

# 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.<sup>1</sup> 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.<sup>2</sup> Citizens of places with a vibrant initiative culture

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<sup>1</sup> 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).

<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> 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

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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).

<sup>3</sup> 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*, BALLOTEDIA, [http://ballotpedia.org/Colorado\\_2008\\_ballot\\_measures](http://ballotpedia.org/Colorado_2008_ballot_measures) [<http://perma.cc/2EZ6-T4DBJ>].

<sup>4</sup> See ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 10 (1956).

<sup>5</sup> 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).

<sup>6</sup> 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.<sup>7</sup>

#### A. Extremism

In an argument best articulated by Besley and Coate, in theory, the ballot initiative process has the ability to unbundle policy issues.<sup>8</sup> 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

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

<sup>8</sup> 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.<sup>9</sup> 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,<sup>10</sup> and citizens are not nearly as policy-oriented, ideological, or extreme as legislators.<sup>11</sup> 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.<sup>12</sup> 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,

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<sup>9</sup> 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).

<sup>10</sup> 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).

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

<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup>

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.<sup>17</sup> 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

<sup>13</sup> 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).

<sup>14</sup> 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).

<sup>15</sup> *Howard Jarvis Taxpayers Ass'n*, BALLOTPEdia, [http://ballotpedia.org/Howard\\_Jarvis\\_Taxpayers\\_Association](http://ballotpedia.org/Howard_Jarvis_Taxpayers_Association) [<http://perma.cc/M3K7-RW8S>].

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

<sup>17</sup> 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.<sup>18</sup>

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.<sup>19</sup> 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

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<sup>18</sup> 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).

<sup>19</sup> 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.<sup>20</sup> 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-taking<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup>

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

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

<sup>22</sup> 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).

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

<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup> 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*.<sup>27</sup> 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.<sup>28</sup> 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.

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

<sup>26</sup> Dyck, *supra* note 22, at 621.

<sup>27</sup> 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.

<sup>28</sup> 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*<sup>29</sup> also declared a constitutional equivalence of the ballot initiative with legislative measures in *Arizona State Legislature v. Arizona Independent Redistricting Commission*.<sup>30</sup> 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 . . . .”<sup>31</sup> 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.<sup>32</sup> 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.”<sup>33</sup> But, direct democracy institutions do not

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<sup>29</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>30</sup> *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652 (2015).

<sup>31</sup> U.S. CONST. art. I, § 4, cl. 1.

<sup>32</sup> *Id.* art. IV, § 4.

<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup>

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”

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<sup>34</sup> See generally GERBER ET AL., *supra* note 7.

<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup> 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).<sup>39</sup>

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.<sup>40</sup> 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.<sup>41</sup>

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

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

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

<sup>38</sup> 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.iandrinstute.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”).

<sup>39</sup> See SMITH & TOLBERT, *supra* note 5, at 85–86.

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

<sup>41</sup> 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.<sup>42</sup> 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 . . . .<sup>43</sup>

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.”<sup>44</sup>

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

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

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

<sup>44</sup> 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,<sup>45</sup> and pressure<sup>46</sup> to turn out. Empirically, the link between the elements of participatory democratic capital—trust and efficacy—and turnout is not especially strong.<sup>47</sup>

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.<sup>48</sup> 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.<sup>49</sup> 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.<sup>50</sup>

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.<sup>51</sup> 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

<sup>45</sup> See SIDNEY VERBA ET AL., *VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS* 16 (1995).

<sup>46</sup> 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).

<sup>47</sup> See STEVEN ROSENSTONE & JOHN MARK HANSEN, *MOBILIZATION, PARTICIPATION, AND DEMOCRACY IN AMERICA* 143–45, 150 (1993).

<sup>48</sup> See Robert D. Putnam, *Tuning in, Tuning out: The Strange Disappearance of Social Capital in America*, 28 POL. SCI. & POL. 664, 664–66 (1995).

<sup>49</sup> 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).

<sup>50</sup> See Joshua J. Dyck & Edward L. Lascher Jr., *Direct Democracy and Political Efficacy Reconsidered*, 31 POL. BEHAV. 401, 408–09 (2009).

<sup>51</sup> 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.<sup>52</sup> More recently, however, this effect has been further clarified; ballot initiatives tend to increase turnout only when the election is competitive<sup>53</sup> and when the issue on the ballot tends to deal with moral issues.<sup>54</sup> Taxation issues, by contrast, according to Biggers, do not lead to turnout gains.<sup>55</sup> In addition, mobilized voters in ballot initiative elections tend to be partisans.<sup>56</sup> 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.

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<sup>52</sup> 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).

<sup>53</sup> 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).

<sup>54</sup> See DANIEL R. BIGGERS, *MORALITY AT THE BALLOT: DIRECT DEMOCRACY AND POLITICAL ENGAGEMENT IN THE UNITED STATES* 47–49 (2014).

<sup>55</sup> *Id.* at 70.

<sup>56</sup> 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*.<sup>57</sup> 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;<sup>58</sup> 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.<sup>59</sup>

## 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.

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<sup>57</sup> SMITH & TOLBERT, *supra* note 5, at 61–66.

<sup>58</sup> 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).

<sup>59</sup> 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 political<sup>60</sup> and social<sup>61</sup> 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.<sup>62</sup> Another kind of trust is social trust, which is the trust that we espouse in others, especially strangers.<sup>63</sup>

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.<sup>64</sup>

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.<sup>65</sup> 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.<sup>66</sup> In the above-cited study,

<sup>60</sup> See generally Joshua J. Dyck, *Initiated Distrust: Direct Democracy and Trust in Government*, 37 AM. POL. RES. 539 (2009).

<sup>61</sup> 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).

<sup>62</sup> 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).

<sup>63</sup> See ERIC M. USLANER, *THE MORAL FOUNDATIONS OF TRUST* 2–5, 14–17 (2002).

<sup>64</sup> Dyck, *supra* note 60, at 540.

<sup>65</sup> Putnam, *supra* note 48, at 665.

<sup>66</sup> 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,<sup>67</sup> 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.<sup>68</sup> 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.<sup>69</sup> 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*

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<sup>67</sup> See BRUNO S. FREY & ALOIS STUTZER, HAPPINESS & ECONOMICS: HOW THE ECONOMY AND INSTITUTIONS AFFECT HUMAN WELL-BEING 11, 142–43 (2002).

<sup>68</sup> This was a central concern in THE FEDERALIST NO. 10 (James Madison).

<sup>69</sup> 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.<sup>70</sup> 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.

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<sup>70</sup> 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).

