the evolution surrounding covenants not to compete has reflected the evolution in industrial technology and business methods, as well as the “ebb and flow of such social values as freedom of contract, personal economic freedom, and business ethics.”⁷⁵

In the absence of a post-employment covenant not to compete, employees are likely to take their knowledge to competing firms in the same industry.⁷⁶ Conversely, employers are more likely to hire away employees from other firms, seeking the knowledge that they will inevitably bring, as opposed to investing in research and development.⁷⁷ Accordingly, firms in California are forced to turn to other methods to protect their intellectual property. Although trade secret laws exist, they are often insufficient to prevent the dilution of intellectual property.⁷⁸ Gilson himself recognizes that the Uniform Trade Secrets Act (UTSA)—which has been adopted by forty-seven states, including California—provides “less effective protection than may at first appear.”⁷⁹ Under the UTSA, litigants are required to establish imprecise distinctions between “trade secrets” and “tacit knowledge,” resulting in litigation that is likely to be expensive and slow, and unlikely to be resolved by summary judgment.⁸⁰ Indeed, this difficulty in enforcing trade secret protection may also explain why many California firms have simply adopted a policy of foregoing legal challenges under trade secret law when employees leave.⁸¹

The relative ineffectiveness of enforcing trade secret law in California only compounds the issue of internal firm inefficiency caused by the inability to enforce post-employment covenants not to compete.⁸² For example, it has been said that “Apple [is] one of

⁷² *Id.* at 627.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 626–27.

⁷⁶ *Id.* at 626.

⁷⁷ Bishara, *supra* note 67, at 310.

⁷⁸ See Yuval Feldman, *Experimental Approach to the Study of Normative Failures: Divulging of Trade Secrets by Silicon Valley Employees*, 2003 U. ILL. J.L. TECH. & POL’Y 105, 110–11 (2003).

⁷⁹ Gilson, *supra* note 1, at 597; see also CAL. CIV. CODE §§ 3426–3426.11 (West 2015).

⁸⁰ Gilson, *supra* note 1, at 599.

⁸¹ HYDE, *supra* note 68, at 30.

⁸² See Gilson, *supra* note 1, at 608.

the most secretive companies in the world.”⁸³ Employees are prevented from discussing projects, even among other internal departments.⁸⁴ Without internal compartmentalization, the intellectual property dilution caused by a single employee leaving to a competitor might be great. Arguably, Apple, better than any other company, has found a way to “embrace secrecy,” and turn it to its own advantage.⁸⁵ However, this internal compartmentalization may hamper the ability of California companies such as Apple to work efficiently, remove incentives to maximize the knowledge base of individual employees, and discourage intra-firm collaboration.

It is clear that there is still a strong desire among Silicon Valley companies to have a mechanism to retain top employees. In May 2014, a “who’s who of Silicon Valley companies” announced the settlement of a class action lawsuit alleging “anti-poaching agreements” between Apple, Google, Intel, Intuit, Adobe, Pixar, and others.⁸⁶ The lawsuit involved agreements affecting at least 60,000 workers over a four-year period.⁸⁷ The rise of such surprisingly “formal and far reaching” anti-poaching agreements within Silicon Valley has occurred because other jurisdictions have an “easier legal alternative” in enforceable covenants not to compete.⁸⁸

Evan Starr at the University of Illinois at Urbana-Champaign has released what is the most current and wide-ranging empirical study on the effect of covenants not to compete on firm-sponsored training.⁸⁹ Starr’s work provides evidence that there is a causal relationship between the enforcement of covenants not to compete and the availability of firm-sponsored training.⁹⁰ Gary Becker’s classic theory of general human capital argues that workers should bear the cost of the

⁸³ Tom C.W. Lin, *Executive Trade Secrets*, 87 NOTRE DAME L. REV. 911, 914 (2012).

⁸⁴ See, e.g., Jim Edwards, *What Apple Employees Say About the Company’s Internal Corporate Culture*, BUS. INSIDER (Oct. 9, 2013, 9:45 PM), <http://www.businessinsider.com/what-apple-employees-say-about-the-companys-internal-corporate-culture-2013-10?op=1> [<http://perma.cc/PL2H-CV2E>].

⁸⁵ ADAM LASHINSKY, *INSIDE APPLE: HOW AMERICA’S MOST ADMIRABLE—AND SECRETIVE—COMPANY REALLY WORKS* 31–47 (2012).

⁸⁶ Jon Xavier, *Silicon Valley Anti-poaching Settlement: Big Money & Missed Opportunities*, SILICON VALLEY BUS. J. (May 1, 2014, 6:52 AM), <http://www.bizjournals.com/sanjose/news/2014/05/01/silicon-valley-anti-poaching-settlement-ig-money.html?s> [<http://perma.cc/SAD8-8J3R>].

⁸⁷ *Id.*

⁸⁸ *Id.* (quoting Orly Lobel, a law professor at the University of San Diego, and author of a book on economic analysis of the law and human capital).

⁸⁹ See Evan Starr, *Consider This: Firm-Sponsored Training and the Enforceability of Covenants Not to Compete 1* (Jan. 25, 2015) (unpublished working paper), <https://sites.google.com/site/starrevan/research> [<http://perma.cc/437L-P8LW>].

⁹⁰ *Id.*

acquisition of the job-related knowledge that makes them employable.⁹¹ However, numerous papers have noted that firms routinely pay for general training.⁹² More importantly, this training does not seem to result in commensurate wage cuts to cover the cost of that training, creating a net benefit for the employee of wages plus additional, valuable knowledge.⁹³ So long as the training of employees causes larger increases in productivity than in the wages of the trained employees, it is economically rational for firms to provide training.⁹⁴ However, increasing employee mobility provides a disincentive, in that it prevents firms from providing (and employees from receiving) the most economically efficient level of firm-sponsored training.⁹⁵

This idea is not new. Others have noted that covenants not to compete are generally unlikely to be desirable tools in perfectly competitive labor markets.⁹⁶ However, when workers cannot acquire the necessary training independently—such as in jobs that require sharing firm-specific, confidential information—the enforceability of covenants not to compete shifts the incentive to the firms to provide training.⁹⁷ In circumstances such as these, a firm must have some mechanism to ensure that the employee will not simply appropriate the value of the training by leaving to a competitor before the company has recouped the value of that training through increased employee productivity.⁹⁸ Enforceability of covenants not to compete provides the mechanism that allows employers to recover that value.⁹⁹

Starr's work suggests that if California (the lowest enforcing state) were to adopt the policy of Florida (the highest enforcing state), then the most impacted occupations in California could receive a 16% increase in the likelihood of receiving firm-sponsored training. It is especially notable that the effect is most noticeable among high-technology firms, such as those in Silicon Valley. This increased training is especially prevalent in the initial years of an employee's tenure in those jurisdictions

⁹¹ *Id.* at 8.

⁹² *Id.*

⁹³ See John M. Barron et al., *Do Workers Pay for On-the-Job Training?*, 34 J. HUM. RESOURCES 235, 235–52 (1999).

⁹⁴ See generally Daron Acemoglu, *Why Do New Technologies Complement Skills? Directed Technical Change and Wage Inequality*, 113 Q.J. ECON. 1055 (1998).

⁹⁵ See John H. Bishop, *Underinvestment in On-the-Job Training?* 1 (Cornell U. Sch. Ind. Lab. Rel., CAHRS Working Paper No. 91-03, 1991), <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1334&context=cahrswp> [<http://perma.cc/5EPF-MU86>].

⁹⁶ See Paul H. Rubin & Peter Shedd, *Human Capital and Covenants Not to Compete*, 10 J. LEGAL STUD. 93, 95 (1981).

⁹⁷ *Id.* at 96.

⁹⁸ *Id.* at 97.

⁹⁹ *Id.* at 97–98.

where an employer will be able to recover the value in productivity of any training provided.¹⁰⁰ While there is often academic concern about “wage compression” when employees are restrained from accepting competing offers of employment by a covenant not to compete, the increased productivity of employees often also leads to higher wages, acting as a counter-balance.¹⁰¹ There is also evidence that in some professions employees earn more due to a position of increased trust with their employer.¹⁰²

This seems to comport with the predictions made by Eric Posner et al., in *Investing in Human Capital: The Efficiency of Covenants Not to Compete*, where they posited that enforcement of covenants not to compete as written should still lead to the most efficient outcomes in human capital investment.¹⁰³ Importantly, so long as covenants not to compete remain open to negotiation, employees and potential employers retain a mechanism to ensure that employees’ skills will be put to the most efficient use.¹⁰⁴ This is done by placing a value on the training provided, while also allowing a value to be placed on the knowledge that is gained or lost by the defection of an employee to a competitor.¹⁰⁵ They determined that enforcement of covenants not to compete could still lead to both ex post and ex ante efficiency by preventing overinvestment in human capital where specific performance is an enforceable remedy and underinvestment in human capital when there are zero liquidated damages.¹⁰⁶ Posner et al. determined that courts should expand recognized interests to include firm-sponsored training when evaluating covenants not to compete, yet remain wary of overreaching by employers attempting to extract rents from prospective employees through crafting overly broad covenants not to compete.¹⁰⁷ In addition, so long as covenants not to compete remain renegotiable, the effect on labor mobility is slight.¹⁰⁸

¹⁰⁰ See Starr, *supra* note 89, at 39.

¹⁰¹ *Id.*

¹⁰² See Kurt Lavetti et al., *Buying Loyalty: Theory and Evidence from Physicians* 4 (Feb. 1, 2014), <http://ssrn.com/abstract=2439068> (finding that physicians with covenants not to compete had contracts with output incentives that are more than twice as strong, were over 40% more productive, earn 14% higher wages, and have within-job earnings growth that is 21 percentage points higher, despite being of the same average quality as physicians without covenants not to compete, with these effects increasing in magnitude with the enforceability in each state).

¹⁰³ Posner et al., *Investing in Human Capital: The Efficiency of Covenants Not to Compete* 3 (U. Chi. L. & Econ., Working Paper No. 137, 2004), <http://ssrn.com/abstract=285805>.

¹⁰⁴ *Id.* at 25.

¹⁰⁵ *Id.* at 3.

¹⁰⁶ *Id.* at 2.

¹⁰⁷ *Id.* at 25.

¹⁰⁸ *Id.* (noting, additionally, that in California, deferred compensation is commonplace

IV. POLICY RECOMMENDATIONS FOR CALIFORNIA

In light of these differing market pressures, the question becomes one of degree. At what point does the value of the employee knowledge lost because of training they will never receive outweigh the value gained by employers who benefit from competitor technology obtained through “knowledge spillovers”? While this Comment has sought only to look at the effects within California as compared to other jurisdictions, it may also be possible that California has benefitted to some extent by the very uniqueness of the ban on post-employment covenants not to compete. So long as they are enforced in other jurisdictions, California becomes an attractive location for former employees to “flee” and create a direct competitor to their previous employer—especially where that previous employer would have been able to enforce a reasonable covenant not to compete in the original jurisdiction. However, once established, these companies then face the same threat from their own employees. In this way, section 16600 might bias California to small, high-velocity startup companies, at the cost of long-term employer and employee stability.¹⁰⁹ The merits of this distinction are beyond the scope of this Comment, and left to later research.

While valid policy reasons might exist for California to prevent its citizens from bargaining away their future ability to work in the field of their choosing, a subtle relaxation of section 16600 would return an incentive to train internal employees, while leaving in place the ability to “poach” outside talent when it would lead to the more efficient outcome.¹¹⁰ By limiting the remedies to legal remedies, instead of equitable, California businesses would be able to accurately weigh the cost-benefits of hiring outside talent versus training internal talent, by providing a means of effectively “buying out” the covenant not to compete from new employees. Additionally, subjecting any covenant not to compete to a “formation analysis” allows California courts to still police covenants not to compete for overreaching by employers, and protect California employees by retaining the ability to void contracts for either lack of assent or unconscionability.

Perhaps the largest potential downfall to any relaxation of section 16600 would be the loss of “knowledge spillovers” that Saxenian and Gilson have credited for the success of Silicon Valley.¹¹¹ But to the extent that “knowledge spillovers” between

and often said to serve the same effect as liquidated damages for an enforceable covenant not to compete).

¹⁰⁹ HYDE, *supra* note 68, at 31.

¹¹⁰ See *supra* Introduction.

¹¹¹ See *supra* Part II.

companies are lost, new avenues for “knowledge spillovers” within companies may grow, increasing internal efficiency while reducing costly trade secret and patent litigation. Indeed, even if California were to legislatively provide for the enforcement of post-employment covenants not to compete in the future, many of the same arguments for inter-firm sharing of knowledge and the benefits of employee mobility would remain equally valid.¹¹² Especially in the tech industry, research suggests that many such knowledge “spills” are anything but unintentional, with clear patterns of knowledge being voluntarily exchanged across industries, and even across countries.¹¹³ Even in jurisdictions where covenants not to compete are fully enforceable, firms are likely to engage in cost-benefit analyses of sharing knowledge—even with direct competitors—where such actions are economically beneficial to the companies involved.¹¹⁴

CONCLUSION

While the information presented here may not conclusively “tip the scale” enough to prove that California’s prohibition on covenants not to compete has caused harm exceeding any value created through “knowledge spillovers,” it should stimulate discussion as to whether the near-complete prohibition is in fact a net positive gain for California. Indeed, if the costs and benefits of the ban on covenants not to compete are roughly equal, then it seems that the preferable state would be to allow people the liberty to enter into covenants not to compete voluntarily, rather than ban them outright.

To protect the arguably valid public policy concerns of unequal bargaining power that California courts have long considered when rejecting both the “rule of reason” or any “narrow restraint exception” while interpreting section 16600, the Legislature can provide a limited exception that allows post-employment covenants not to compete when subjected to a “formative analysis,” looking for assent and unconscionability, as well as by providing that all such contracts will be renegotiable and limited to legal—rather than equitable—remedies.

At a time when California finds itself struggling to stay competitive with other states and facing a decline in technology exports, California should consider a legislative exception for

¹¹² See generally ORLY LOBEL, *TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE RIDING* (2013).

¹¹³ Melissa M. Appleyard, *How Does Knowledge Flow? Interfirm Patterns in the Semiconductor Industry*, in *THE STRATEGIC MANAGEMENT OF INTELLECTUAL CAPITAL AND ORGANIZATIONAL KNOWLEDGE* 537, 548 (Chun Wei Choo & Nick Bontis eds., 2002).

¹¹⁴ *Id.*

voluntarily entered covenants not to compete as one small measure to increase the attractiveness of Silicon Valley for the investment of venture capital, the establishment of new businesses, and to lessen incentives for established companies to leave for states that are seen as more “employer favorable.” Both employers and employees should encourage a measure that would create incentives for firm-sponsored investment in human capital, as well as lead to increased internal efficiency. Finally, everyone should welcome the increased liberty that results when both employer and employee are able to bargain for and voluntarily enter into mutually agreeable terms of their employment relationships—including enforceable post-employment covenants not to compete.

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