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The Choice of the People: Direct Legislation, Abortion Policy,
and the American Democratic Ideal

Senior Project submitted to
The Division of Social Studies
of Bard College

by

Madelin Siedler

Annandale-on-Hudson, New York
May 2012

To my project advisor Verity Smith, whose penchant for political theory
and steadfast encouragement to stretch my academic boundaries
helped me direct and focus my passion into these pages;

to my parents, who instilled in me the values of justice, equality,
tolerance and compassionate citizenship through leading by example;

to Adam, Jessica, and Sydney, who have made these four
transformative years at Bard rich with fond memories;

and to anyone who's ever knocked on a stranger's door or roamed the streets
clipboard in hand in the simple name of a more perfect democracy,

this project is for you,
for you truly make this country what it is.

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CHAPTER 1

What's in a Name? "Democracy," Past and Present

On November 8, 2011, a surprisingly high turnout of voters - much heavier than average for the state of Mississippi in an off-year election - streamed through the polls to vote on a topic that had captured the nation's attention. Proposition 26, the so-called "Personhood Amendment," would have amended the state's constitution to legally define life as beginning at the moment of conception - thus banning all abortion and likely extending its impact to restrictions on the use of intra-uterine contraceptive devices, emergency contraception and even in-vitro fertilization.¹ Sensing the serious implications of the issue at hand, national rights advocacy goliaths like the American Civil Liberties Union and Planned Parenthood launched a massive opposition campaign, warning Mississippians about the far-reaching consequences of the bill.² Even sitting Mississippi governor Haley Barbour, himself staunchly anti-abortion, noted that he harbored some concerns about the measure's "unnecessarily ambiguous" wording, though he as well as the Democratic and Republican contenders vying for his spot on that same fated day went on to ultimately endorse the measure. Even in a state, however, in which Democratic and Republican candidates alike support an outright ban on abortion and in which there remains only one location providing abortion services, the amendment could not pass the threshold required to amend the state's constitution (Pettus). By the time the polls closed, 58% of voters had rejected the proposal.³

¹ Pettus, Emily Wagster. "Mississippi 'Personhood' Amendment Fails." *Huffington Post* 8 November 2011. Web. <http://www.huffingtonpost.com/2011/11/08/mississippi-personhood-amendment_n_1082546.html>

² Seelye, Katharine Q. "Anti-Abortion Initiative 26 Defeated in Mississippi." *New York Times* 9 November 2011. Web. <<http://www.nytimes.com/2011/11/09/us/politics/votes-across-the-nation-could-serve-as-a-political-barometer.html>>

³ Lemire, Jonathan. "Election Day: Mississippi Voters Reject Constitutional Amendment That Would Have Outlawed Abortion in the State." *New York Daily News* 8 November 2011.

The battle over Mississippi's Personhood Amendment is only the most recent in a line of state-level elections that have seen citizens from Miami to Anchorage marching to the polls to decide on the fate of a host of policies related to abortion. Over the past few decades, this steady stream of proposals has included laws to restrict access to abortion services for minors, bans on public funding of services for lower-income women, and even outright attempts to overturn the ruling of 1973's *Roe v. Wade* Supreme Court decision and ban abortion altogether. According to the online ballot initiative and referendum database provided by the National Conference of State Legislatures (NCSL), 17 states have decided or plan to decide in the near future on abortion-related policies through a direct vote of the people.⁴

The process of referring a proposed policy to the public at large (instead of pursuing the more conventional means of law-making through representative lobbying and compromise) can occur in one of two ways. In an *initiative*, a citizen proposes a policy and is required to obtain a specific number of voters' valid signatures on a petition before the proposal progresses to the ballot for a vote. In a legislative *referendum*, the state legislature must pass a proposed policy before presenting it on the ballot for public approval or rejection. The initiative and referendum process has been referred to by scholars of the subject as *direct legislation*, and it is often communicated by its proponents as fulfilling the ideals of a *direct democracy* more broadly.

Though attempts to use the initiative and referendum process to broaden access to abortion services in the time before *Roe* made the procedure legal in 1973 did occur, they played only a limited and by now obsolete role in that regard. In fact, the NCSL online database counts a total of five attempts to pass pro-choice legislation through state-wide initiatives and referenda.

<<http://www.nydailynews.com/news/national/election-day-mississippi-voters-reject-constitutional-amendment-outlawed-abortion-state-article-1.974849?localLinksEnabled=false>>

⁴ "Initiative, Referendum, and Recall: Overview." *National Conference of State Legislatures*, n.d. Web. 13 September 2011. <<http://www.ncsl.org/default.aspx?tabid=16600>>.

The use of direct legislation as a tool to restrict access to and funding for abortion, however, has seen a much higher rate of use (NCSL). This rather lopsided utilization of the tool in current times makes perfect sense: since 1973 when *Roe v. Wade* made it illegal for a state to criminalize the abortion procedure barring certain conditions, pro-life groups bent on repealing *Roe*'s precedent have been on the political offensive.

In a resounding 7-2 decision and with a precedent-setting majority opinion written by Justice Harry Blackmun, *Roe* officially barred states from criminalizing abortion up through the second trimester of pregnancy when it struck down a Texas law that had prevented Norma McCorvey (alias Jane Roe) from obtaining an elective termination of her pregnancy. The Court decided that the law and similar bans in other states violated *Roe*'s 14th Amendment right to due process against a state invasion of privacy and found no "compelling state interest" for the criminalization of abortion – at least within the window of time up through the first six months of pregnancy.⁵ Though Justice Blackmun and his colleagues avoided touching on the delicate and contentious subject of when life actually begins,⁶ they found no compelling justification to

⁵ Until the six-month line at which a fetus could be said to have a decent chance at surviving outside the womb as an independently functioning individual, the state could effectively regulate the methods, procedure and facilitation of abortion but it could not ban the practice altogether. The life (or potential life) of a fetus, whether considered at that moment as a "person" or simply its prototype, was only deemed worthy of state protection of its life in the last three or so months of its development; until then, the freedom of privacy and bodily autonomy of the mother reigned legally paramount (*Roe v. Wade*. No. 70-18. Supreme Ct. of the U.S. 22 January 1973. Web.).

⁶ Justice Potter Stewart is known to have commented during the *Roe v. Wade* trial that "[i]f it were established that an unborn fetus is a person, you would have an impossible case here": the state would have been able to prove it had a compelling interest to protect fetal life over any argued rights to bodily autonomy or privacy. Newer controversial attempts such as the Mississippi "Personhood Amendment" attempt to do just that, and consequently intend to ultimately overthrow the precedent of *Roe* in their wake. (Phillips, Rich. "Mississippi Voters Reject Anti-Abortion Initiative." *CNN* 9 November 2011. Web. <http://edition.cnn.com/2011/11/09/politics/mississippi-election/>.)

violate privacy in the name of protecting any such life until relatively late in a woman's pregnancy.

The resounding 7-2 decision of *Roe* came as a shock to millions of Americans, most of whom identified themselves as religious Catholics and Protestants. Many simply could not fathom the idea of a nation that seemed to gaze in approval upon the taking of what they believed to be an innocent, God-given human life. Many of those citizens who would form the country's first nation-wide pro-life groups only first realized with the shock of *Roe* in 1973 that the values with which they had been raised, and which they had until that point presumed to be part of a nationally shared worldview, were in peril.⁷ In hopes of challenging the legal specificities of *Roe* by enacting more and more restrictive policies (policies that, intentionally or not, would doubly prove to reduce the overall numbers of abortions *de facto*) these activists have succeeded in requiring parental notification prior to a minor's abortion in states as politically and geographically diverse as Alaska, Colorado, Florida, and Michigan, as well as in banning the public funding of abortion services in Arkansas and Colorado. All of this has been achieved while bypassing the more conventional means of law-making through representation.

The very act of enacting such policies that restrict access to abortion has not gone without a substantial challenge. In another Supreme Court case, 1992's *Planned Parenthood of Southeastern Pennsylvania v. Casey*, five state policies (ones that had been passed not by initiative but under legislative authority) were challenged as undermining the precedent of *Roe*. These policies ranged from requiring informed consent and a 24-hour waiting period before an abortion to demanding notification of a married woman's spouse to mandating parental consent

⁷ For a seminal study of the root causes and motives behind the modern pro-life movement, see Kristin Luker's *Abortion and the Politics of Motherhood*. United States: University of California Press, 1985. Print.

of guardians of minors to prescribing certain reporting requirements for abortion facilities. This time, in a much more narrow 5-4 decision, the Court upheld the basic tenets of *Roe* – that a state may not pass laws banning abortion within a two-trimester window of time – but also held that all additional state policies and regulations concerning abortion access were constitutional, barring any policies that placed an “undue burden” upon the woman seeking to obtain the procedure.⁸ Of the five policies in question, only one – the spousal consent provision – did not pass this litmus test. Hence, since 1992, judicial authority has upheld the basic right to abortion yet has defended many of those obstacles to access that the pro-life community has taken into its own hands to enact – whether through the more traditional means of legislative lobbying or by using the tools of initiative and referendum.

Admittedly, however, success is never a given for these measures - even in relatively conservative states. Attempts to ban public funding, require parental consent, or ban abortion altogether or under very limited exceptions have counted 21 failures since the first ballot initiative attempt in 1978. They count only six laws among their successes – yet the influence of these attempts at shaping state-level abortion policy through direct legislation extends far beyond the nominal wins and losses incurred and the policies enacted in each state. Far from remaining isolated to the specific political climates and players of each state that faces a vote, the phenomenon of abortion-related policy proposals up for a direct vote of the people has ridden on the wings of the nationally influential and deeply motivated pro-life movement on the one hand, and the coattails of the more general nation-wide resurgence of the use of direct legislation

⁸ Author of the Court’s majority opinion, Sandra Day O’Connor, specifically described an “undue burden” as one whose “purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability” (*Planned Parenthood of Southeastern Pennsylvania v. Robert P. Casey*. No. 91-902. Supreme Ct. of the U.S. 29 June 1992. Web.)

through initiative, legislative referendum, and recall on the other.⁹ As an issue that strongly divides and unites Americans along social, political and religious lines, the abortion debate has found a welcoming home on the minds, ballots, tongues and television sets of citizens in 17 different states so far, and will maintain a formidable presence in the sphere of law-making into the foreseeable future.

The use of direct legislation to dictate access to, funding for, and the very legality of abortion services not only affects the nature of the national debate on abortion; it also offers unique grounds on which to examine the functions, benefits and drawbacks of direct legislation construed more broadly. The recent upsurge of the use of direct legislation devices has prompted those in the academic world to more deeply investigate the implications of the use of initiatives and referenda on the perceived health of American democracy. Some scholars stand by the direct legislation process, arguing that it may act as a necessary “safety valve” with which a popularly favored piece of legislation may be promoted when, for whatever reason, it proves a failure within the legislative process. These writers argue that policies that would otherwise be clearly favored by the voting public succumb to legislative rituals such as logrolling, partisan agenda control, and an overall lack of direct accountability to the public’s wishes.¹⁰

There are several distinct lines of argument that advocate for an increased involvement on behalf of the mass public in the making of laws. They range from empirical - from the nineteenth-century observations of Alexis de Tocqueville to the writings of contemporary political thinkers Matsusaka, Bowler, and others - to theoretical - from the eighteenth-century

⁹ Banducci, Susan. “Direct Legislation: When is it Used and When Does it Pass?” Bowler, Shaun, Todd Donovan and Caroline J. Tolbert, eds. *Citizens as Legislators*. United States: The Ohio State University, 1998. 109-131. Print.

¹⁰ New, Michael J. “The Citizen Initiative, Public Opinion, and Abortion Policy.” The University of Alabama. Working paper, 2011. Web. 16 November 2011.
http://www.sppc2011.org/Papers/New_abortion.pdf.

liberalism of John Stuart Mill to the Progressive-era ideals elaborated by John Dewey. Some, such as Mill and Dewey, favor direct legislation for its argued ability to bring about a certain observable result, whether it be a more just and wise set of laws for the people to live by, or rulers who are accountable and sensitive to the changing needs of the public. Others, like de Tocqueville, believe it is necessary on a normative level to keep the true ideals of democracy active within the everyday system of democratic governance. This line of argument sees the importance of direct legislation not in terms of its immediately observable results (which may even have an adverse effect on legal justice and competence in the short-term), but on the long-term development of more competent citizens who possess enlightened democratic ideals and are able to wield them adroitly at the helm of a healthy, sustainable democracy.

By “allowing the general public to participate in lawmaking,” argues contemporary political scientist John Matsusaka, direct legislation devices such as initiative, referendum and recall do appear to “improve the performance of government.”¹¹ Even the very term attributed to the process itself, *direct democracy*, conjures inherently positive images in the mind’s eye. One immediately imagines the rejuvenation of long-lost ideals of civic engagement and public consideration of worldly issues that, at some point in the development of American history, must have disappeared amidst the influences of elitism and professionalization that formed the modern representative legislative system. What’s more, in “An Overview of Direct Democracy in the American States,” Shaun Bowler writes that at the birth of the initiative in the United States, promoters hoped direct democracy would “instill civic virtue by simultaneously *educating* and

¹¹ Matsusaka, John. G. “Direct Democracy Works.” *Journal of Economic Perspectives*, 19.2 (2005): 185-206. Web. p. 186.

involving the mass public” (italics added) (2).¹² This sentiment conveys a desire not only to enforce the will of the common voting public in the form of policy creation, but to engage that public to further educate themselves and others about the matters of policy at hand. As such, it inspires a certain anti-elitist notion of deliberation, public discourse and of engaging those who would otherwise be alienated and invisible from the everyday mode of representative legislation.

On a more normative level, political theorists and philosophers have offered several lines of defense in favor of a more direct and participatory form of democratic governance.

Educational and social reformist John Dewey argued in 1927’s *The Public and its Problems* that the modern American system of legislation through representation values technocratic authority and expertise over a sense of familiarity and understanding of contemporary social needs and problems. This inherently disconnects the rulers – who have difficulty comprehending the state of affairs lived daily by the classes below – from the ruled, who feel alienated and disregarded by the experts they vote into office. As time goes on, this gap between those who daily live with the problems that need fixing and those who monopolize the power to fix them grows larger. “[I]n the absence of an articulate voice on the part of the masses, the best do not and cannot remain the best, the wise cease to be wise.” In the sense that the technocratic elite becomes a specialized ruling class, “they are shut off from knowledge of the needs which they are supposed to serve” (169).¹³ Though a ruling elite possessing a specialized area of expertise may indeed appear attractive and would seem to result in the formation of effective and intelligent policy, the veneer

¹² Bowler, Shaun. “An Overview of Direct Democracy in the United States.” Bowler, Donovan and Tolbert 1-19.

¹³ Dewey, John. “Selection from *The Public and its Problems*.” *Theories of Democracy: A Reader*. Ed. Ronald J. Terchek and Thomas C. Conte. Lanham, MD: Rowman & Littlefield Publishers, Inc, 2001. 168-171. Print.

of technocratic authority quickly fades as the lives and experiences of the ruling class resemble less and less the lives of those with the problems in most dire need of fixing.

Dewey argues in *The Public and Its Problems* that the very function of direct legislation - by which these everyday citizens who are more familiar with the grievances of the masses are empowered to take matters of political change into their own hands - acts in a unique way. It not only ameliorates present social problems – it also serves to bring them to the forefront of public consciousness in the first place. The public may first only agree upon one fact: that there exists a widespread social problem in society, and that action must be taken to fix it. Hailing from all types of experience and background, they may not understand precisely the ways in which the problem can possibly be fixed. Furthermore, the masses may initially not even truly have a thorough grasp on their exact position on the matter, or even how they would stand to gain or benefit from a change in policy. The purpose of direct democratic institutions is to encourage an atmosphere of “consultation and discussion” which would bring about a better conceptualization of those very “social needs and troubles” which haunt the public consciousness (169).

To elaborate on this point, Dewey points to the observation made by mid-19th century French political thinker Alexis de Tocqueville in *Democracy in America*, the renowned investigation of the factors that successfully drove the first century of democratic governance in the United States. Dewey explains that de Tocqueville saw a primary function of popular government as “forc[ing] a recognition that there are common interefsts, even though the recognition of what they are is confused.” Further, “the need it enforces of discussion and publicity brings about some clarification of what they are. The man who wears the shoe knows best that it pinches and where it pinches, even if the expert shoemaker is the best judge of how the trouble is to be remedied” (169). By engaging the population in a discovery and

investigation of the social issues in need of fixing in a way that a purely representative mode of legislation could not, institutions of direct democracy empower citizens to advocate for themselves and thus strengthen the lines of mutual understanding and communication between representative rulers and the electorate at large.

In *Democracy in America*, de Tocqueville himself made another distinct point about the potential of active citizen engagement to have a salutary effect on the overall health of democracy. His observations of the jury system in the United States, in which everyday citizens were encouraged to take part in the judging of their peers in both criminal and civil cases, led to a surprising conclusion. In analyzing these observations with specific regards to the subject of popular government more specifically, the jury system (by which individuals and the morality of their behavior are judged with a legal action) can act as a stand-in for the system of direct legislation (by which policies are debated and judged for their worth through a vote). In both cases – that of the citizen jury and that of direct legislation - it is argued that everyday citizens lack the experience and specialized set of skills and knowledge of the more learned ruling class of judges, lawyers and legislators. Indeed, de Tocqueville admits, if a completely just and thoroughly wise decision is the primary goal of the American judicial system, then a citizen jury is not the optimal setting. However, he contends, the jury system remains an ingenious institution for a completely different reason: it effectively trains Americans to play active roles in the decision-making process of their community as well as educates them about the particulars of the law, its interpretation and its enforcement. In this, citizen involvement is key to preserving the strength and legitimacy of American democracy.

However, unlike Dewey - who sees popular government as encouraging the communication of experience and ideals from the ruled to the ruling class, de Tocqueville

believes that citizen involvement in democratic decision-making “serves to communicate the spirit of the judges to the minds of all the citizens” - thus serving a top-down rather than bottom-up educative function (798).¹⁴ Also unlike Dewey, who believes citizen involvement will bring about a more desirable political result by holding the technocratic elite accountable and invigorating the policy-making arena with fresh voices and backgrounds, de Tocqueville distinctly sees citizen involvement in political and judicial decision-making as a means-oriented mechanism: the journey of American citizens’ enlightenment and empowerment is more important than the actual results of their involvement in decision-making. Lay citizens can gain a rich understanding of justice and governance through sharing the responsibility of making impactful decisions alongside their more learned judicial rulers. Eventually, de Tocqueville argues, judicial results *will* become increasingly wise in these decisions as the educative function of citizen involvement in matters of the law and social governing gradually molds lay people into enlightened and accountable community members.

Another prominent political thinker who took a stance on the role of lively discourse in shaping and providing for the interests of society was the nineteenth century’s John Stuart Mill. Several centuries before Dewey, Mill also pointed to the system of direct legislation as a means of bringing about the most just and wise political result possible. In his treatise *On Liberty*, Mill contends that the existence of a diverse and competitive marketplace of ideas and arguments is the only way to ensure that truth and wisdom prevail in the public sphere and in the policies of government. More than simply serving to bring about a heightened awareness of political issues and educate the masses to become competent democratic citizens, Mill argues that a competition-rich public stage in which opposing arguments are brought to the fore, argued and played out

¹⁴ De Tocqueville, Alexis. *Democracy in America*. Trans. Harvey C. Mansfield and Delba Winthrop. United States: Random House, 2004. 1 September 2011. eBook.

will also bring about the best result in terms of enhancing society's wisdom and ensuring the prevalence of truth and justice in political and legal systems. "Complete liberty of contradicting and disproving our opinion is the very condition which justifies us in assuming its truth for purposes of action," he argues, "and on no other terms can a being with human faculties have any rational assurance of being right" – and, following from this, of being politically just (18).¹⁵

The use of direct legislation as a part of any democratic form of governance arguably paves the way to creating this lively and competitive public discourse through engaging citizens with the promise that their perspective on this salient issue at hand matters. By the very nature of the pro-versus-con, up-or-down voting that occurs with ballot measures and referenda, direct legislation encourages those in the minority to offer arguments and perspectives counter to conventional wisdom. These are arguments that often go unheard when the entire public is not encouraged to weigh in on a matter important to them, or when legislators' extraneous interests in maintaining bipartisan support and compromise collide with the desire to genuinely debate a heated topic (an occurrence which played out in one of the following case studies). As Mill would argue, the voices and views of the minority may in fact be the source of the arguments that, when given the right time and place for serious consideration and debate, will lead to an overall better outcome for citizens, for the sensibility of their government, and for the quality of justice that prevails in the world they inhabit.

Others, however – notably, more contemporary political thinkers - have argued a myriad of points regarding the inherent dangers in the initiative and referendum process as it is observed in modern-day American policy-making. Barbara S. Gamble provides evidence that initiatives intended to quell protections for minority rights are passed with an alarming success rate. As she

¹⁵ Mill, John Stuart. "On the Liberty of Thought and Discussion." *On Liberty*. Ed. Elizabeth Rapaport. Indianapolis: Hackett Publishing Company, Inc., 1978. Print.

argues, this threatens the founding ideals of protection of minority interests, thought by founder James Madison and his contemporaries as achievable only through the more indirect form of representative government.¹⁶ Susan Banducci finds that voters with lower levels of education tend to vote in a more haphazard manner than their more educated counterparts, raising doubts about whether direct legislation can truly be said to provide an educative function for those most in need of it. Similarly, this finding causes one to suspect whether the results of initiative votes can even be said to reflect the true desires of the voting public - or whether lack of political literacy coupled with the often highly confusing legal language of initiatives causes voters to make misguided choices at the polls that could wreak potentially hazardous consequences (42).

Regardless of one's views on abortion policy and rights, there remains a complex dilemma to untangle. Gamble's concern over the public's ability to dictate the extent of civil rights and liberties guaranteed to minority groups raises a core argument in the debate over direct legislation. Indeed, direct consultation of the public over issues such as legislative term limits, environmental regulations or tax rates is questioned by a multitude of scholars on the subject. However, a particularly heightened fear arises over the potential of the public at large – specifically, a majority of that public - to dictate issues of individual liberty and basic human rights which are often held most vulnerably by individuals and groups with minority status. Citing the country's forefathers who first set up the institutional separation of powers, Gamble argues that issues as personal and crucial as rights of privacy, equality and autonomy should be taken up by the Supreme Court, whose specified role it is to arbitrate the interpretation and application of the Constitution. While the question of whether “the people” should have a say in the taxes they pay or the term limits of their representatives may deserve further debate, the last

¹⁶ Gamble, Barbara S. “Putting Civil Rights to a Popular Vote.” *American Journal of Political Science*, 41.1 (1997): 245-269. Web.

place the public should have authority to legislate is in the spheres of individual liberty and civil rights, which many (including the majority opinion authors of both *Roe* and *Casey*) would say includes the right to abortion services.

In a broader sense, then, should the system of direct legislation as it is manifested today indeed be lauded for upholding the traditional ideals of democracy? Can one argue that today's direct legislation process fosters a heightened level of civic responsibility and engagement or that it serves to enlighten a voting public in a more widely accessible arena of political discourse, as its Progressive-era proponents first intended? Can direct legislation in modern-day American society empower the everyday citizen to take the responsibility of governing into one's own purview, a spot reserved in non- or less direct democracies for the wealthy, landed, professional or otherwise elite class, as argued by John Dewey and others? Or, rather, should direct legislation be rejected as merely a tool used by well-funded groups that capitalize on a lack of information and political literacy among a citizenry to benefit their narrow financial and political interests? Further, might it be a tool more accessible for use by a tyrannical majority to enact legislation that benefits vested majoritarian interests while risking the rights of the minority, as argued by Gamble? In all, should modern-day direct legislation be regarded as nothing but an unfortunate distortion of the democratic ideal that flies in the face of democracy's true ideals, or may some aspects of the initiative and referendum system actually achieve the goals of democracy in ways indirect representation cannot, and therefore perhaps be worth saving?

THE MANUFACTURED DEMOCRACY AND THE DIM ELECTORATE:

INVESTIGATING MODERN-DAY CHALLENGES AND CRITIQUES

Of the two main ways in which critique of the initiative and referendum process is typically approached by contemporary scholars, the first focuses on direct legislation as an

unregulated, cutthroat and calculating industry. The critique asserts that the high-level interest-group spending, professionalization and strategization of almost every aspect of the typical initiative campaign betray the purported goal of direct legislation to promote a genuine, all-encompassing and grassroots channel of decision-making. In “California’s Political Warriors: Campaign Professionals and the Initiative Process,” McCuan, Bowler, Donovan and Fernandez explore the development and role of the “initiative industry” in crafting successful initiative campaigns, utilizing California as a case study. Through adoption of direct legislation devices, they argue, political parties in California have steadily lost influence to other types of organizations and interest groups contesting elections (Bowler, Donovan and Tolbert 60).

In the 1990s, the state was estimated to harbor about 89 polling, mail and field consulting firms, as well as 36 survey research and targeting services, including consultants “engaged solely as initiative and referendum consultants” (62). These firms were often specialized even further into specific issue-related services, pertaining to any subject from tobacco use to taxes. On an even deeper level of specialization, legal consulting firms provide services that range from providing legal advice on advertisement disclaimers, campaign funding compliance, and conflict-of-interest law (63). Lastly, because of the considerable effort it takes to gather enough valid signatures to pass a proposed initiative onto the ballot, paid signature gathering is a star feature of the services rendered by almost every initiative consulting firm.

The realities of the “initiative industry” in California raise questions about the influence of monetary as well as organizational power in direct democracy. Any citizen may bring up an issue to be considered for the ballot, but in this day and age, without the assistance needed to at least gain the required amount of valid signatures, little hope is to be had for the Progressives’ envisioned “citizen legislator.” Further, the role of narrow interests and well-funded actors begs

skepticism about the real nature of direct democracy; it causes one to question whether the initiative and referendum process has indeed realized the initial goal of “educating and involving the mass public” in a lively and egalitarian discourse over the merits of a proposed policy measure. The influence of such marketing and consulting firms, as McCuan et al. discuss in “California’s Political Warriors,” is an unavoidably contentious aspect of the debate on the merits of direct legislation. The role of powerful and moneyed interests is a considerable fear of those opposed to methods of direct legislation, specifically the use of slick advertisements and unilateral bombardment of cleverly crafted messages blasted by well-oiled interest groups.

Through interviews with some of the industry’s heaviest-hitting consultants, David S. Broder’s *Democracy Derailed: Initiative Campaigns and the Power of Money* paints a picture of a process almost completely driven by the size of the campaign’s checkbook.¹⁷ The more money a campaign has and is willing to shell out to consulting firms – which may handle everything from the legal drafting of the initiative’s wording to hiring petition gatherers who may be paid up to \$1.50 for every voter’s name they can acquire – the higher chance, Broder argues, that campaign has of winning on election day. Campaigns fought over ballot measures are just as strategically waged as those fought over seats in Congress or the Oval Office. Before the paid collectors even hit the streets and parking lots clipboards in hand, the legal jargon of the measure itself must be drawn up by the proponents’ camp in a way that offers the fewest windows of opportunity for the measure’s opponents to find legal technicalities or distasteful side-effects that they can later attack in advertisements and op-eds.

¹⁷ Broder, David S. *Democracy Derailed: Initiative Campaigns and the Power of Money*. New York, NY: Harcourt, Inc., 2000. Print. 260 pp.

According to Broder, this initial stage is so important that “there are firms in California that have made a specialty, and a good living, out of drafting initiatives” from the cruder concepts brought in by activists with a dream for making their ideas into law (69). Often, the drafting of the proposed measure’s language is strongly driven by the polling trends of the moment as well as the campaign consultant’s input (71). The people who are willing to work long hours for the promise of being rewarded around one dollar for every signature collected come from a myriad of varied backgrounds. As Broder explains, the direct legislation regiment is composed of “students, housewives, laid-off workers, and some who evade state residency requirements and follow the initiative trail from place to place” (60). Regulations such as the aforementioned residency rule are one of a handful that have been placed upon various stages of the initiative process; however, Broder argues, “efforts to regulate the industry have been sporadic and, for the most part, ineffective (67).”

In the Supreme Court case *Buckley v. American Constitutional Law Foundation*, the Court ruled that the state cannot require petition gatherers to wear name badges or be registered to vote, or demand detailed financial reports from the initiative campaigns. What it can ask is that the gatherers possess residency within the state and be over a certain age; they may also require them to wear badges clearly marking them as “paid” or “volunteer” signature collectors (67). The paid collectors, regardless of the requirements placed upon them, have been found by most activists to be a necessary, if less than ideal, tool to winning an initiative campaign. “When the legalities have been completed and the petition gathering is finished,” Broder continues, “the campaign is just beginning. At that point, control shifts to another group of consultants – the pollsters, the media experts, and the campaign managers” (72). Among the pillars of a successful initiative campaign as listed by the interviewed consultants are “[i]ntensive opinion

research, the first vital step; definition of the issue...in terms that appeal to voters' self-interest; focused and repetitive advertising; and careful selection of endorsers" (78). Raising the funds needed to implement all of these strategic aspects, however, takes a host of generous donors and a whopping checkbook.

The second concern critics share in relation to direct democracy is tied to the first: slick media campaigns, clever messages and sneaky consultants using poll results and legal loopholes to their advantage have the potential to pull the wool over a voter's eyes, resulting in a final vote not representative of the real interests of the people, but of the campaign which has best mastered the art of deceit. This fear fundamentally relies on the assumption that the voting public is largely too incompetent to see through the ubiquitous smoke-and-mirrors campaign tactics in order to understand the real pros and cons of a proposed policy. This oft-voiced critique relies on one central factor: an inherent mistrust of the competence and compassion on behalf of the majority of voters for the interests of those in the minority and, consequently, the voting public's inability to deal with nuanced policy debates which, as the argument goes, would be better left up to their more enlightened career politicians and leaders.

In *Citizens as Legislators*, Susan Banducci takes a look at the effect of a voter's ideological orientation on his or her voting behavior in "Searching for Ideological Consistency in Direct Legislation Voting." One main factor that political scientists often use to consistently explain voting behavior is "self-identified ideology," and Banducci asks whether the same explanation can be applied to the political decision-making that occurs within the process of direct legislation (Bowler, et al. 133). Ultimately, she finds three major "dimensions" of ideological voting patterns along which the majority of voters operate: social, economic and regulatory (140). More educated voters are more likely to vote consistently along all dimensions

than those with fewer years in school, and furthermore, “those who vote without partisan consistency in candidate races also have a less coherent structure to their votes on ballot measures” (142). One primary factor in the voting differential between those with more education – and, by correlation, more exposure to current political discourse - and those with less can be explained by the role of political elites in endorsing or opposing an initiative at hand.

In “The Influence of Elite Endorsements in Initiative Campaigns,” Jeffrey A. Karp explores the role of these elites and their influence on voting behavior through a case study of notable Washington representative Speaker Tom Foley, who publicly opposed an initiative that would limit congressional service to just two terms. As Karp cites, “Converse (1964) argued that individuals rely on information or messages from political elites to help organize political issues and ideas.” Furthermore, the “least informed individuals” are less likely to utilize cues from elites in their political decision-making because “they are less likely to be exposed to persuasive messages” (Bowler et al. 150). Finally, Karp contends, “[t]hose who are “moderately informed are in fact most susceptible to campaign messages because they have a higher probability of being exposed to the message than the least aware and are more likely to be persuaded by the message than the highly aware” (151). Therefore, level of exposure to public discussion over a current political topic interacts with an individual’s level of educational attainment to predict how easily she or he will be persuaded by the messages amplified by a policy’s elite supporters or opponents.

In his study, Karp found that those who felt favorable toward Foley were least likely to support the measure, while those who disfavored Foley were most likely to support it. Further, they were almost twice as likely to vote for the initiative as those who were unaware of Foley’s position on the initiative at all (161). Like Banducci’s assessment of political decision-making

among those with more or less education and exposure to political discourse, Karp illustrates the significant impact that varying opinion of elites who are conveying a message about a ballot measure can have on public attitude toward the measure and voting outcomes. Public opinion of these “messenger elites” matters most for those who are moderately aware – they are sufficiently exposed to the positions of the elites, but their opinions are somewhat more malleable. Both Karp and Banducci bring up the problematic mediating role both class and level of educational attainment play in determining the role of political ideals and political elites on the nature of the public discourse and deliberation that takes place over a proposed policy.

With this evidence in mind, one may argue that less educated voters are less exposed to the influence of politicians and other elites who advocate for or against certain initiatives on an ideological basis – that they are missing this “information shortcut” used by those with more education and exposure to political discourse. As Anthony Downs theorizes in his classic work *An Economic Theory of Democracy*, the average rational actor has no compelling reason to spend time and resources gaining knowledge about political issues, such as which elite figures endorse certain policies and why, to make informed decisions at the ballot box. Instead, she or he will either rely on whatever information takes the least effort to acquire - such as the expressed views of peers judged to be more knowledgeable - or simply take no action at all.¹⁸ In terms of the initiative as a force of public deliberation and education, this raises questions about the truly democratic nature of direct legislation. If fair and energetic discourse and debate is only truly a realistic option for those to whom information is more readily available and synthesized, then those with less education and resources are not taking a comparable part in the process of democracy that is meant to equalize and engage. This could then raise formidable

¹⁸ Downs, Anthony. *An Economic Theory of Democracy*. New York: Harper and Brothers, 1957.

doubts about the use of the initiative as a tool for upholding the ideals of truly participatory democracy.

AN ANCIENT MODEL FOR A NEW WORLD:
CLASSICAL DEMOCRATIC LAW-MAKING

To truly understand these very supposed ideals of “participatory democracy”, one must first understand a history of the ideals, goals and methods of democratic modes of governance that extends much further back than the push for direct democracy in the American Progressive Era. If followed to its logical starting point, this study takes one to the ancient city widely considered to be the “birthplace” of democratic thought and practice: Athens, Greece. Yet *democracy*, that sweeping monolith of a phenomenon, once began in Athens as just one of several accepted modes of governance with its own unique benefits and drawbacks like any other form of rule. In the world of today, however, it is arguably considered the supreme ideal of governance, a beacon lighting the way toward expanded freedoms and prosperity world-wide. The struggle for that shining light of democratic rule around the world has started trillion-dollar wars, toppled once-all-powerful autocrats and caused oppressed populations the world over to revolt in unity with one another for the common promise of a freer and more prosperous tomorrow. The fervor of its adherents and the undeniable appeal of its rosy gospel create a picture of democracy that approaches world-religion quality in its sacrosanct power to compel individuals, groups and nations to act in concerted efforts violent and peaceful in hopes for its professed effects.

Yet the very definition of *democracy*, taken from its Greek origins and transplanted into modern-day global politics, is itself highly contested. As John Dunn explains in *Democracy: A History*, although ancient Greece counted among its citizens some “partisans” of democratic rule

as one of several acceptable modes of governance, democracy was by no means viewed as the sole legitimate way of organizing political power (16).¹⁹ However, its proponents did believe there to be a set of unique properties that made democracy an appealing mode of governance. As ancient Greek ruler Pericles contended, Dunn quotes, “ ‘...we Athenians decide public questions for ourselves or at least endeavor to arrive at a sound understanding of them, in the belief that it is not debate which is a hindrance to action, but rather not to be instructed by debate before the time comes to action’ ” (27). Described by Dunn as the most full “expression of hope which lies at the very centre of democracy as a political ideal,” this quotation illuminates the connection of the origin of the democratic ideal with more modern forms of direct legislation - such as the kind used by the pro-life movement to restrict abortion access and funding. Namely, both ancient Athenians and contemporary supporters of the initiative process in America believe that truly democratic rule – the direct rule of the people unfiltered by elected, appointed or otherwise legitimated mediators of political influence - has the ability to spark participation, enlightenment and awareness amongst a *polis*.²⁰

However, Dunn argues, the literal sense of democracy as it was executed in ancient Athens has never been successfully replicated in the modern world. “When any modern state claims to be a democracy, it necessarily misdescribes itself,” whether by guile or simple semantic confusion (18). Neither was it, contrary to popular assumption, in any way a democracy unadulterated. In another take on the disputed legacy of Athenian-style democracy, Bernard Manin claims in *The Principles of Representative Government* that “in the so-called

¹⁹ Dunn, John. *Democracy: A History*. Great Britain: Atlantic Books, 2005. Print. 248 pp.

²⁰ Indeed, one of the earliest purported benefits of democratic rule above other competing forms was its potentially educative function. This claim, one finds, remains today at the very core of ideals of those who support a broader use of direct legislation by the people instead of more indirect form of representative rule.

‘direct democracies’ of the ancient world – Athens, in particular – the popular assembly was not the seat of all power. Certain important functions were performed by other institutions,” most of them executed by a group of citizens selected not by a democratic vote but by the simple drawing of names through lot (5).²¹

This revelation has come as a shock to many, including classical historians, who consider Athens to have been a model of political efficiency and enlightenment. Manin, however, puts forth one contending theory, arguing that the function of selection by lot played a role in effectuating one of the key Athenian democratic principles: that of rotating power structure. Rotation was considered foundational to democratic freedom, as it ensured Athenians would be better able to “visualize how their orders would affect the governed” (29-30). Having both been led and governed before, they would therefore make better leaders as well as civil, law-abiding citizens. According to Aristotle, such an “alternation between command and obedience” would constitute the worldview of the ideal Athenian citizen (28).

Regardless of the seemingly contradictory utilization of selection by lot in what most people today consider the shining standard of unfettered democracy, one can actually delineate a key ideal threading through the political arrangement in ancient Athens to the American arena of direct legislation today. In both worlds the belief is strong that the making of a truly competent and ideal citizen is achieved not solely in doing the ruling nor solely in being the ruled, but in reconciling the positions and gracefully dancing between them at different intervals of one’s life according to the needs of the citizenry. As proponents of the use of direct legislation argue today, the initiative and referendum system simultaneously encourages citizens who are ordinarily “the governed” to “do the governing” for once, becoming through this process a more

²¹ Manin, Bernard. *The Principles of Representative Government*. Britain: Cambridge University Press, 1997. Print. 243 pp.

actively engaged and politically enlightened governee. By that same token, by holding elected officials accountable to public sentiment about the laws they pass, the initiative and referendum process makes those who are used to doing the governing become, in a sense, the governed – and in doing so, become more sensitive and enlightened rulers.

There yet remains a more general critique of Greek-style direct democracy and the claims of its modern-day proponents to take into account. Both Dunn and Manin's examinations of the ancient mode of governance throw the true appeal of authentic "democracy" itself into question. Not all thinkers throughout time have thought of democracy as kindly as Pericles, his Athenian contemporaries, or those who desire to see more direct forms of law-making today. Far from being seen as the sole legitimate source of political power and decision-making that it is viewed to be in the Western world today, democracy in its various forms has weathered its fair share of critics. These skeptics question the value of its purported benefits and fear even more its potentially negative consequences. Echoing preceding students of Western democracy such as James Madison and Alexis de Tocqueville, Dunn notes that the ancient precedent of democratic rule entails a premise that is "disconcerting from the outset": namely, that "democracy" in its purest form must be obeyed by way of the ultimate legitimacy of the people's rule, regardless of the host of potentially disastrous consequences for the interests of those in the minority (24).

After all, as students of democracy's "second coming" such as Madison and de Tocqueville reasoned, Athens did not fall without cause. In fact, the very idea of democracy was mentioned by thinkers in this era "most consistently and prominently as the familiar name for a negative model, drawn from the experience of Athens, of an outcome which they must at all costs avoid" (72). Even before the advent of the Western world's second wave of democracy, seventeenth-century English political philosopher Thomas Hobbes had described the Athenian

model as “disorderly, unstable and intensely dangerous” (61). Most importantly, he feared that the democratic arena was a “paradise...for orators...and also in effect a form of tyranny by orators: of subjection against one’s will to the force for others, not of the better argument, but of the more potent speech” (61-62). Clearly, this is a concern that is only magnified by the contemporary use of direct democracy devices such as initiative and referendum.

Both Madison and de Tocqueville made it clear in their writings that they believed only the institution of indirect, representative forms of government would be the nascent country’s saving grace from the evils that plagued and eventually brought ruin to the direct democracy of ancient Greece. Yet as even David S. Broder, today one of direct legislation’s most outspoken critics, admits in *Democracy Derailed*, “the democratic principle has coexisted with the republican from the very beginning of our nation and created a tension that has undergirded much of our politics for more than two centuries” (23). Even during the pre-revolutionary period, for instance, the men of Plymouth Colony would gather every three months to consider proposed local measures in a deliberative setting. However, the last decades of the nineteenth century brought about two economic forces that produced a strong political reaction. The rapid industrial revolution and the new wealthy “upper ten” to which it gave birth led to the formation of labor unions and an abundance of working-class discontent; secondly, the cycle of market panics and infelicitous farming conditions led to a widespread bankruptcy suffered by the nation's agrarian class. The government was increasingly viewed in these hard times as puppets on strings held by the corrupt and irresponsible industrial elite who could no longer be trusted to keep the public good in mind when legislating.

Thus, with the initiative process imported from Switzerland at the dawn of the Progressive Era in the 1890s, direct legislation in America was born. From its very beginning,

modern direct democracy was intended not only to thwart the corruption perceived in the representative process of law-making at the time; it would also help educate and enlighten all classes of people who would unite in a fight for the common good and sound public policy. In an essay published in 1893, J.W. Sullivan argued that "as citizens took on the responsibility of writing the laws themselves, 'each would consequently acquire education in his role and develop a lively interest in the public affairs in part under his own management'" (Broder 26). "What the majority of the Progressives hoped to do," as Broder quotes the renowned work Progressive-era historian Richard Hofstadter, *The Age of Reform*, "was to restore popular government as they imagined it to have existed in an earlier and purer age," precisely the lively and engaging democracy they believed, whether accurately or not, to have thrived in ancient Athens - "...revivifying the morale of the citizen, and using his newly aroused zeal to push through a series of changes in the mechanics of political life" (28). There exists a theme, dating back to the very creation of the ballot measure in the American Progressive Era, of the intention for direct democracy to provide grounds for lively public debate and consideration.

As so many turn-of-the-century Progressives believed, this mode of legislation would certainly provide a more involved politics than the representative law-making done by the politicians they found corrupt and alienated from everyday American issues and experiences. Driving the fundamental justifications for implementing these more direct forms of legislation is a belief that public opinion is inherently dynamic; with a richer wealth of information and the chance to consider new facts, an individual's political opinions change accordingly. Rather than simply reaffirm presumed public values and consensus, direct legislation as intended by its Progressive proponents would uphold the ancient Athenian ideal of arousing public consideration and rumination.

It would give the public a chance, as Pericles so eloquently put it, “to decide public questions for ourselves or at least endeavor to arrive at a sound understanding of them, in the belief that it is not debate which is a hindrance to action, but rather not to be instructed by debate before the time comes to action” (Dunn 27). Direct legislation is at heart a developmental and catalytic process rather than just a reaffirmative one. Again hinting at the conversational rather than reaffirmative nature of the modern democratic ideal, Dunn writes, “[t]he role of democracy as a political value within this remarkable form of life...is to probe constantly the tolerable limits of injustice, a permanent and sometimes very intense blend of cultural enquiry with social and political struggles” (171).

TALKING IT OVER?: THE POSSIBILITIES AND PARAMETERS OF DELIBERATIVE DEMOCRACY

One particular solution to the need for increased citizen engagement and public awareness has come from self-proclaimed *deliberative democrats*. The ideal of deliberative democracy, as Shawn W. Rosenberg explains, first emerged in the 1990s as a response to the so-called “aggregative view of democracy” which perceived the individual as a “self-directing actor who orients her initiatives in the political arena so as to realize her interests.”²² In terms of the initiative process, for instance, the voter (or even the proponent of an initiative) is a rational actor who will approve or propose whichever type of policy that she or he believes will produce the best possible outcome for her or himself. Along these lines, autonomy is defined in the aggregative schema as “the ability to freely influence collective decisions in a manner consistent with the pursuit of one’s own preferences” – for example, the voter may tell his or her friends of

²² Rosenberg, Shawn W. “Rethinking Democratic Deliberation: The Limits and Potential of Citizen Participation.” *Polity* 39.3 (2007): 335-360. Web.

a similar persuasion why to vote for or against an initiative so that the proposal may be defeated or passed according to his or her personal interests (337).

In the deliberative democratic view, on the other hand, “an individual is not only a rational actor who makes choices and acts to satisfy personal interests, she is also an ethical and moral agent who reflects and collaborates” (339). An individual who at first felt firmly in opposition to a proposed policy due to how it was seen to potentially affect his or her own personal interests may, after discussion and deliberation with a group of diverse individuals also in some way affected by the policy, decide to support it after finding that the policy would, in fact, provide the best possible outcomes for the community as a whole. This shift in consideration of interests further leads to an “expansion of the concept of autonomy to include the freedom to participate with others in a joint attempt to elaborate each other’s specific and general interests and to construct a shared sense of just rules of interaction and the common good” (339).

However, Rosenberg argues, there are some obstacles to achieving the ideal promoted by deliberative democrats. For one, “the foundational assumptions regarding individuals overestimate their cognitive abilities, incorrectly equate the abilities of all individuals, and fail to attend to the emotional dimension of interpersonal relationships” (342). Interestingly, these reservations about deliberative democracy all seem to echo the critiques put forth by those skeptical of direct democracy, mainly those raised in regards to questionable levels of voter competence and of the influence of hidden emotional factors in decision-making. Rosenberg contends that “when people reason, they use various cognitive shortcuts rather than logical reflection or rational calculation,” and that “even beliefs that are not value laden or emotionally charged can powerfully distort how people interpret the significance and deduce the implication

of incoming information” (343). These critiques of the potential pitfalls of deliberative democracy sound notably similar to those raised in opposition to direct legislation. However, Rosenberg clearly states his opposition to the possibility of deliberation occurring in an electoral format. Not only do conventional elections not “yield a shared judgment” at the end of public discussion and decision, he argues, but “[n]o common views are forged, little legitimacy is conferred and no trust develops” (336).

Conversely, I contend that Rosenberg’s conception of deliberative democracy and the possibilities of direct legislation when implemented correctly (if possible) share more natural similarities than they do irreconcilable differences. The ideals of both conceptions of public political action are the same: at their best, both direct and deliberative democracy open up the public arena to a more egalitarian opportunity to discuss and act as agents of political change, coming to never-before-realized agreements about the values and ideals of the community at large. Ideally, the goal of both forms of democratic action should not involve pursuit of pre-existing personal interests, but rather “the determination of those interests to be pursued” (358). At their worst, their potential for realizing these ideals may be overcome by the influence of illogical human emotion, of hegemonic constructs which value some participants’ voices and views over others, and of varying levels of understanding and competence among those voices.

In a discussion as particularly polarizing as that over abortion, however, the ideal setting of the deliberative democratic format is at risk. As Simona Goi argues, any debate over abortion requires not only an adjudication of “the relative value of agreed-upon goods” (such as in this case, for instance, of human life or personal autonomy) but rather one that “extends into a

confrontation between incommensurable systems of belief” (55).²³ The nature of the abortion debate, she finds, is *agonal* rather than deliberative. In an agonal setting, “the formation of a consensus over policy decisions is not the concern, but rather the participants are focused on understanding the true nature of each other’s positions” (56). In this way, agonal deliberation may promote the democratic ideal of “citizens truly coming to an understanding with one another, rather than being coerced, swayed, or manipulated by the rhetoric, bargaining power, and threats of any one party” (57). However, because citizens need a practical reason to spend time and energy participating in such a discourse, “the momentary closure of debate into a policy outcome” must be “kept in sight” while “the space for dissent remains open” to ensure a more egalitarian setting within which to progress toward a mutual understanding of others’ political ideals and values (60). As Goi argues, this “active preservation of dissent” cultivates the “liveliness and vibrancy” of democratic participation, forcing “both ‘winners’ and ‘losers’ to continue to pay attention to each other and to the world they have in common” (61-62).

One primary draw of the concept of agonal deliberation put forth by Goi is that it “does not reduce each position to an artificially ‘rationalized’ set of reasons” - as might the more traditional process of deliberative democracy promoted by communicative rationality theorist Jürgen Habermas and others. It instead “acknowledges the complexity of a perspective and its roots in authentic moral commitment,” not simply the “invidious prejudices and malicious intentions” of the other side of the debate (70). Lastly, agonal deliberation offers a means of legitimizing a policy measure in that it “allows all citizens the opportunity to appear and be recognized as acting members of the public space” (81). As with the type of deliberative

²³ Goi, Simona. “Agonism, Deliberation, and the Politics of Abortion.” *Polity* 37.1 (2005): 54-81. Web.

democracy discussed by Rosenberg, agonal deliberation at its best represents the ideals of American democratic participation and policy-making; again, however, Goi feels that the conventional electoral means of direct legislation go against the ideals of persistent rumination and continual discussion that her agonal setting puts forth. Also unlike the traditional process of deliberative discourse set forth by Habermas, agonal discourse does not possess as an end goal the eventual agreement or consensus of actors.

For Habermas, deliberation should bring about the result of an enhanced understanding and an agreed upon solution to a problem or disagreement between agents. Through rational communication, using a shared sense of language and a similar understanding of the objective world, two actors or group of actors with initially competing normative values, or competing sets of interests, could come to an agreement that would satisfy all interests and needs. The goal is to cause a genuine change of beliefs within an actor, not just influence his or her external behavior to bring about a desired result. Through the process of deliberation, Habermas contends, initially held conceptualizations of interests are “open to criticism, interpretation, and revision... Thus, deliberation is really about working out interests we share with each other which can furnish a reason for collectively recognizing a norm” and coming to a mutual understanding that would benefit all involved (Chambers 102).²⁴ Thus, the conceptualization of discourse that would most beneficially aid a better understanding between citizens on the polarizing issue of abortion is dramatically different from the form of discourse advocated by Habermas: Goi believes that actors in a deliberation should embrace the irreconcilability of moral worldviews in order to get past that first stumbling block and come into a space of mutual understanding of one another, if

²⁴ Chambers, Simone. *Reasonable Democracy: Jürgen Habermas and the Politics of Discourse*. Ithaca, NY: Cornell University Press, 1996. Print.

not an agreement. For Habermas, without such agreement, the entire goal of deliberation has not been achieved.

Though they possess distinct versions of deliberation as their democratic ideal, Habermas, Rosenberg and Goi all stand together in their belief that the conventional electoral process is not the appropriate venue in which to make democratic decisions. At the core of this belief is the argument that the very time-bound nature of electoral politics works to shut off public discourse and political activity. In the electoral model at its best, deliberation and discussion occur and shared values - perhaps even leading to consensus - are realized, but at the end of the day all involved parties take a vote and the proposition either becomes public policy or it is rejected. This boom-and-bust cycle so familiar to politicians and political organizers is inherently contradictory, these authors argue, to the deliberative goal of persistent reevaluation and investigation of the merits of any given policy. Deliberation must occur continually so that the policies in place are most likely to reflect the in-depth process of realizing one another's "authentic moral commitments" and coming to an understanding of the needs and desires of others living within a shared political community.

In their respective conceptualizations of effective models of deliberative discourse both, Rosenberg and Goi explicitly set up a dichotomy between the deliberative and electoral model of democratic decision-making that need not be so limiting. After all, at the very core of the initiative process as it exists in the United States today remains the fact that any individual, at any given time and regardless of the existing political scheme, may propose a policy and put it up to a vote after proving that a substantial part of the public has taken an interest in the matter. Issues of funding aside, it matters none whether the citizen is attempting for the first time to pass his or her proposition or the hundredth. It also makes no difference whether the proposition is

intended to repeal an existing law – in fact, this is one of the main strengths of the direct legislation process as per its supporters.

To put this argument in empirical context, one need look no further than the most recently decided abortion policy put up to a public vote. Directly after Mississippians resoundingly rejected the so-called Personhood Amendment in November 2011, the number of “battleground” states which would most likely see a similar or identical proposition on the ballot within the next three years reached a total of 14.²⁵ Even though the measure had been rejected in Colorado twice as well as in the overwhelmingly conservative state of Mississippi, backing groups such as Personhood USA only used these losses as motivation to launch a more widespread campaign to overturn *Roe v. Wade*. As long as the resources and funding are at a group or individual’s disposal, the act of voting - and specifically of electoral rejection - seems to do little to the continued activity of citizen-sourced legislation.

Beyond conveying this false sense of the limiting nature of electoral politics to models of democratic deliberation, both Rosenberg and Goi overlook undeniable similarities between their proposed systems of democracy with the process of direct legislation as it already occurs today. All of these conceptions of democracy share the potential to turn a narrowly acting, self-interested agent into one that acts for the perceived good of the community as a whole; the opportunity to cause an individual to reject a simple picture of the opposition as operating under malicious intent and accept their “authentic moral commitment” to a fundamentally different worldview (Goi); the inherent legitimization of policy that comes hand-in-hand with active public participation and discourse; and the (at the very least, temporary) goal of policy formation or revision to inspire and incentivize community members to take on a more active role in the

²⁵ “Abortion on the Ballot.” *Ballotpedia*. Web. 26 November 2011.
<http://www.ballotpedia.org/wiki/index.php/Ballotpedia:WikiProject_Issues>.

political arena. As an issue which possesses a history of igniting public discussion and interest as well as one in which monetary “speech” may take a back seat to actual oration, the instance of dictating abortion policy through direct democracy presents a prime format in which to investigate whether the ideals of deliberative and agonal democracy may in fact have the potential to be realized, with relatively little need for reform, on our current national stage through the channels of electoral democracy already in existence.

THE UNIQUE CIRCUMSTANCES HYPOTHESIS:

DIRECT DEMOCRACY MADE PERSONAL

As Susan Banducci finds in “Searching for Ideological Consistency in Direct Legislation Voting,” voting behavior across the board is consistently more coherent on the social dimension, which includes the issue of abortion, than on economic or regulatory lines. The reason for this may simply be the fact that those very issues judged by some to be divisive and polarizing, such as the socio-cultural issues of abortion, gay rights and school prayer, are by that same token the most engaging - even to voters who otherwise would have little time to educate themselves about other kinds of public policy. Indeed, the pro-life movement borne out of the post-*Roe* shock served as the perfect catalyst needed to bring once-politically silent, private worshippers out of the woodwork and into the realm of political activism, eager to see a return to an America more befitting of their moral worldview (Luker). Regardless of whether or not one agrees with the goals and values promoted by the product of this cataclysmic surge – notably, the modern-day Religious Right – the movement has engaged voters around issues in a way that is deeply

motivating, meaningful and continues to prompt high levels of diligent political activity (Diamond; Martin; Wills).²⁶

An understanding of the way in which divisive issues such as abortion so inherently arouse public discussion is necessary in order to see why issues of public morality may, conversely, offer the sphere in which to view the practice of direct legislation in its *best* light. To begin, as even Broder admits in *Democracy Derailed*, intensely debated topics with a home in the socio-cultural sphere such as abortion are in fact the *least* likely to elicit the high-level campaign spending that typically fuels the so-called initiative industry. The difference, he puts it simply, is that “[i]t’s not obvious who has a large enough stake in [the measure’s] passage to justify the big investment” (84). This distinction between broadly debated, diffuse interests versus those with more narrow financial motivations is a key consideration when determining the merits of direct legislation – especially with regards to the more personally intrusive nature of public morality policies. As we will see in the following case studies, the groups who take on the role of mobilizing citizens to action on abortion-related measures indeed tend to be locally directed groups whose primary goal is political advocacy toward its own end - not as a means of securing financial interests, as is often the case when other types of policy are debated within the context of direct legislation.

Exploring this distinction, Donovan, Bowler, McCuan and Fernandez discuss the various contexts in which organized forces may fight to either pass or defeat a proposed ballot initiative

²⁶ Classic studies of the rise to power of the Christian Right include Sara Diamond’s *Spiritual Warfare: The Politics of the Christian Right*. Boston: South End Press, 1989; Martin William’s *With God on Our Side: The Rise of the Religious Right in America*. New York: Broadway Books, 1997; and Gary Wills’ *Under God: Religion and American Politics*. New York: Touchstone, 1990.

in “Contending Players and Strategies: Opposition Advantages in Initiative Campaigns.”²⁷ They find that measures promoted by broad-based constituencies are more likely to pass than those promoted by narrow interests – but “by no means” are they “the best-financed players in the direct democracy arena” (81). In other words, although it is a critique often raised by skeptics of the initiative process, money does not, in truth, mean everything in direct legislation. They also find that as a so-called “Type 4” electoral contest,²⁸ public morality initiatives such as abortion-related measures feature a reassuring combination of qualities that differentiate them from other, more narrowly debated initiatives: a relatively high level of public discussion coupled with relatively lower levels of campaign spending. Finally, they find that while many advantages are retained by those groups opposing a given ballot measure, Type 4 contests present a better chance for public approval than in any other type of debate - a point echoed by Gamble in regards to another group of broad-based Type 4 contests, those pertaining to civil rights laws (Gamble).

Moreover, Donovan et al explain, because the typical Type 4 proposal is “large and diffuse,” campaigns both for and against these initiatives often include the prominent use of candidates and political parties (93). The significantly wider scope of the proposed policy’s potential effects also raises the “political stakes” at hand, and therefore these measures are more likely to be “discussed publicly and in the free media by candidates, parties and pundits” (93). In addition, the likelihood that the subject at hand is a hot-button issue that rouses public discussion

²⁷ Donovan, Todd, Shaun Bowler, David McCuan and Ken Fernandez. “Contending Players and Strategies: Opposition Advantages in Initiative Campaigns.” Bowler, Donovan and Tolbert, 81-99.

²⁸ Donovan et al. divide the array of initiative election match-ups into four categories: Type 1 (narrow interest versus narrow interest, e.g. trial attorneys v. insurance companies), Type 2 (broad interest versus narrow interest, e.g. bottle bills or “tax the rich” initiatives), Type 3 (narrow interest versus broad interest, e.g. the repeal of smoking/industrial regulations), and Type 4 (broad interest versus broad interest, e.g. criminal justice or social/moral issues) (86).

of complex moral, ethical and cultural worldviews also increases the window for widely publicized debate. Furthermore, “rival political elites and parties” are made to take “controversial positions” within this type of debate, and as such “citizens are offered alternative sources of information and elite cues that can be used in making decisions” (95). Therefore, as an inherently polarizing subject of law-making, abortion arguably represents the perfect example of this cultural, social and political struggle – and may therefore also provide the best avenues by which to “probe...the tolerable limits of injustice” and come to terms with the deeply distinct worldviews that make up the American polity.

As Gamble and a host of other critical scholars of direct legislation would most likely argue, areas of personal autonomy, privacy and civil liberties should be the last corner of American life, if any, to be put up to a popular vote. As opposed to deciding the amount of tax money an individual pays or the state of a community’s public facilities, these critics contend, the area affected by a vote related to deeply held social values digs deep into citizens’ personal lives and freedoms. The Supreme Court, as thinkers from James Madison to Barbara Gamble have argued, should stand as the bulwark against tyranny by majority; their function is to interpret the Constitution in a way that preserves civil rights and liberties for all citizens, especially when the majority of a population which otherwise might not. In this way, the hypothesis that the issue of abortion - or other similarly controversial issues rooted in deep-running concepts of morality – might in fact be the *best* chance to see the benefits of direct legislation at work is a relatively novel idea. It is also one that begs the presentation of hardy evidence of the involvement of the Supreme Court system in maintaining standards of constitutional justice within the direct legislation process.

Because the issue of abortion so often catalyzes political activity among the less engaged and offers a deeply divisive ground upon which to publicly learn about, discuss and decide on social policy, I intend to investigate the use of direct legislation to influence abortion policy as a test for a more general hypothesis. I will attempt to elucidate the reasons why highly divisive and deeply personal issues might actually be the medium through which direct legislation can reach the highest potential of educating and inspiring citizens to be more aware and engaged as a political community. Because direct legislation is already so deeply institutionalized in several states in the American West – whereas mechanisms more specific to deliberative democracy are not – it has the best chance of promoting these ideals within the already existing political system. If not, then direct legislation is not worth the time and effort to defend against modes of democracy that purport to remedy its argued drawbacks.

As a highly contested issue that easily raises public debate and participation to considerable levels, the issue of abortion presents a near perfect basis for the consideration of the merits of direct legislation in fulfilling the American ideal of democracy and the active, engaged and educated public that acts within it. The average voter may be quick to decide based on a sparing set of associations and cultural views, which may preclude the type of high-quality public debate needed to bring more complex and deeply rooted conflicts of worldview into light. This, indeed, will be the primary crux of my thesis: are American voters engaged, empowered and educated when they vote on the issue of abortion, or are their decisions misled, arbitrary or inappropriately simplistic considering the complexities of the matter at hand? What do these realities say about American theoretical ideals of democracy, especially in regards to its potentially educative function, versus the way they subsequently play out in the observed world?

In order to come to a rich and nuanced understanding of the direct legislation process in America (with specific regards to the role it plays within the debate over abortion and other hot-button socio-cultural issues) it will be most helpful to also study similar policies passed by the more traditional indirect means of representative legislation. In this way, a thoughtful comparison between the two processes - as well as the kind of debate and political activity occurring within them - can be achieved. It will be of utmost importance to investigate the political climate and context within which these policies were proposed and debated, the actors and groups involved, and the overall spirit of public discussion over these topics. If my hypothesis proves correct, one should expect to observe a more lively, engaged and educated community within the context of a policy debated through direct legislation rather than one passed via the more indirect, and hypothetically more insulated, process of representative law-making.

In conversation with the literature of both supporters and opponents of direct legislation, the common organizing strategies employed by pro-life and pro-choice interest groups, the nature of their respective media campaigns and messaging tactics, and the resulting climate of political discourse and level of civic participation will be observed in order to investigate both the potentials as well as limits of the direct legislation process. If the following examination reinforces the idea that the behavior of powerful interest groups - and of the public that act within and alongside them - is conducive to a reasonably equal and lively debate over the issues at hand (rather than simply a unilateral enforcement of narrow and moneyed interests) then direct legislation may fit the democratic ideal after all - in both the ancient and modern sense. This conclusion would ring especially true if the comparable cases of representative legislation being studied were found to possess a more exclusive and insular nature. If the common polity appears

to experience lower levels of engagement, activity and education about the policy at hand within the representative context of law-making than within the process of direct legislation, this finding will raise questions, challenge conventional beliefs and add new color to the long-argued debate over the ideals of American democracy.

I hypothesize that, as an issue which is typically more widely debated by the national population, as a socio-cultural question which typically garners lower levels of campaign spending than economic propositions (Bowler et al), and as a topic on which even voters with relatively little political literacy vote consistently (Banducci), the issue of abortion stands the best chance to vindicate the proposed benefits of direct legislation in America. Upon this investigation, it indeed appears to be the case that forces inherent in the process of direct legislation actually serve to incentivize powerful interest groups to add complexity and depth to the abortion issue and relay this complexity back to voters for renewed consideration of a policy's potential benefits or drawbacks; to provide the space for dissent, controversy, and deliberation amongst political peers that is crucial for ensuring that the policy outcome which best reflects the interests of the people is realized; and to offer a "safety valve" through which an engaged public can bring a policy to serious debate and discussion when elected officials remain nonrespondent to the voters' continued expression of interest.

Thus, I argue, direct democracy is not necessarily the villainous curse to society it may at first seem. To make the system of direct legislation an even more beneficial and effective method of law-making, however, interest groups should take seriously the need to wield their power in a way that serves to include a broad and diverse population in public debate and discourse. As the study will show, the actions and strategies of interest groups in both cases possessed an undeniable amount of influence over the nature of public discourse - from the facts

and figures brought up by voters in op-eds to the very ideological grounds upon which citizens considered the proposed policy's merits. When both the practical as well as ideological scope of a policy's potential effects is portrayed as broad and far-reaching, more citizens are encouraged to come into the fold and join the public discussion - rendering the direct legislation all the more beneficial for American ideals of democratic governance and civic engagement. Groups in Arkansas achieved this goal more ably than those in Alaska, and while this far from negated the educative and discursive potential of abortion-related initiatives in the state altogether, it likely limited it. Thus, while this study aims to show the myriad ways through which the forces of direct legislation can have a positive impact on civic engagement and the health of public political discourse, it also aims to warn that in this process, much power inevitably lies in the hands of interest and advocacy groups, and the size and scope of these positive effects depends in large part on the way these groups present their arguments and the messages they choose to relay to the public for rumination and decision.

DISCLAIMERS AND CAVEATS: A BRIEF NOTE

Taking an in-depth look at states with relatively high levels of direct legislation use as well as focusing on a notably controversial and polarizing issue comes with its benefits as well as its share of caveats. What this investigation of direct legislation and its effect on political engagement and public discourse has to offer in terms of specificity, it may lack in the potential to broadly generalize its findings. One may be able to broaden the scope of findings to states that share high levels of use of direct legislation devices or to other controversial, morally rooted issues other than abortion – for instance, the legalization of gay marriage, another socio-cultural issue that has recently taken the nation's ballot boxes by storm. However, the benefits outlined in this particular study may not be directly applicable to all forms of direct policy-making.

Indeed, the very hypothesis set out to test required a political issue that is deeply divisive and which by nature tends to be widely and lively discussed; it is the argument that culturally divisive issues such as abortion present a *unique circumstance* through which the benefits of direct legislation may best be realized.

Most states with high rates of initiative and referendum use tend to be by their very nature more politically progressive states. In these states, therefore, while a proposed restriction on abortion access may be attempted on the statewide ballot, it is unlikely that such a policy would be seriously debated within the state's legislative system. The states of Arkansas and Alaska stand out as unique in that both states have witnessed several battles over abortion policy within both modes of law-making, representative and direct. This is arguably due to the fact that both states possess a relatively conservative political make-up (even in nominally Democratic-controlled Arkansas) but also happen to allow initiatives and referenda in their respective constitutions, a right their residents exercise regularly. Therefore, the states of Arkansas and Alaska will be utilized as case studies in the investigation of the effects of the direct legislation of abortion policy on civic engagement and the quality of statewide political discourse.

One caveat worth mentioning, however, is the fact that although in-depth case studies of parental notification initiatives in Arkansas and Alaska may be used to investigate the potentially beneficial aspects of direct legislation, these findings may only be found applicable to these specific circumstances. In other words, there can be no way of knowing whether high levels of citizen engagement, lively discourse and electoral results that accurately reflect the will of the public at large might be better realized in the context of, for instance, a property tax issue or a proposition repealing affirmative action. Instead of an individual's moral worldview at risk, as

one might argue, perhaps increased engagement comes in the form of economic or cultural anxiety.

These potential obstacles aside, the very act of first focusing on the more extreme case in which direct legislation may be seen in its best light opens the door to stretch the limits of this hypothesis to a continually wider array of political issues. Though this investigation is more of a descriptive and explorative task than a comparative one, I intend to use whatever findings arise in the hopes of opening the door to a rejuvenated consideration of the possibilities of direct legislation and the potential for the process to be used in a way that can bring myriad benefits to the American citizenry. I can only hope this work will once again turn the rusty wheels of thought on direct legislation by throwing conventional wisdom on the subject into question and inviting scholars of the process to reinvestigate the system with renewed vigor – and perhaps even a refreshing sense of optimism about the possibilities of experiencing a democracy in America that is more engaging, more enlightening and which serves to bring out the natural political passion of its citizens.

CHAPTER 2

The Ethics of Expansion: Abortion Rhetoric in Arkansas and the Incentive to Include

The state of Arkansas is consistently ranked as one of the top five most pro-life states in the country, and for good reason. As Michael P. Laffey argues in a study conducted for national pro-life interest group Americans United for Life, the issue of abortion is dear to the hearts of many in the Razorback state. Arkansas “has consistently passed legislation that takes advantage of every possible avenue to discourage or prohibit abortion,” explains Laffey. Moreover, its citizens’ and law-makers’ use of both the direct as well as representative legislation pathways in order to undercut the precedent of *Roe v. Wade* to the fullest legal extent possible has served as a model for other pro-life states to emulate (1).²⁹ In fact, one such piece of legislation that was passed in 1988 through the initiative process became the 68th amendment to the state constitution. This amendment not only prohibits the use of state funds for abortion except when the mother’s life is at risk, but also makes it the policy of the state to “protect the life of every unborn child from conception until birth, to the extent permitted by the federal constitution.”³⁰

On the representative front as well, pro-life interest groups and the state legislators they support have successfully passed a host of laws restricting access to abortion. Two notable examples are the “Women’s Right to Know Law,” which mandates a waiting period and certain forms of informed consent before a woman may obtain an abortion, as well as a law requiring the notification of a parent or guardian whose minor is seeking to terminate her pregnancy (with exception to minors who receive a judicially ordained bypass). Especially with regards to recent years, due to the state’s relatively conservative (though nominally Democratic) electorate which

²⁹ Laffey, Michael P. “Arkansas: A Political Culture that Respects Life.” Americans United for Life. 2007. Web. 8 February 2012. <<http://www.aul.org/docs/statecourts/AR.pdf>>.

³⁰ “Constitution of Arkansas.” *arkleg.state.ar.us*, n.d. Web. 8 February 2012. <<http://www.arkleg.state.ar.us/assembly/Summary/ArkansasConstitution1874.pdf>>.

predictably votes into office an accordingly conservative line-up of state legislators, pro-life interest groups in Arkansas don't see much of a need to turn to the initiative and referendum process in order to enact anti-abortion laws. Upon an investigation of the laws which have been successfully passed by pro-life forces and the paths those laws followed on their way to enactment, it is clear that not only has the representative system in Arkansas presented a much more hospitable environment for the formation of pro-life legislation, but it also has proven to be a tactic that is somewhat less inclusive to the public and which has escaped judicial monitoring to a far greater extent than its more voter-driven alternative.

Two identifiably hard-hitting interest groups are the Arkansas chapter of the national pro-life advocacy group Right to Life and the Family Council, a homegrown conservative group that advocates for socially conservative policies, not the least of which is the restriction and eventual prohibition of abortion. The guiding motto of Arkansas Right to Life (ARTL), nestled under the powder blue logo on the organization's website, triumphantly reads "*Taking a Stand...Making a Difference!*" Indeed, as a premier pro-life interest group in the state, ARTL counts among its legislative accomplishments helping pass the state's Parental Notification Law in 1989 as well as 2001's Act 353, the "Women's Right to Know Law." This law requires a physician to give certain types of informed consent, such as the name of the physician who will be performing the abortion, the medical risks associated with the "particular procedure to be employed," and the "probable gestational age of the fetus at the time" to a woman before she is able to obtain an abortion.³¹ ARTL also touts the role it played in attempts to ban late-term abortions in both 1997 and 2009, its sponsorship of a 1999 "Fetal Protection Act" which serves to include any fetus "12

³¹ An Act to Assure Women of Their Right to Receive Adequate Information Before Terminating a Pregnancy; and for Other Purposes. Act 353. 1 May 2001. <<http://www.arkleg.state.ar.us/assembly/2001/R/Acts/Act353.pdf>>.

weeks or more” as a secondary victim of violent crime, and its awareness campaign to the “citizens of Hot Springs” about the local Planned Parenthood’s purported plans to “establish abortion services” in the town among numerous other points of activism.³²

Judging by the organization’s web page, Arkansas Right to Life heavily depends on the mobilization of its members in order to achieve its policy goals, both inside and outside of the state capitol building. The website features a “Citizen’s Guide to Lobbying” with tips for writing letters to the editor, calling legislators via telephone, and meeting them in person; it also links the reader to a page with contact information to members of U.S. Congress as well as the Arkansas State Senate and House.³³ Both on and off the Internet, the number of Arkansans being mobilized by Arkansas Right to Life is considerable. Every year, for instance, during the organization’s annual march to the state capitol building in Little Rock on the anniversary of 1973’s *Roe v. Wade* decision, vast throngs of Arkansans gather to hold vigils for the unborn and hear prominent social conservatives speak about abortion, the sanctity of life, and above all, the need to continue efforts get policies passed that support these beliefs.³⁴ As public debate over abortion has staggered in prominence over the past quarter-century, so too has the size of the event. According to reports by Little Rock’s most prominent print news source, the Arkansas Democrat-Gazette, while around 2,000 citizens were estimated to have attended the 1986 march³⁵, over 5,000 were counted at the event in 2011.³⁶

³² “Activities and Legislative Accomplishments.” Arkansas Right to Life. 2011. Web. 5 February 2012. <http://www.artl.org/about_activities_legislative.html>.

³³ “Grassroots Lobbying.” Arkansas Right to Life, n.d. Web. 5 February 2012. <http://www.artl.org/resources_citizens_guide.html>.

³⁴ “Arkansas March for Life.” ArkansasOnline, 17 January 2010. Web. 5 February 2012. <<http://www.arkansasonline.com/galleries/2389/album/?page=1>>.

³⁵ Reed, John. Untitled Article. *Arkansas Democrat-Gazette* [Little Rock] 27 January 1986. Web. 6 February 2012.

A focus on piecemeal, state-level policy change is representative of the overall strategy favored by pro-life activist groups in the present political climate. In January of 2011, the national office of Americans United for Life (AUL) named Arkansas the “4th most pro-life state in the nation” on its annual “Pro-Life List.” The list proclaims a wave of “cutting edge legislation that restricts abortions/protects life at the state level.” AUL’s CEO Charmaine Yoest announced that the new “state-based approach to protecting life in the law is ‘changing the momentum towards life at the state level...The results reveal that legislative action at the state level is turning the tide toward life with strategic refinement of the law’” and a gradual roll-back of the rights granted by *Roe v. Wade*.³⁷ Through its influence on the representative system of legislation especially, ARTL has been a prominent contender on the pro-life front of state-level abortion policy. A large part of this work lies in the engagement and mobilization of its voters to work individually and in small groups, most often within a pre-established context of community events or religious institutions, in pushing for state-wide policy changes as well as in the hopes of one day challenging the federal ruling of *Roe*.

The newest surge of activity is displayed on the website’s home screen and reads as a “New Petition for Arkansas Only,” asking the Governor and General Assembly members to support “(1) a law that will opt Arkansas out of abortion coverage in the Obama Health Care Law, (2) a law that will ban web-cam abortions in Arkansas and (3) a law that will ban abortions on an unborn child capable of feeling pain.” The site urges its pro-life supporters to print the petition and “begin gathering signatures today” in a grassroots-style effort to effect desired

³⁶ Hanson, Aprille. “5,000 join march against abortion at state Capitol.” *Arkansas Democrat-Gazette* [Little Rock] 24 January 2011. Web. 6 February 2012.

³⁷ “AUL’s Life List Shows Cutting Edge Legislation Protects Life at the State Level”). Americans United for Life. *familycouncil.org*. 20 January 2011. Web. 5 February 2012. <<http://www.familycouncil.org/Library/News/Arkansas4thMostProLifeState-PressRelease-1-25-11.pdf>>.

change in state-level abortion policy.³⁸ As is the strategy of many political organizations with views largely driven by matters of faith, the petition urges pro-life supporters to tap into the rich reserves of like-minded citizens that can be found in “church Bible study or adult discussion groups.”³⁹ Even when everyday citizens are encouraged to participate in advocating for a policy within the process of legislation through representation, it is clear that the *modus operandi* of pro-life lobbying groups in Arkansas is to funnel organizing attention to those predictably pro-life voters who inhabit insular circles of religious study and worship. As a simple matter of efficiency, it seems that ARTL chooses not to reach out to those who associate with more diverse interests or could offer a more complex perspective on the policy at hand.

Much of this is likely due to the ease with which polarized, culturally exclusive and arguably misleading rhetoric is employed among more insular political and social associations. Indeed, the actual complexity of the issue of abortion is not the focus of most lobbying efforts driven by ARTL. For instance, the petition in the example above describes telemedicine – a safe procedure in which a woman living in a rural area can obtain medical advice and supervision remotely while taking RU-486 (sometimes referred to as “the abortion pill” or a “medical abortion”) - as a “web-cam abortion.” The petition fails to note that when such a procedure is conducted by Arkansas’ regional Planned Parenthood affiliate, the patient must be in live contact with a technician who must perform an ultrasound and witness the patient signing an informed consent form before the prescription can be unlocked.⁴⁰ Instead, the petition claims that the

³⁸ “Arkansas Right to Life” Arkansas Right to Life, n.d. Web. 5 February 2012. <<http://www.artl.org/index.html>>.

³⁹ “Stop the Abortion Agenda in Arkansas!” Arkansas Right to Life, n.d. Web. 5 February 2012. Downloaded pdf: <<http://www.artl.org/index.html>>.

⁴⁰ Donaldson James, Susan. “Iowa Study Shows Telemedicine in Abortion is Safe, Gives More Women Access.” *ABC News*. 27 July 2011. Web. 10 March 2012.

“dangerous procedure” consists of “the abortionist prescrib[ing] use of the deadly RU-486 abortifacient via web-cam, without any contact with the patient in person.” Similarly, the petition describes the fetus as an “unborn child,” who at 20 weeks of development is capable of feeling pain (“Stop the Abortion Agenda in Arkansas!”). As we will see, the very same inciting rhetoric that is used with such ease while organizing citizens to lobby for bills within the context of legislation through representation has actually worked against those same groups who attempt to use these insular organizing strategies within the context of direct legislation.

A similar organization that has worked to influence abortion law through mobilizing pro-life Arkansans is the Family Council, a state-wide education and research organization that strives for the passage of a myriad of socially conservative policies from anti-gaming legislation to pro-life laws. In a press statement slated for immediate release on January 6, 2011, Council President Jerry Cox announced that the organization had assembled a “bill bank,” described as a “free resource that lawmakers and voters alike can browse to see what legislation they like and what they want passed in Little Rock over the next few weeks.”⁴¹ In hopes of maintaining Arkansas’ reputation as possessing some of the country’s most restrictive abortion policies, the “bill bank” is one inventive way pro-life forces in Arkansas are utilizing the widespread accessibility and convenience of the Internet in order to engage citizens in the process of legislation through representation. “Jerry’s Blog,” another notable feature of the Family Council website, is used to inform its base of pro-life voters by providing up-to-date information about

<<http://abcnews.go.com/Health/iowa-study-shows-telemedicine-abortion-safe-women-access/story?id=14166312#.T1taO5jPo20>>.

⁴¹ “Family Council Director Predicts Busy Legislative Session.” Family Council. *Family Council*. 6 January 2011. Web. 5 February 2012. <http://www.familycouncil.org/Library/News/FamilyCouncil-DirectorPredictsBusySession-PressRelease-1-6-11.pdf>>.

the status of bills that have been identified by the Council as either “good” or “bad” as they make their way through the General Assembly.

It perhaps should come as no surprise that the broad-strokes painting of laws as “good” and “bad” is commonplace with such a tool, whose online audience is comprised of predictably staunch social conservatives with very similar worldviews. The primary objective, of course, is to get the most crucial information to the Council’s constituents – individuals who, as director Jerry Cox has found, often feel already discouraged from contacting and lobbying their legislators – while taking the least amount of their time and effort.⁴² Moreover, as likely only those Arkansans who already strongly identify as pro-life traffic the site with the genuine intention of joining the cause, the Council does not seem to feel the need to present the matter as engaging to a more moderate or undecided voter. Indeed, these are not the individuals the Council would prefer to call their legislators to lobby passionately for or against a given “good” or “bad” bill.

Like their counterparts at Arkansas Right to Life, Family Council organizers find it much more efficient to stay within the comfort zone of local churches and predictably pro-life groups when activating voters and raising awareness about bills being passed by means of indirect legislation. Jerry Cox, long-time pro-life organizer within the state, offered a multitude of reasons for this chosen strategy in a telephone interview. Most notable was his insistence that the direct legislation process is more valuable for the “public discourse” it creates and its ability to expand the discussion of abortion past the usual suspects involved in pro-life or pro-choice-related associational and political groups. In terms of efficiently shaping public policy, the Council turns to the legislature; when they sense the issue needs to be more widely discussed and

⁴² Cox, Jerry. Personal telephone interview. 29 February 2012.

debated outside of the typical zone of pro-life discourse – often as a strategy for changing local public opinion on the issue and gaining constituents - the direct legislation process is preferred.

As founder and current director of the Family Council, Mr. Cox possesses over 25 years of experience advocating for pro-life legislation within both pathways of law-making. Before founding the Family Council, he successfully worked to pass the 1988 ban on the public funding of abortions.⁴³ According to Cox, it is generally easier to mobilize and ignite the public's interest within the direct legislation process because “most people don't know what goes on in the Arkansas legislature” and many find it to be “too much trouble to keep up.” Like their brethren at ARTL, Cox and the Family Council also tap into the rich, preexisting social networks of local churches to spread awareness and activate citizens. “It works better if I contact a church with petitions to get signed,” Cox explains. “That gives the church leadership, and it gives them something concrete and specific...that they can put their hands on to do.” Conversely, when Mr. Cox occasionally makes cold calls to individuals on the Council's contact list to tell them to speak to their legislator about a given bill, “first they'll say, ‘I don't even know who he is’” – and even in the event that they do call, he explains, they may not get in touch with the actual legislator on first try and will be too discouraged to continue (Cox).

In terms of the relative ease of mobilizing individuals to political action and garnering public interest in pro-life legislation, Cox explains, the representative system would receive a “40” and direct legislation a “60.” However, he believes, “it's not so much the effect of the law that you pass; it's the public discourse it creates.” Indeed, the Family Council has enjoyed much success earning free publicity from local news stations and papers in order to talk about pieces of direct legislation being faced by the Arkansas public. Earned media time also gives the Council

⁴³ “Our Staff.” Family Council. *Family Council*, n.d. Web. 8 March 2012. <https://familycouncil.org/?page_id=8>.

the chance to talk directly to a wide and diverse population of Arkansans about other issues important to the Council and to rally public support and advertise for the group's general cause. In this way, the Council uses the event of a ballot measure to heighten public awareness about the Council's goals and values more generally, and with the amount of earned media time they are usually able to garner when a measure is coming up on the ballot, they take the opportunity to reach out with their message to a wider variety of citizens beyond their typical e-mail and phone list of staunch pro-life advocates. In the end, direct legislation is "probably worth as much as a public opinion changer as a public policy changer," Cox says. However, the success of any group in pushing for the passage of a law through direct legislation heavily depends on the public's perception of the issue as a pressing one.

For instance, the Family Council worked hard to pass the state's 2004 constitutional amendment defining the institution of marriage as being between one man and one woman. Out of a state with approximately 3 million people, the Council was able to mobilize 5,000 volunteers. "It's a public opinion changer when you have that many ambassadors," Cox states, "but if people don't care about the issue, then the potential of the direct legislation system is weakened. If there's a rising tide, a rising sense of the people, then you can take that wave and grow it," but "you can't just drum it up on your own" (Cox). For instance, Cox has met with several individuals lately who suggest that the Council should focus on the purported attacks on religious liberty that they see as pressing today. In contrast to the marriage amendment, however, which had already garnered a high level of preexisting public interest with which it was able to achieve such success with the electorate, Cox currently sees little potential for the claim of violations of religious freedom – and he knows that more harm than good would come out of investing time and effort to championing such cause. Cox's quarter-century of experience tells

him that in the absence of a substantial amount of grassroots fuel and a preliminary level of discourse about a particular issue, the proposed law is sure to fail.

In working for the passage of initiative and referenda, then, it is clear that the electorate are not simply pawns within a larger scheme of interest-group policy drivers. Rather, their involvement and passion must be considerable from the outset if the proposed policy is going to be even considered a worthwhile effort by the groups whose job it is to take this public energy and direct it towards a successful political outcome. As opposed to the direct legislation process, Cox has observed that getting laws passed through the legislature “does much less to change public opinion,” than it does public policy - and it is therefore somewhat less useful for a number of the Family Council’s overarching goals. Much of the Council’s success within the legislative system is familiar to those who navigate the belly of state and national legislatures: they rely upon the tedious process of compiling information, seeking out policy-makers willing to champion bills, finding doctors and lawyers to testify for and shepherd them through committee, and only once in a while – “rarely” – sending out e-mails directly to constituents requesting them to contact their legislators. Much of the success of the Family Council in passing laws through indirect legislation, Cox states, “depends on our ability to work with the legislators who are there... The grassroots part of it, mobilizing people and churches, is secondary” (Cox).

It is clear that in terms of tapping into public energy and encouraging high levels of political discourse and activity among citizens, the Family Council finds the process of direct legislation much more effective. Through this system, not only can they enliven those constituents who are typically less connected to the political happenings of the day, but they can also earn media time with which to further spread their general message and stated values. All of this, according to Cox, cannot be accomplished with the way bills are typically created and

passed through indirect legislation. The Council cannot shape a policy that the people will find engaging and worth their time and energy unless it grows from the ground up. In the initiative process, it is not truly the Family Council or its related interest groups that are taking the initial action of political change - it is the public. The Council merely serves to turn public agitation into streamlined political advocacy. This notion of grassroots, people-driven discourse and activism stands in stark contrast to the picture painted by Cox of the Council's typical workings within the Little Rock capitol building: hours of scouting out legislators to sponsor a bill, finding medical and legal experts to testify before the legislature, and only "rarely" reaching out to the public whom these laws will soon affect.

One tactic the both pro-life and pro-choice forces in Arkansas share are their annual dueling rallies on the steps of the capitol on the weekend surrounding the anniversary of *Roe v. Wade*. Formally, these rallies act as a motivating force for both sides, and can serve to bring the attention of the public as well as of the media to the groups' respective agendas while attracting new members. Otherwise, however, the two sides of activism around abortion policy in Arkansas stand in stark contrast to one another in their style of mobilization and outreach to potential agents of support and change. The cadre of pro-choice activist groups in Arkansas follows an approach which relies much more heavily on in-person meetings and events than on the more convenient, albeit somewhat more impersonal, channels of access through web-based communications and local church networks favored by local pro-life groups. The type of independent and small-group organizing beloved by the Family Council and Arkansas Right to Life are also noticeably absent from the websites of major pro-choice groups in the state, most likely because unlike socially conservative causes, feminist and pro-choice organizations lack the

pre-established mobilizing structure found in churches and Bible study groups and must rely instead on self-made forms of mobilization.

On the website for the Little Rock chapter for the Arkansas National Organization for Women (NOW), links for donations, contact, and issue information float above a stylized photograph of the Little Rock skyline next to a watermark of the iconically rotund NOW logo. “The Little Rock Area Chapter of NOW meets regularly to discuss issues, plan actions, work in coalitions on areas of interest, and write letters to congress and local media about our viewpoints,” it explains. “Email us...if you are interested in attending a meeting and/or staying informed of our actions.”⁴⁴ However, the site offers its visitors no easily accessible means of acting on behalf of women’s rights causes within the state without first attending a meeting. The web presence of a large part of Arkansas’ pro-choice organizations is even considerably weaker, with some sites, such as Arkansas NOW, left without an update since before the 2008 general election⁴⁵ while others, such as the ACLU of Arkansas, last updated their legislative alerts during the 2005 session.⁴⁶

It undoubtedly appears to be the case that pro-choice groups and their associated pro-women’s rights organizations navigate a pathway of personal connections, intimate gatherings and rallies to inform and activate citizens, as opposed to the more wide-ranging tactic of mobilizing a multitude of churches and individuals often used by pro-life groups. The ostensibly more direct and efficient mode of organizing utilized by pro-life groups can be seen as a result of the nature of abortion policy today: within the legal precedent of *Roe v. Wade*, pro-life groups

⁴⁴ “About: Little Rock NOW.” *Little Rock NOW*. n.d. Web. 16 February 2012.
<<http://littlerocknow.org/about/>>.

⁴⁵ “Arkansas NOW: Current Campaigns.” *Arkansas NOW*. n.d. Web. 18 February 2012.
<<http://nowarkansas.org/>>.

⁴⁶ “ACLU of Arkansas: Legislation.” *ACLU of Arkansas*. n.d. Web. 18 February 2012.
<<http://www.acluarkansas.org/Legislation/Legislation.htm>>.

must act on the offense to garner support for their cause in the hopes of one day turning the tide on abortion in the United States; on the other hand, pro-choice groups have taken upon themselves the role of defenders, taking considerable action only when a threat to existing reproductive rights or services has been sensed. However, as one will discover, both groups share a more insular approach to passing or defeating abortion-related bills within the representative system of law-making, but are forced to incorporate expansive outreach and informational tactics to achieve a similar effect on articles of direct legislation.

PARENTAL CONSENT GOES TO LITTLE ROCK

On April 19, 1999, as the 92nd General Assembly of the Arkansas State Legislature drew to a close, Ray Pierce of the Arkansas Democrat-Gazette reported that more legislation related to abortion had been filed that session than in all other sessions throughout the past decade. The sudden landslide of anti-abortion policies up for debate ranged from laws including fetuses developed 12 weeks or more as violent crime victims to enforcing certain reporting requirements and standards at abortion clinics to “outright prohibiting certain abortion procedures.” Rosie Mimms of Arkansas Right to Life chalked up this new slew of anti-abortion legislation to the effect of a recent “influx of new members, specifically new Republican members,” in helping to shape, introduce, and usher through debate the host of new proposals. The large majority of those Republicans, Mimms explained, “ran on a pro-life platform” as candidates in the 1998 elections, several of them unseating incumbents due to term limits. Of the 13 bills introduced, however, only one went on to be signed at the governor’s desk.⁴⁷

Pro-life forces and leaders were more heartened than discouraged, however, and held the next year’s 22nd annual March for Life with particular gusto. Reverend Happy Caldwell, founder

⁴⁷ Pierce, Ray. “Legislators OK 1.” Arkansas Democrat-Gazette [Little Rock]. 19 April 1999. Web. 16 February 2012.

of the local Agape Church and owner of the Victory Television Network station broadcast in the region, told a crowd the length of three downtown blocks that an opportunity lay in the hands of the pro-life movement to “build a new millennium for life” that lay in their capable hands. Also in attendance were Governor Mike Huckabee and several Republican state legislators. Robert Burr, president of Arkansas Right to Life, announced that the recent rise of pro-life interest groups throughout the country had brought deserved recognition to the movement as “one of the most effective lobbying forces in the country.”⁴⁸ Pro-life forces set their eyes on the upcoming years as crucial in the passage of legislation that would restrict abortion access.

Five years later, one of the several crowning achievements came in the form of a parental consent law, which built upon the parental notification requirement passed in 1989. Act 537 demands that a minor seeking to obtain an abortion have her parents notified unless her life is in immediate danger, she is a victim of sexual abuse, or she obtains judicial bypass from a judge who either deems her family situation too dangerous or believes she is mature enough to independently consent to the procedure. The consent law advanced from the House rather quickly: several lawmakers in this relatively conservative state had expressed utter surprise that a similar law was not already in effect, and thus voted in its favor without delay. House Republicans, including the bill’s sponsor Rep. Hutchinson, framed the bill as a simple means of ensuring a young woman’s right to have “help from [her] parents in making a decision about an invasive medical procedure.” Pro-choice advocates across the aisle, however, contended that the parental notification law already in effect fulfilled the function of protecting girls’ safety and encouraging family communication and involvement; requiring notarized consent, they argued, only added a more dangerous hurdle for a possibly abused young woman seeking a perfectly

⁴⁸ Waite, Matthew. “Abortion foes unite in LR for 22nd March for Life.” Arkansas Democrat-Gazette [Little Rock]. 24 January 2000. Web. 16 February 2012.

legal medical procedure.⁴⁹ Regardless, the bill sped onto the state Senate, where it passed by a 27-3 majority later that month.⁵⁰

Within the walls of the capitol building in Little Rock, the voices raised on this issue were passionate and often emotional. Indeed, both the Family Council and Arkansas Right to Life as well as the local ACLU and Planned Parenthood affiliates devoted much time and energy to advocating for or against this bill to senators and representatives in testimony. However, upon investigation of the local news sources in charge of tracking the fate of the bill, little evidence of public excitement or discussion outside of the walls of the capitol building can be traced to this issue. The best examples of public discussion and advocacy surrounding the parental consent bill occurred within the context of larger and more general points of activism – most notably, the annual March for Life and “celebration and information” events held by regional women’s rights and reproductive choice groups to commemorate the anniversary of the 1973 *Roe* decision (Waite). Specific discussion of the bill among citizens and their fellow peers who held no pre-existing connection to the issue of abortion specifically, however, was muted.

WORTH ALL THAT?: THE TRIALS AND TRIBULATIONS OF THE PUBLIC FUNDING AMENDMENT

An anti-abortion initiative that made its way to the ballot almost two decades earlier - and the high level of fiery debate that it successfully aroused among abortion-related advocacy groups and ordinary citizens alike - tells a very different story. First designed as the 1984

⁴⁹ Kellams, Laura. “Parental consent bill advances.” 2 February 2005. Web. 16 February 2012.

⁵⁰ One Democratic representative informed his colleagues that as a guidance counselor, he had once advised a high school girl to speak with her parents upon discovering she was pregnant. Upon wondering why the girl did not show up to school the next day, he later learned that she had been admitted to the hospital with a broken arm caused by her angry father (Wickline, Michael R. and Jake Bleed. “Parental consent bill OK’d in Senate.” 16 February 2005. Web. 16 February 2012).

“Unborn Child Amendment,” the initiative, which aimed to outlaw the use of public funds for abortion services, was stricken down in a split decision by the Supreme Court of Arkansas due to its sensational name. The title, the Court argued, misled voters and “convey[ed] a biased view of the merits of the proposal” (Laffey 3). In the case of *Arkansas Women’s Political Caucus v. Riviere*, pro-choice plaintiffs argued that the title of the amendment constituted “a partisan coloring of the ballot.”⁵¹ By a split decision, the Court granted the petition.⁵²

The Unborn Child Amendment Committee did not retreat, however, going on to gather enough signatures and pass court approval for a similar amendment and ultimately landing it a spot on the 1986 state-wide general election ballot. Although its title was revamped, the content of the bill largely stayed the same. It proposed that taxpayer funds would be disallowed from paying, “directly or indirectly” to perform abortions unless the mother’s life was at risk (Laffey 3). Furthermore, it aimed to “make it the policy of the state to ‘promote the health, safety, and welfare of every unborn child from conception until birth.’”⁵³ In the public debate that ensued that year, both pro- and anti-amendment groups served to inform the electorate about the merits, drawbacks, and perhaps most importantly, the legal nuance of the language of the bill itself – an

⁵¹ *Arkansas Women’s Political Caucus v. Riviere*. No. 84-215. Supreme Ct. of Arkansas. 29 October 1984. Web.

⁵² Also deserving of consideration is the fact that the open and wide-ranging discourse created by the direct legislation system in this case encouraged groups like the Arkansas Women’s Political Caucus to call out the opposition on their use of strong emotional language (such as the term “unborn child”) in their efforts to usher an anti-abortion policy onto the ballot. This is not the case within the more insular form of organizing that occurs in the context of legislation through representation. For instance, groups such as Arkansas Right to Life are able to utilize the term “unborn child” when mobilizing local churches and Bible study groups to political action without challenge (the petition to “Stop the Abortion Agenda in Arkansas” rapidly comes to mind). The very nature of the direct legislation system, on the other hand, is one of cross-political discourse and, by that same token, the constant checking of the rhetoric, tactics, and possible missteps taken by the other side.

⁵³ “Constitution of Arkansas.” *arkleg.state.ar.us*, n.d. Web. 8 February 2012. <<http://www.arkleg.state.ar.us/assembly/Summary/ArkansasConstitution1874.pdf>>.

almost uncanny foreshadowing of the debate that was to come to the state of Mississippi one quarter-century later.

The petition drive for Proposed Amendment 65 began on October 24th, 1985. In an interview with the Arkansas Democrat-Gazette a month beforehand, current chairman of Arkansas Right to Life Earlene Windsor was confident in the proposed amendment's ability to win over the Arkansan electorate. "If it gets on the ballot I have no doubt that it will be passed by a landslide," confided Windsor. The move was a pre-emptive rather than defensive one. The Democrat-Gazette pointed out that Arkansas spent "little money" on abortions at the time, but that pro-life forces were concerned that this was not the case in other states. "We're trying to prevent some problems further down the road," Windsor stated.⁵⁴ But soon, trouble began to brew as backers of Proposed Amendment 65, as it was now called, sought a legal justification for such a proposal when the Hyde Amendment of 1976 had already effectively outlawed the use of public funds for abortion on the federal level.

As the opposition to Proposed Amendment 65 coalesced over the coming year, they began to leverage attacks on this very weakness, arguing that not only were the full ramifications of the amendment unclear and potentially dangerous to the freedoms and services Arkansans currently enjoyed, but that the law would just become another superfluous burden to the state constitution and would not even make any real impact on the status of abortion policy in Arkansas. Furthermore, the language of the initiative could possibly affect state-run programs distributing birth control devices - including but not limited to emergency contraception and in-vitro fertilization treatments both of which could be legally construed as obstructions to the protection of life from the moment of conception. Utilizing a tactic well-known to those groups

⁵⁴ Untitled article. Arkansas Democrat-Gazette [Little Rock]. 23 September 1985. Web. 6 February 2012.

who find themselves on the opposition side of an initiative campaign (recall the recently successful effort to defeat Mississippi's Prop 67 in 2011) the opposition to Arkansas' 1986 initiative extracted and brought to light legal loopholes in the text of the initiative in order to prove to moderates and undecided voters that the measure would result in unwanted side-effects on top of the primary purpose of prohibiting tax-payer funds from paying for abortions.⁵⁵

The biggest hitters to emerge from the opposition to Proposed Amendment 65 were the Arkansas chapters of the National Organization for Women (NOW) and the Arkansas Women's Political Caucus (AWPC). Two months before election day, both sides of the battle began mobilizing their forces and striking blows to their respective opposition. In a state-wide plan that utilized a large volume of citizen activists for both fundraising and field efforts, Arkansas NOW swiftly set up campaign coordinators in 15 of the state's most populated counties to "organize volunteers to work at telephone banks, distribute literature and operate information booths at county fairs."⁵⁶ In terms of the heightened political excitement brought about by the battle over the initiative, however, the engagement of ordinary citizens in spreading awareness and education amongst their peers was not limited to the amendment's opposition. Arkansans in support of the initiative held their own in terms of engaging the public and garnering widespread support for their cause.

Public excitement and discourse surrounding Proposed Amendment 65 culminated on the last Sunday of September, as the two camps organized dueling public rallies to further their respective agendas. Near the steps of the state capitol building in downtown Little Rock, sisters Dr. Kaye Cash and Donna Terry of Oakland, California, were finishing a 16-day-long, 365-mile

⁵⁵ "Abortion Study is No Help." Arkansas Democrat-Gazette [Little Rock]. 8 September 1986. Web. 6 February 2012.

⁵⁶ Farris, Anne. Untitled article. Arkansas Democrat-Gazette [Little Rock]. 14 September 1986. Web. 6 February 2012.

walk through the state of Arkansas in support of Proposed Amendment 65. Around 150 supporters, including “children and babies in strollers,” joined then in their final mile to the capitol and gathered for a reception afterwards. Most of the marchers expressed their support with signs, with one man bearing a cross. Upon receiving a bouquet of roses from a local obstetrician and several rounds from the enthusiastic audience, Dr. Cash asked the crowd to “vote for 65 and vote for the babies.” Among the many stories Cash recounted of her journey, she informed ralliers that word of their walk had been dispersed over CB radio, truckers honking approvingly as they spotted the sisters marching alongside the road.

Meanwhile, using the birthday of birth control pioneer Margaret Sanger as a rallying cry to organize citizens against 65, NOW teamed up with the Women’s Political Caucus on September 28th to hold an event in Little Rock in which there was promised “[I]ive entertainment, speeches by women political candidates, and refreshments.”⁵⁷ A crowd of around 75 people gathered at a local park were told by Brownie Ledbetter, chairman of the AWPC, that Proposed Amendment 65 had the potential to endanger the Medicaid-funded services of “40,000 Arkansas women,” would put birth control in legal jeopardy, posed a potentially “tremendous” financial burden to the state, and assaulted Arkansans’ religious freedoms “by advocating a particular religious point of view.”⁵⁸ In this sense, groups working to defeat Proposed Amendment 65 worked actively to reappropriate not only the morality tack utilized by the backers of the amendment but also reframed the redistributive dimension of the policy, noting that the almost inevitable litigation over the amendment, if passed, would suck even more of

⁵⁷ Untitled Article. [Arkansas Democrat-Gazette](#) [Little Rock]. 23 September 1986. Web. 6 February 2012.

⁵⁸ Untitled Article. [Arkansas Democrat-Gazette](#) [Little Rock]. 29 September 1986. Web. 7 February 2012.

Arkansans' hard-earned tax money from their wallets than did the infamously costly battle over the teaching of creationism in public schools that occurred in 1981.

However, the large majority of “women political candidates” invited to speak at the event decided to forego mention of the initiative entirely. This finding follows academic research on the subject of direct legislation, which posits that morality issues such as abortion - especially when debated within the context of an initiative or referendum - tend to draw much less activity on behalf of political elites, who avoid the subject for fear of committing missteps that could potentially prove harmful to their electoral fortunes. At the same time, as academic literature on the subject of direct legislation of social issues has found, these issues work to heighten political activity among everyday citizens and civilians: not only do the issue's strong associations with aspects of gender politics, morality and civil liberties encourage a feeling of political efficacy among voters, but it is also an issue with a considerable amount of salience, stoking widespread political engagement throughout “the diverse stages of the policy process” and piquing the interest of those who typically restrain from political discussion or activity within other policy dimensions.⁵⁹ Indeed, the star public advocates for the bill were not political figures well known throughout the state, nor did they take the form of Little Rock insiders with the likes of Family Council president Jerry Cox, to whose tenacious work in the capitol building much of the success of several anti-abortion laws can be attributed. Instead, the image of two sisters with jobs and lives outside of politics and throngs of citizens gathered together in local parks and on capitol steps is conjured most frequently by primary sources documenting the events as they unfolded up until the day of the election.

⁵⁹ Roh, Jongho and Frances S. Berry. “Modeling the Outcomes of State Abortion Funding Referenda: Morality or Redistributive Policy, or Both?” *State Politics & Policy Quarterly* 8.1 (2008): 66-87. Web. p. 67.

A large part of the decided-upon strategy turned on broadcasting the hidden potential consequences of the text of the initiative to as wide an audience as possible. “When people learn this goes much farther than just preventing abortion,” stated Wanda Stephens, president of the Fayetteville NOW chapter, “they say, ‘I’m not going to vote for that.’” Those “far-reaching effects” could be as serious as infringing on a “woman’s choice to particular types of health care,” NOW activists announced; the law also would make no exceptions for victims of rape or incest as well as had the potential to “make some types of birth control illegal” (Farris). This strategy, as well as the firestorm it touched off regarding how Arkansas voters perceived the potential consequences of the bill, came to a head in late October of 1986, just days before Arkansans would go to the polls to decide the fate of Proposed Amendment 65.

An advertisement sponsored by opponents to 65 depicted the parents of a young woman who had been a victim of rape. In an emotional message, the ad suggested that Proposed Amendment 65 could prevent victims of rape from obtaining abortions.⁶⁰ Robert S. Shafer, President of the Unborn Child Amendment Committee spearheading the initiative, publicly called the advertisement a “straight-out lie,” and a spokesperson for Planned Parenthood of Greater Arkansas, a group working to defeat the amendment, went on to contend that due to the unclear language embedded within the proposition, the amendment could in fact “virtually stop all abortions in Arkansas,” citing the amendment’s text affirming that “it would make it the policy of the state to ‘promote the health, safety, and welfare of every unborn child from conception until birth’” (“Constitution of Arkansas”).

Another Planned Parenthood spokesperson added that the amendment would not simply change the way abortions were funded - it would most likely also manifest in decreased access to

⁶⁰ Van Laningham, Scott. Untitled Article. Arkansas Democrat-Gazette [Little Rock]. 29 October 1986. Web. 6 February 2012.

reproductive health services for all Arkansans, regardless of income. “[A]lmost all hospitals and physicians get some public funds administered by the state,” he explained, “and rather than risk losing those funds, the agencies would stop performing abortions” (Van Laningham). Not only did the text of the initiative arguably have the potential to do much more than the proponents of 65 would want moderate swing voters to believe, but opponents complained that the pro-65 camp was not informing those voters of the fact that state funds were not even currently being used to fund abortions. Some opponents, including renowned Arkansan political activist and then-chairman of the AWPC Brownie Ledbetter, charged that the pro-amendment radio ads “implied that the issue was whether voters would rather see their tax money go for roads and education or for abortion,” when this simply was not the case.⁶¹

Wanda Stephens, Arkansas NOW coordinator, perhaps best characterized the nature of the battle of Proposed Amendment 65 in an article published just days before the election: “Disinformation is rampant,” she told the Democrat-Gazette.⁶² However, this very amount of “rampant” disinformation, when in the context of the direct legislation system, can in fact lead to an overall higher volume of information to which the public is privy, providing the electorate with a chance to evaluate the diverse claims made by the two opposing sides. To once again echo the words of John Stuart Mill, the “[c]omplete liberty of contradicting and disproving our opinion is the very condition which justifies us in assuming its truth for purposes of action” (Mill 18). This rich marketplace of ideas and arguments presented to the public for debate is very often not the case when interest groups mobilize insular groups to lobby for bills in the state legislature.

⁶¹ Ledbetter, Brownie. “Aborted Rights in Arkansas.” *Southern Changes* 10.6 (1988): 1-3. Web.

⁶² Van Laningham, Scott. Untitled Article. *Arkansas Democrat-Gazette* [Little Rock]. 30 October 1986. Web. 6 February 2012.

Rather, these groups are able to use strong, inciting rhetoric that often goes unchallenged by outside groups but is taken at face value by dyed-in-the-wool, staunch citizen-activist, and they capitalize on the polarized nature of discourse that tends to breed when there is less incentive for an oppositional group to make an effort to combat their claims. In the case of Prop 65, however, the fiery agonal discourse at play between the interested groups led them to publicly air claims made by the other side that they believed were inaccurate and misleading to the public. This arguably resulted in a heightened level of information in the public sphere for the electorate to consider and let inform their ultimate voting decision.

The differing nature of the two pathways of law-making makes sense when their distinct goals. When lobbying for a bill in the capitol, a small number of passionate citizens and leaders can achieve great success in persuading law-makers to pass the desired legislation. Within the context of direct legislation, however, both sides must vie to lure not only those predictably partisan voters to their side, but also those less invested moderates who inhabit the sweet spot of the “50%+1” of the electorate needed to pass a ballot measure. Thus, in the case of Proposed Amendment 65, both groups were incentivized to expand their rhetoric past their usual base of support while turning on-the-fence moderates away from the “lies” and “misinformation” being spewed their way by the opposing camp.

With an election that was narrowly defeated by just 519 votes in 1986 and then handily approved by almost 30,000 votes just two years later (Laffey 3), the need for both interested parties to reach out beyond the typical base of support was crucial. In fact, the very strategies used by both sides should not be unfamiliar to students and scholars of the American political system: in *An Economic Theory of Democracy*, Anthony Downs posits that a rational voter is only interested in information “which might change his preliminary voting decision,” as he or

she judges this information to be the most efficient at providing the best possible electoral outcome to his or her perceived interests (241). Thus, both groups widely broadcast information they felt would be most effective at changing the minds of the crucial swing segment of the electorate while claiming that the information spread by the other side was deeply misleading and inaccurate.

Certainly with an issue such as abortion, on which even those who are less politically informed often feel a strong sense of understanding and opinion (as argued by Roh and Berry, and others before them) this decision-changing information must be made salient to “median voters” - “those whose views place them between [the stated platforms of] the two parties” - in order for either side to pass legislation via a direct vote of the people. To garner support from this coveted sweet spot of “crucial middle-of-the-road voters,” both sides must form a message that more closely resembles that of their opponent, rather than one which is only accessible to voters at one ideological extreme (Downs 116-117). Thus, both sides of the abortion funding debate in Arkansas attempted to rally a broader base of support by expanding their rhetoric past stark and arguably polarizing concepts of “innocent life” and “reproductive freedom,” to focus on issues or aspects of the proposed law that had the potential to galvanize those with more moderate views on abortion (the aspect of economic redistribution, for instance, or threats to health services, birth control, or in-vitro fertilization).

The public funding amendment was eventually won in November of 1988, but only after four years of court battles and a slim 519-vote rejection at the polls in 1986, followed by eight years of judicial wrangling which resulted in a temporary injunction of the amendment on constitutional grounds (Laffey 3). Finally, in 1996, the U.S. Supreme Court handed down a ruling in *Dalton v. Little Rock Family Planning Services* that approved of a large part of the law,

albeit reaffirming the precedence of federal programs and services, such as Medicaid, over the laws of the state. In 1999, this ruling was reaffirmed in *Hodges v. Huckabee*, in which Amendment 68 was “ruled null and void” to any extent that it interfered with federal Medicaid services (4). This string of rulings essentially gutted what was left of the amendment, along with the sweat and troubles that had gone into ushering this embattled initiative into law. One should indeed feel dubious that the years of money and activism spent by pro-life organizations on the public funding amendment were truly worth the while of those with an actual interest in lowering the number of abortions performed in the state. However, whereas the representative system has proven a much more efficient and rewarding legislative pathway for those supporting anti-abortion policies, the events that unfolded during the debate over Arkansas’ proposed ban on the public funding of abortion services does shed light on at least one unique way in which the initiative and referendum process can serve an educative function for the voting masses.

A SHARED ARENA: PROPOSED AMENDMENT 65 AND THE EDUCATIVE AND INTEGRATIVE POTENTIAL OF “RAMPANT” DISINFORMATION

Scholars of direct legislation often make the claim that “abortion as a morality issue is relatively easy to frame as a simple issue” which allows citizens “with little information and knowledge to have high involvement in all phases of the policymaking process” (Roh and Berry). To those concerned about the more basic form of knowledge most voters possess about these issues, especially with regards to the implications of directly deciding on policies that are more complex and far-reaching than the issue might seem on its face, it has been argued times over that the direct legislation of so-called morality policies such as abortion could have a negative impact on the quality of the laws that are passed. In the case of Arkansas’ ban on the public funding of abortion, however, the media strategy around the ballot measure on behalf of

the pro-choice camp acted in an all-inclusive and educative fashion - in a way that the tactics used by these groups to usher bills through the representative system typically do not. Due to the sheer strategic need of both groups to criticize and broadcast every aspect of their opposition's tactics and rhetoric that crucial non-partisan voters might find to be unsavory, the electorate was provided a wide variety of competing sources of information from which to make their ultimate decision.

The state's pro-choice groups such as NOW and the Arkansas Women's Political Caucus made the claim that the proposed amendment would not only harm access to abortion but to a whole host of reproductive health care services, from the forms of birth control many otherwise pro-life women depend on to the process of in-vitro fertilization (at its very core, an arguably "pro-life" procedure). Because of these efforts, Arkansan voters were exposed to an educative side effect that does not often occur through the more insular form of organizing familiar to the representative process. Moderate, undecided voters held the key to winning or defeating Proposed Amendment 65, and this fact forced both sides of the aisle to speak plainly and honestly about the complex issues involved in state funding and reproductive health care services. No longer was abortion an issue of black and white, of religious or moral conscience versus freedoms to privacy and choice. Embedded within the initiative were legal and political effects that ranged far beyond the issue of abortion itself, and because of this, both camps chose a politics of inclusion and the admission of a given policy's complex implications, a far cry from the type of political activity the issue of abortion is known to cause in both the legislatures of the nation as well as within the individual states.

The experience of Arkansas as a case study does not resound with Barbara S. Gamble's contention that the judicial branch is too weak to be counted on to preserve constitutional rights

in the event that they are violated by an initiative or referendum. Pro-life groups in Arkansas will attest to the fact that the insider's-club nature typical of representative law-making, the main tactics of which are lobbying one-on-one with policy-makers and navigating the halls of the capitol building to testify at a hearing, evokes much less judicial involvement than the alternative pathway of direct legislation. Michael P. Laffey, himself a pro-life legal scholar and practitioner, even admits that “[c]onsidering its strong pro-life legislation, there have been surprisingly few legal challenges to Arkansas’ legislative efforts to protect life.” Even when such cases are brought to trial, “the elected judiciary has been reluctant to overrule the legislature” (Laffey 1). However, the Court seemed to have harbored no qualms about stepping in a number of times throughout the debate over what would become Amendment 68 to the state constitution, and it ultimately upheld the precedence of federal services over those of the state. In order to spend the least amount of money and time and while minimizing the dilution of the fiery rhetoric so familiar to those engaged in abortion politics, the representative system of passing or defeating a given law is the method of choice in the state of Arkansas, and indeed, it seems to be this way for good reason.

Finally, in terms of the agonal deliberative setting put forth by Simona Goi and discussed earlier, the citizens of Arkansas were forced not only to come to an understanding “with one another,” as Goi argues is a primary benefit of deliberative decision-making, but had to come to terms with the meaning and potential consequences, both positive and negative, of the law being proposed. Because the proposed amendment was argued to reach much further in scope than the issue of abortion itself, voters who would have typically voted in their own perceived self-interest as it related to abortion faced a question that was presented as much more complicated. Already an issue which forces most voters to think outside of the immediate consequences to her

or himself, agents in the process were now being asked to consider the complex notions of redistribution, morality, health equity, and personal liberty – often not as they related to the self, but to others in their lives - such as the “40,000 women” of Arkansas whose health care service may have suffered as a consequence of the amendment.

In Goi’s words, Arkansas voters in 1986 and 1988 were forced to acknowledge not only the “roots” of each side of the issue “in authentic moral commitment” – some committed to unborn life, some to economic freedom, and others to the right to basic health care – but also “the complexity” of these differing perspectives – and it is apparent that they were considerably thoughtful and sensitive to these expressed moral commitments. Two years after the defeat of Proposed Amendment 65, the electorate again reviewed the bill before them, but this time voted it into law by an almost 30,000-vote margin – a nearly 60-fold increase from the 519 votes which decided the fate of the 1986 initiative (Laffey 3). Such a drastic change within only two years’ time indicates that the Arkansan electorate indeed maintained an “active preservation of dissent” in which both winners and losers continued to “pay attention to the world” they shared and the complex and mutable interests motivating their view of this world. Indeed, Arkansas voters went to the polls not within the insular and static confines of self-interest, but after much public discussion, the airing of several different perspectives on the bill’s potential consequences, and rumination over what those consequences meant for the Arkansas community as a whole. In a world in which many claim that a harmful and polarized political animus is perpetuated by the 24-hour cable news media, this form of political organizing and policy debate has the potential to serve as a healing force for the abrasive nature of our country’s political sphere.

CHAPTER 3

Taking Initiative: The Power and Potential of Citizen Agency in Alaska's Abortion Politics

“By strengthening families in Alaska through informed citizenship, community involvement and improved public policy, the Alaska Family Council intends on being engaged in the important issues of our day on a long-term, ongoing basis,” proclaims the home web page of the Alaska Family Council, a major organization dedicated to advocating for conservative social policies within the state. “We look forward to serving you and ask you to join us financially, prayerfully and as an active volunteer partner.”⁶³ The Alaska Family Council website is well-designed, sensibly organized and updated frequently, featuring such articles on its home page as “What’s Happening With The Gay Initiative?” and a publication urging members to help “Expose Planned Parenthood.” (Indeed, the use of such inciting language in order to motivate the Council’s base of support to action is strongly reminiscent of the same strategies used by pro-life interests in Arkansas).

Prominently featured along the sidebar is a downloadable article with the newest information on the “Parental Notice Law,” the statewide initiative passed in August of 2010 requiring parental notification for minors in the state seeking an abortion. Titled Ballot Measure 2, or “Abortion for Minor Requires Notice to or Consent from Parent or Guardian or Through Judicial Bypass,” the Alaska Family Council, along with the ad hoc group “Alaskans for Parental Rights,” played a key role in ushering the measure through the direct legislation process to a 56% approval.⁶⁴ The initiative aimed to make it a felony “for a doctor to knowingly violate the statutory notice provisions for giving the minor’s parents notice of the minor’s intent to have an

⁶³ Minnery, Jim. “Alaska Family Council: Strengthening and protecting Alaskan families.” *Alaska Family Council*, n.d. Web. 20 February 2012. <<http://www.alaskafamilycouncil.org/>>.

⁶⁴ Ballot Measures Database. *National Conference of State Legislatures*, n.d. Web. 20 February 2012. <<http://www.ncsl.org/legislatures-elections/elections/ballot-measures-database.aspx>>.

abortion” at least 48 hours before the procedure. It also required that, in the case of abuse, the minor have an “adult relative” or otherwise “authorized official,” such as a police officer or social worker, sign a notarized statement verifying the abuse (NCSL). Ballot Measure 2 was, in fact, a revised version of a similar law passed through the state House and Senate in 2007, the so-called “Parental Consent Act,” which was temporarily enjoined by the Supreme Court of Alaska in 1997 and permanently struck down ten years later. Indeed, just as the Family Council and Right to Life Chapters of Arkansas spent years wrangling a trap-laden piece of legislation onto the ballot, through the court system and back again, Alaskan pro-life activist groups have experienced no better luck - even as they and their pro-choice opposition poured a combined total of nearly \$1 million into advertising, outreach and persuasion on the 2010 ballot measure in a state with just over 700,000 actual residents at the time.^{65 66}

Outside of the parental notification initiative - which as of this writing is still in the process of being contested in court - the Alaska Family Council’s other recent activities have been aimed at getting conservative state legislators elected in the near future in order to ensure the passage of more pro-life and other socially conservative policies. In February of 2012, the Council held a meeting in the interior-region city of Fairbanks to unveil the new campaign to “reclaim Juneau.” Guests included the Tea Party Express-backed 2010 U.S. Senate candidate Joe Miller, who won the Republican nomination in an upset over the state’s more moderate incumbent Lisa Murkowski. (Murkowski went on to win the seat as a write-in candidate in the general election). Council director Jim Minnery explained that the purpose of the event was to kick off the group’s renewed effort for “vetting, fundraising and endorsing state candidates” that

⁶⁵ Marty, Robin. “Alaska Passes Parental Notification in Tuesday Primary.” RH Reality Check. 25 August 2010. Web. 23 February 2012. <<http://www.rhrealitycheck.org/node/14153>>.

⁶⁶ “Alaska Quick Facts.” U.S. Census Bureau. 17 January 2012. Web. 23 February 2012. <<http://quickfacts.census.gov/qfd/states/02000.html>>.

would fight for conservative family values in the state capitol. According to Minnery, this endeavor is “the first time - besides when we endorsed Joe Miller in 2010 - we’ve really got political by supporting and vetting candidates.”⁶⁷ It is clear, however, that the Council has in actuality maintained a deeply political – and considerably powerful – presence with socially conservative constituents throughout the state, especially regarding but not limited to its activism within the direct legislation system.

Like the Arkansas group with which they share their name, the Alaska Family Council offers on its webpage a number of electronic resources and points of access by which interested pro-life constituents can work to effect desired political change as well as stay informed about the current issues at stake. The organization sends regular e-newsletters to its base of supporters with updates about issues facing the state from abortion laws to school vouchers. Writing letters to the editor is encouraged as a way to speak publicly about these matters. “Most of the letters sent in are published,” the site advises, “and in many cases, [they] inspire other letters that can generate a lively public discussion on an issue.” “Do not be hateful or overly aggressive,” the site warns. “Creative sarcasm and wit,” however, “is acceptable.”⁶⁸ On top of letter-writing, calling their legislators, and sending brief Public Opinion Messages, pro-life constituents are urged to publicly testify for or against legislation, and are instructed on how to utilize the Legislative Information Office and related governmental resources. In addition, it provides a “Value Voter Guide” which lists the state legislators who express support for pro-life, anti-LGBT, anti-gambling and pro-school choice causes as well as a list of links to notable governmental groups throughout the state.

⁶⁷ Buxton, Matt. “Conservative Alaska Family Council to host Reclaiming Juneau event with Joe Miller.” *Daily News-Miner* [Fairbanks]. 23 February 2012. Web. 26 February 2012.

⁶⁸ “Letters to the Editor.” *Alaska Family Council*. n.d. Web. 23 February 2012.
<http://www.alaskafamilycouncil.org/action_center/letters_to_editor.html>.

As in the case of Arkansas, the Alaska Family Council is no stranger to the use of strong, inciting rhetoric to drive its staunch subscribers to action. In a recently published document explaining the current state of the parental notification law in the State Supreme Court, the Council states that “Planned Parenthood and two abortion doctors” challenged the “will of both the Alaska Legislature and the state’s voters” by bringing the newly passed law to court. Minnery and the Council, it asserts, are “not going to stand idly by and watch the multi-billion dollar abortion industry trample on the will of the Alaskan people” as Planned Parenthood, an “extreme group” with “radical views,” attempts to intervene in the decision of the electorate. “I pray,” Minnery ends the letter, that I’ve “convinced you that we cannot abandon the battlefield in the face of this persistent enemy.”⁶⁹

Unlike the case of Arkansas, however, the Alaska Family Council is headquartered in the city of Anchorage - a metropolitan area in which more than 40 percent of the state’s population currently resides - rather than in the state capital of Juneau, a coastal town accessible only by boat or plane. A fairly unique state in that it possesses a vast landmass with a relatively small population (1.2 persons per square mile in 2010), political organizing and outreach in Alaska is even more dependent on remote communications.⁷⁰ Whereas the Little Rock-based political organizations and interest groups in Arkansas use their proximity to the seat of state governance to their advantage with in-person rallies and events, both pro-life as well as pro-choice groups in Alaska must be more inventive in the way they effect change in state-level abortion policy. As Alaska has ranked number one in the nation for home computer penetration and Internet access within the last decade - despite (or, perhaps, due to) its large swaths of rural lands and

⁶⁹ Minnery, Jim. “Web Update on Parental Notice Law.” Alaska Family Council, n.d. Web: downloadable pdf. 10 March 2012. <<http://www.alaskafamilycouncil.org/>>.

⁷⁰ “Anchorage (municipality) QuickFacts.” U.S. Census Bureau. 31 January 2012. Web. 26 February 2012. <<http://quickfacts.census.gov/qfd/states/02/0203000.html>>.

populations – it may come as no surprise that Web-based outreach and mobilization efforts seem to top the list of these organizations.⁷¹ E-mail blasts have served as a major asset for both sides of the state’s highly debated abortion policies, as have letters to the editor and newspaper editorials written by a diverse host of concerned citizens ranging from distinguished pediatricians to high school students.

In a similar fashion to the pro-life organizing landscape of Arkansas, the locally owned and directed Alaska Family Council has led the way as an independent family-values advocacy organization that uses its outreach savvy and its multiple connections with leaders and related organizations from the “Lower 48” (the 48 contiguous American states) to effect significant change on social issues. However, whereas in Arkansas the large part of the pro-choice mobilizing energy came from small but powerful local groups such as the Arkansas Women’s Political Caucus who utilized intimate in-person gatherings and events to stimulate interest in their political activities and efforts, in the case of Alaska, Planned Parenthood of the Great Northwest and the ACLU have taken the lion’s share of responsibility for fighting proposed abortion restrictions - from flying in experienced organizers from outside the state to hiring top-notch lawyers to challenge anti-abortion laws in court to tapping into a national network of dependably generous donors and ultimately outspending the pro-life side significantly.

Neither Planned Parenthood nor ACLU appear to offer as many resources or points of entry for activists wishing to speak out against proposed laws that would restrict abortion access; regardless of their relative size or financial power, they are clearly overpowered by the advantages of effective local networking through pre-existing church organizations possessed by

⁷¹ Murphy, Kathleen. “Alaska tops in Internet use.” *Stateline*. Pew Center on the States, 30 November 2004. Web. 26 February 2012.
<<http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=15854>>.

Jim Minnery and the rest of the Family Council.⁷² According to Kime McClintock, a field organizer with Planned Parenthood of Alaska-Anchorage who was deeply involved in the No on 2 campaign of 2010, the organization sticks to more discreet and efficient modes of organizing unless a potentially dangerous initiative makes its way to the ballot. The legislative session previous to the initiative being on the ballot, the Planned Parenthood base was “very receptive to show up to testify” in Juneau against it, but this activity was limited to those with enough investment in the cause to travel down to the remote capital. Indeed, McClintock asserted in a personal telephone interview that “people feel removed from the process who live outside of Juneau,” and that it takes much more effort to take actions that could effect desired political change. In 2010, however, McClintock recalls hearing the “sense of urgency” in people’s voices, amplified as never before: “What can I do?” they asked her. “People were very serious about wanting to be involved” in the process, and felt that they had the power to do so, regardless of how far away they lived from the capital.⁷³

Thus, whereas the method of outreach favored by pro-life forces such as the Alaskan Family Council heavily hinges on widespread e-mail blasts, intra-church mobilization, and the use of an easily navigable site with which constituents can stay informed and take political action, Planned Parenthood must actively seek out prospective volunteers who can access the capital with relative ease and must expend time recruiting and developing these individuals in

⁷² The ACLU of Alaska limits its Web presence to relevant news stories, policy briefs, and contact information for Alaskans who believe their constitutional rights may have been violated. Though it does feature a general interest form for eager volunteers to fill out, a need for volunteers with a specific interest in advocating for pro-choice policies is not mentioned. The site of Planned Parenthood of the Great Northwest is also relatively difficult to navigate for local activists looking to get involved in pro-choice efforts within the state; self-identified volunteer prospects must first fill out a lengthy questionnaire, which includes questions about the individual’s legal history as well as education level and a list of previous work and volunteer experiences, before they are contacted for recruitment.

⁷³ McClintock, Kime. Personal telephone interview. 9 March 2012.

order to keep their base active and functioning despite their diminished Internet presence. When it comes to laws up for passage through initiative, however – most recently with the battle over the parental notification initiative of 2010 - both organizations have kicked their outreach and mobilization efforts into high gear, using thoroughly strategized messaging, organizing widespread volunteer efforts, and putting the newfound state-wide portals of entry to activism which a ballot measure typically brings about into good use, tapping into a rich variety of networked activists and local and state leaders to debate the policy on the public stage.

POLITICS AS USUAL: WHEELING AND DEALING

WITH PARENTAL CONSENT IN JUNEAU

Though it originally made it to the statewide ballot in 2010, the parental consent and notice law was not originally intended as a policy to be decided upon by the masses: the bill first made its rounds through several fatiguing sessions in the state capitol in Juneau. It would come to pass, however, that the authentic drives of conservative law-makers from around the state to pass the policy (along with a host of other anti-abortion bills) was no match for the overwhelming culture of political maneuvering and alignment that favored a strategy of ignoring potentially polarizing subjects so that political interests could be pursued on common ground between members of different parties. Both Sarah Palin - the presiding governor at the time who had thrown the politics of the state under the national spotlight when she was selected by the John McCain presidential campaign as his running mate - as well as a number of state senators involved in precarious cross-party alliances chose to stall the discussion of a bill which was deemed to be in possession of more polarizing potential and moral baggage than either the Governor or the senators were willing to assume at the time. Though the issue continued to weigh heavily on the minds of the electorate, as is evident through the numerous letters to the

editor, op-eds, and committee testimonials that flowed through the media and transcended the duration of the legislative sessions, the state Senate and even the vocally pro-life governor took little action to have the bill considered.

Indeed, the history of the bill in its most recent form tells the story many proponents of the direct legislation system are none too shy to recount: the story of partisan agenda control, underlying motives and precarious alliances stalling political issues that the electorate finds to be an important, engaging and timely matter. The long-debated issue itself - and the involved history of legal trouble surrounding it - can be traced stretching back to 1997, when the first Alaska Parental Consent Act was passed by the state legislature over the veto of Governor Tony Knowles. The Act proposed not simply to require notification of a parent or guardian prior to a minor's abortion, but parental approval. It never went into effect, however, due to court challenges, and one full decade later, it was struck down permanently in a 3-2 decision by the state Supreme Court. The Act was ruled to not fulfill the "proper constitutional balance" between "the State's compelling interest" to ensure the rights of the parent or guardian on the one hand and "a minor's fundamental right to privacy" on the other.⁷⁴ This decision was no doubt prompted, among other factors in play, by the fact the Alaska State Constitution actually guarantees a fundamental right of the people to privacy.⁷⁵

As was also demonstrated in the case of Arkansas, the renewed vigor behind parental consent in Alaska between 2008 and 2010 was part of a larger push to pass socially conservative policies, including restriction abortion access throughout the state. Representative John Coghill,

⁷⁴ Quinn, Steve. "Alaska Supreme Court calls Parental Consent Act unconstitutional." Seattle Times. 3 November 2007. Web. 2 March 2012.

<http://seattletimes.nwsourc.com/html/localnews/2003991974_webabortion03.html>.

⁷⁵ "The Constitution of the State of Alaska," Article 1, Section 22. *Justia.com*, n.d. Web. 1 March 2012. <<http://law.justia.com/constitution/alaska/constitution-1.html>>.

a Republican and major sponsor of several of the bills, had made his intentions clear early on that the legislative actions were in direct response to the previous rulings of the state courts on the issue of abortion, on which he felt that they were “just so dead wrong.” The parental consent bill was one of those most prominently debated of this host of proposed laws, spending six hours in testimony in the State House before moving on to the finance committee.⁷⁶ This experience stands in stark contrast to an arguably even more extreme anti-abortion bill, which would have made it a felony to provide late-term abortions within the state. No one, the Anchorage Daily News observed, spoke out for public comment as this bill was up for debate by a House panel; even the bill’s sponsor, Rep. Coghill, admitted that he expected “more of a legal discussion” to occur over the seemingly more contentious proposition. At this moment in time, it seems, the public had already zeroed in on the issue which it felt was most worthy of serious discussion - and it would be the public that would carry the proposed policy through two years of political stalling and ultimately debate in on the public stage in 2010.

Interestingly, even as the parental consent law caused the state House to stir with debate and excitement from both sides, the bill died in the Senate judiciary committee at the end of the regular session in April with hardly any ado from Senate law-makers or the Governor. Mrs. Palin, who had just recently skyrocketed to fame as John McCain’s selection for running mate, chose not to push the Senate too hard on the lack of consideration that the parental consent and notification bill had received over the session. Many political observers marked this as a wise move that would improve the chances of her championed all-Alaska natural gas pipeline plan, for which she had convened a special legislative session spanning the summer months to garner

⁷⁶ Sutton, Anne. “5 Measures in Legislature renew abortion debate.” Anchorage Daily News. 3 March 2008. Web. 25 February 2012.

bipartisan support.⁷⁷ This unexpectedly weak response from the Governor to the death of several anti-abortion laws in the Senate worked in tandem with the force of a powerful Senate caucus, comprised of 10 Democrats and 6 Republicans, who maintained that the precariously bipartisan nature of the group made not only passage but even serious discussion of more “extreme” and potentially polarizing bills very unlikely.⁷⁸

The Alaskan public, however, did not go without noticing the deeply political motives behind the initial rally of support, the long and heated period of debate and, finally, the quiet death of the parental consent bill in Juneau. Even though both conservative and liberal policy-makers in the capitol building maintained their own reasons for keeping the discussion of anti-abortion bills on the back burner in order to make room for the bipartisan compromise necessary to pass laws more directly related to their political interests, the people of Alaska found these issues engaging and worthy of a continued debate beyond mere political posturing and agenda control. Op-eds and letters to the editor flowed into the Anchorage Daily News headquarters. “If our governor really wants to bring these babies into this world,” contended one letter, “then she needs to budget the future costs to Alaska.”⁷⁹ Another argued that “[p]arents have the right to determine what kind of decisions their children are ready to make,” and that not notifying a parent before his or her child was to go through “the emotional and physical punishment of

⁷⁷ Palin had also just clinched the approval of Alaska Right to Life, who had in the recent past all but dismissed her commitment to the pro-life cause. They now claimed that the action of carrying her baby to term after it was diagnosed with Down’s Syndrome and proudly displaying the newest addition to the family on the national stage - as well as speaking honestly about her family’s hardy support of her oldest daughter Bristol when she became pregnant earlier in the year - spoke more about her credentials as a pro-life force than could her political or verbal support for any specific piece of legislation. (Demer, Lisa. “Abortion opponents give Palin high marks.” Anchorage Daily News. 7 September 2008. Web. 25 February 2012.)

⁷⁸ Cockerham, Sean. “Palin stands firm on consent.” Anchorage Daily News. 27 March 2009. Web. 25 February 2012.

⁷⁹ Glass, Sam. Letter. “Parental notice comes with costs.” Anchorage Daily News. 2 March 2009. Web. 25 February 2012.

abortion” was “cruelty,” plain and simple.⁸⁰ An 18-year-old high school student wrote that she personally knew “many teens” who would be “afraid to seek care” if parental consent was required⁸¹, and a parent argued that if other parents needed a state law to “force” their daughter into talking with them, then family communication had already been mismanaged and a new government mandate was not the answer.⁸² Another simply wrote: “Google ‘self-induced abortion.’ See what you get. Risky? For some teens, it’s not as bad as asking parents’ permission for an abortion.”⁸³

Regardless of the seemingly doomed fate of the parental consent bill, conservative lawmakers seemed reassured that they would find a way to eventually pass the policy into law. Many had already sensed the public’s deep continued interest in the proposed policy, as well as their expressed desire to bring it to the table for discussion and debate. State Representative Charlie Huggins told the Anchorage Daily News that if the Legislature did not act soon to pass this revised bill, it would surely find its way onto the ballot for a direct vote of the people.⁸⁴ Besides, a few things had changed over the course of the year that most likely made Huggins and his colleagues believe the bill had a chance to fare much better than it had in years prior. One notable difference was the renewed presence of Governor Palin, who set aside her failed run for vice president and tabled hopes for the gas pipeline plan to come out in vocal support of the bill. Conservatives took Palin’s return to a role as outspoken pro-life advocate as a sign that the

⁸⁰ Pratt, Steve. Letter. “Parents must be involved.” Anchorage Daily News. 2 March 2009. Web. 25 February 2012.

⁸¹ Hodson, Sable. Letter. “Parent notification no answer.” Anchorage Daily News. 24 April 2009. Web. 25 February 2012.

⁸² Winterberger, Ken. Letter. “Bill about abortion, not teens.” Anchorage Daily News. 24 April 2009. Web. 25 February 2012.

⁸³ Martin, Stephanie. Letter. “Getting parents’ OK hard for teens.” Anchorage Daily News. 26 April 2009. Web. 25 February 2012.

⁸⁴ Demer, Lisa. “Palin says abortion-consent bill would protect children.” Anchorage Daily News. 26 February 2009. Web. 25 February 2012.

consent bill would gain priority in the session, the main aims of which - settling the state budget and discussing dueling plans for the gas pipeline - had cast a shadow on conservative legislators' efforts to effect change in the arena of social policy.

By the beginning of April, the consent bill once again passed through the House with a 22-14 vote.⁸⁵ However, the bipartisan caucus that continued to hold sway over the Senate's policy priorities once more posed a threat to the bill's chances of passing with just nine days left in the regular session. Palin had, until this point, clearly expressed disdain for the compromising effect of a law that would only require parental notification rather than consent and had refused to support such a deal. Perhaps sensing the need to pass any sort of law restricting minors' currently unfettered access to abortion that would stand a chance in the Senate as well as in court, Governor Palin threw her full support behind a notification-only version of current bill in a highly publicized news conference from her Juneau office, explaining that it would still achieve the goal of protecting children as well as parents' rights to be involved in their daughters' medical decisions.⁸⁶ Just three days later, Rep. Coghill followed Palin's lead and announced that he would also be willing to compromise and strike the consent requirement from the bill.⁸⁷ However, by the end of the session, the bill had stalled in the Health, Education and Social Services Committee, once again held up by the Senate majority caucus that chose to focus more

⁸⁵ "House OKs parental consent for abortion." Anchorage Daily News. 2 April 2009. Web. 25 February 2012.

⁸⁶ Cockerham, Sean. "Senate Democrats reject another Palin pick." Anchorage Daily News. 10 April 2009. Web. 25 February 2012.

⁸⁷ Joling, Dan. "Parental consent bill sponsor ready to deal." Anchorage Daily News. 13 April 2009. Web. 25 February 2012.

on economic issues with less potential to polarize its members than the issue of restricting teens' access to abortion.⁸⁸

ALASKANS TAKING AGENCY: MEASURE 2 AS “SAFETY VALVE”
AND POLITICAL INSTIGATOR

With yet another year of defeat experienced by the champions of the parental consent law, it indeed appeared that Rep. Huggins' premonition of the people taking the matter into their own hands was set to materialize: just days after the end of the 2009 session, initiative sponsors applied to start gathering signatures for a ballot proposal. The group Alaskans for Parental Rights (AFPR) was promptly launched with the specific goal of promoting the initiative, which would come to be known as Measure 2. Under the wing of the Family Council, Alaskans for Parental Rights: Yes on 2 was the official sponsor of several television and radio advertisements and conducted outreach efforts throughout the state in support of the measure, set to be on the ballot of the statewide primary election on August 24. The site featured printable flyers with information about the initiative, including one specifically designed for church distribution, a list of ways to get involved with the campaign – from receiving action alerts to writing a letter to the editor to vowing to “pray regularly for parental rights to be upheld” - and talking points for pro-initiative Alaskans when debating members of the opposition.

Alaskans for Parental Rights, along with the richly connected network of churches mobilized by the Family Council, were required to gather at least 37,734 signatures before January of 2010 to get the issue onto the August primary ballot. Planned Parenthood of Alaska quickly announced that it planned on devoting any legal, financial and political resources necessary to defeating the initiative, whether in court over questions of the proposition's

⁸⁸ Cockerham, Sean. “Abortion notification bill stalls in Senate health committee.” Anchorage Daily News. 18 April 2009. Web. 25 February 2012.

accordance with the state constitution or on election day.⁸⁹ Planned Parenthood, along with a local high school teacher, sued in late July of 2009 on the basis that the text of the proposed measure had problematic “legal technicalities” and could mislead the public. For instance, they argued, the language suggested merely “minor tweaks to an existing law” rather than an abolition of currently afforded rights (those of a minor to bodily autonomy and privacy).^{90 91}

While the matter temporarily stalled in court, groups on both sides of the issue did not hesitate to begin forming messaging schemes and outreach efforts in the event that the bill was upheld by the court for a public vote in the coming year. Jim Minnery, director of the Alaska Family Council, composed an op-ed that introduced Alaskans to one of the primary talking points for parental notification: that of the parents’ right to know about their children’s medical histories and decisions. The nasal vaccine currently being used to combat the H1N1 virus, argued Minnery, could not be administered without parental consent, yet “children as young as 13 [could] walk into an abortion clinic and have their pre-born children exterminated without the consent or even knowledge of their parents.”

Though Minnery and the Council continued to use strong terms such as “pre-born children” and “exterminated,” the focus was not on the immorality of abortion itself but on more complex issues of medical ethics, informed consent, and the role of government in family

⁸⁹ Cockerham, Sean. “Palin backs initiative on parent notification of abortion.” Anchorage Daily News. 3 May 2009. Web. 25 February 2012.

⁹⁰ Holland, Megan. “Lawsuit targets initiative requiring abortion notification.” Anchorage Daily News. 31 July 2009. Web. 25 February 2012.

⁹¹ However, for Alaskans for Parental Rights, business continued as usual. With almost exactly one year until the election, a public kick-off event was held at ChangePoint, an Anchorage mega-church, and promoted by AFPR and the Family Council. The now-nationally famous Gov. Palin was slotted to appear to the event, which suggested a door donation of \$500; shortly before the event, however, she claimed she had never received such an invitation. Palin was replaced by Star Parker, a nationally known conservative pundit. (KTUU. “Abortion-consent campaign begins without Palin.” Anchorage Daily News. 28 August 2009. Web. 25 February 2012.)

communication and management. The Yes on 2 campaign also used the Minnery article to introduce to the public the idea of abortion as an “invasive surgical procedure,” using clinical language such as “suction and curettage” (while choosing to avoid the fact that when performed early in pregnancy, abortion is 20 times safer than carrying a child to term).^{92 93} Thus, though the language remained intense, emotionally driven, and potentially misleading, the need to persuade voters who do not vehemently feel one way or another about the question of abortion’s morality led the campaign to use an approach that targeted the broader consequences of the bill and highlighted the more complex and nuanced political issues it brought up, adding richness and complexity to the public discourse and debate over the initiative.

On top of introducing the messages that Alaskans would be hearing from the initiative campaign in the coming year, Minnery and the Family Council used the op-ed as a recruiting tool, explaining that although the campaign had been met with an encouraging amount of enthusiasm and activity, still more work needed to be done to usher the proposition onto the 2010 ballot. AFPR, announced Minnery, had mobilized around 500 volunteers around the state to circulate petitions for the initiative, and had succeeded in getting half of the almost 33,000 required signatures in as little as three months. It perhaps should come as no surprise, then, that the initiative camp soon find that public opinion was on their side: an op-ed from two Alaskan politicians published just four days before the petition deadline showed that in a 2005 poll commissioned by the Alaska Legislative Council, “almost 80 percent of Alaskans” had endorsed

⁹² “Comparison Between Surgical Abortion and Medical Abortion with Mifeprex, or Methotrexate, and Mifoprostol.” *Pregnancy Options Workbook*, n.d. Web. 4 March 2012. <<http://www.pregnancyoptions.info/whichmethod.htm>>.

⁹³ Minnery, Jim. Letter. “Consent for flu vaccine but not abortion?” *Anchorage Daily News*. 27 October 2009. Web. 25 February 2012.

a policy of parental consent or notification.⁹⁴ Indeed, it seemed those opposing the initiative had their work cut out for them - from finding a message that would resonate with an electorate overwhelmingly supportive of parental consent, to finding a network of citizens they could tap into and mobilize. Their primary challenges would be combating the spread of information by AFPR, which they viewed as misleading and dishonest, and solidifying a messaging campaign that tapped into the libertarian streak so prominent in the Alaskan political landscape in hopes of capturing the median voters who would decide the fate of the measure.

The State Supreme Court's ruling came down in early June 2010, giving the green light for the initiative to be decided by the public that August. Planned Parenthood and the ACLU quickly mobilized in response. The answer took the form of an ad-hoc issue group that would stand opposite Alaskans for Parental Rights, with a name just as strategically selected: Alaskans Against Government Mandates (AAGM). Just as in the case of Arkansas, groups opposed to the initiative found it in their best interest to widely air the tactics used by the opposition that they found to be misleading and harmful to the electorate's need for accurate information on the issue. If the state of public opinion and the spread of misleading information was the obstacle to be overcome by AAGM, financial power was its advantage. With help from the nationally powerful Planned Parenthood and ACLU organizations and a network of reliable and generous donors, Alaskans Against Government Mandates maintained a steady cash lead, ultimately outspending the pro-initiative camp by a three-to-one margin. AFPR and the Family Council often attempted to put these facts to their benefit, sending e-mail blasts to their constituents

⁹⁴ Olson, Sen. Donny and Samuels, Ralph. Letter. "Petition will advance abortion notification." Anchorage Daily News. 11 January 2010. Web. 25 February 2012.

admonishing them to contribute. “They are outgunning us,” Minnery wrote to pro-life voters around the state, “and unless we tell our story far and wide, victory is unlikely.”⁹⁵

According to Kime McClintock, who served as a field organizer with AAGM, the need to mobilize a large number of individuals who are not typically involved with reproductive issues was the primary drive of the anti-initiative campaign. With a ballot measure such as this one, she explained in a personal telephone interview, “you have to get them out to vote,” and “persuade a large number of people” in order to succeed. Specifically regarding the thorny issue of parental notification of a minor’s abortion, McClintock recalled, “there were a lot of people on the fence” in need of a good deal of convincing. As in the case of Arkansas, this drastically changed the model of organizing that Planned Parenthood utilized from its typical day-to-day legislative lobbying efforts. With the indirect system, she explains, “we still do phone banks” with citizen activists, but “we call our base of supporters” - those voters Planned Parenthood is confident will want to help and who can passionately convey a message to their legislators. Getting people to testify, McClintock explains, is very important to the success of a bill passing through the legislature, and during testimony, just one or two passionate individuals can change the fate of a bill. Therefore, within the walls of the capitol building much more than in the context of an initiative or referendum, Planned Parenthood aims for “emotional persuasion that comes from a personal place” of a personally affected individual (McClintock).

Conversely, within the direct legislation process, the group focuses less on strongly emotional and highly individualized messaging and aims primarily to “stay on message” with a number of points backed by empirical claims and widely conveyable arguments. “Staying on message,” McClintock explained, is of the utmost importance when working on a ballot initiative

⁹⁵ Bohrer, Becky. “Group opposing abortion initiative has big cash lead.” Anchorage Daily News. 27 July 2010. Web. 25 February 2012.

campaign because the high volume of volunteers with little to no prior experience in political organizing necessitates the need for clear and concise communication. The No on 2 campaign, for instance, held phone banks several days of the week, many of them coaching newly interested volunteers for their first act of political engagement, and hammered the same four or five points to each of its volunteers: that the ballot measure was “bad public health” policy and was not supported by the Alaskan chapter of the American Academy of Pediatricians; that it would endanger teen safety in a state with high numbers of rape, incest and domestic abuse; that over 80% or more of teens already involved a parent in their decision when faced with an unplanned pregnancy and those who did not likely had a good reason not to; and so on (McClintock).

While their field campaign was waged heavily with facts, academic endorsements and appeals to rationality, in terms of broadcast media AAGM’s messaging strategies followed the very narrative of anti-government sentiment that the group’s name implied. Among the talking points utilized in television advertisements, press statements and published editorials were arguments that the government had no power to mandate family communication; that the law would be an unnecessary and extraneous policy as most teens already involved their parents when faced with an unplanned pregnancy; and that the real answer to teen pregnancy is not a government mandate after a pregnancy has already occurred, but preventative efforts to reduce pregnancy through comprehensive sex education and open and supportive family communication. The primary television ad run by AAGM featured “Nellie,” a mother of two, explaining to the camera, “As a mom, I hope my daughter would come to me about a pregnancy so that I could be there for her. But Measure 2 is a bad idea: no law can mandate family

communication. Some teens can't talk to their parents because of abuse. I don't need the government telling me what to do in my family. I'm voting 'no.'"⁹⁶

As Tonei Glavinic, a progressive activist and past AAGM volunteer explains, the decision to focus on an anti-government approach was informed by not only the libertarian nature of Alaskan political discourse, but that of the national Tea Party movement that had recently taken the country by storm. The No on 2 campaign was a case of “liberal activists doing libertarian feminism: protesting government intervention and oppression...rather than advocating for abortion rights” (Glavinic). AAGM tapped into the anti-government sentiment to argue to voters, even those who are pro-life, that a new law attempting to tell parents how to run their families would only cause harm. However, those exclaiming the danger of this new “government mandate” were not the only ones tapping into libertarian modes of discourse in order to persuade the electorate in their favor.

Interestingly, Yes on 2 – in and of itself a campaign proposing increased government intervention into family life and individuals' medical decisions - used this very same approach of focusing on freedom from government intrusion rather than positive rights being given. The messaging focused on the potential of the law to “prevent abusive older men from forcing girls to have abortions,” and further, that the government had no place to limit the rights of parents to be involved in their children's decisions. One prominently broadcast ad featured a number of middle-aged mothers of different socioeconomic and ethnic backgrounds explaining that if their daughter “had been raped or attacked,” they would want to know. “I don't want the government telling me what I can and cannot know about my daughter's life,” they told the camera. “She's my daughter. I need to protect her” (Glavinic).

⁹⁶ Glavinic, Tonei. “NO on 2: The Fight Against Parental Notification in Alaska.” American University. 3 December 2010. Web. 4 March 2012. <<http://vimeo.com/17454633>>.

THE POTENTIAL OF PUBLIC EXCITEMENT AND THE LIMITS OF POLITICAL
STRATEGY: LESSONS LEARNED FROM ALASKA

Public discourse regarding Measure 2 was lively throughout the summer months in the midst of an otherwise relatively quiet election season. In fact, the story of Measure 2 and the throngs of typically apathetic voters it drove to the polls is a prime example of the power of direct legislation to excite citizens not only about the specific policy to be voted on, but the other races on the ballot. Many who observed the incredible turnout for the otherwise doldrum primary election even target Measure 2 specifically as having had a massive and unexpected impact on the contest for the Republican Party's nomination for U.S. Senate. Dozens of letters to the editor were published in local newspapers on the measure. At the same time, with only two weeks until primary elections, the concurrent gubernatorial race had not "heated up yet," according to candidates from both sides of the aisle and political scientists throughout the state. However, they noted, Measure 2 had created "the most heat of the campaign" thus far.⁹⁷ This observation proved true on the day of the election: "[I]ike red meat to the wolves, Ballot Measure 2 brought out the Right to Life crowd in force," stated one prominent state-wide blog. Churches had devoted "entire services on the Sunday before primary day" to urging members to vote for Measure 2. In fact, approximately 10,000 of the ballots cast that Tuesday were for the measure alone, without even the selection of a candidate for U.S. Senate.⁹⁸

Many journalists, amateur and seasoned alike, marked down the success of the socially conservative Tea Party darling Joe Miller over pro-choice Republican establishment candidate Lisa Murkowski for the Republican U.S. Senate ticket, theorizing that many voters who came

⁹⁷ "No fire in the race?" *Anchorage Daily News*. 9 August 2010. Web. 25 February 2012.

⁹⁸ Goodman, Josh. "In Alaska, proof that ballot measures can drive turnout." *Governing: The States and Localities*. 25 August 2010. Web. 4 March 2012.

<<http://www.governing.com/blogs/politics/Alaska-Ballot-Measures-Turnout.html>>.

out of the woodwork and flocked to the polls in support of Measure 2 chose to vote for the pro-life alternative to the more moderate, yet much better known, Murkowski. According to the national politics blog *Politico*, 131,000 votes were cast on the ballot measure while only 72,000 were made regarding the Senate seat. Michelle Meyer, a Democratic activist and organizer in the state, was not surprised by the overwhelming power of Measure 2 to bring out voters in an otherwise lethargic election year. “I saw my neighbors, who were involved in a very conservative church, who were usually not involved in politics at all, waving signs on the street corner,” she explained. “That moment, I said to myself, ‘this is going to pass.’”⁹⁹

The overarching message that the battle over parental notification and consent in Alaska brings us is two-fold: as Jerry Cox of Arkansas’ Family Council asserted, if there is enough public energy and interest surrounding an idea, citizens will ultimately find a way to bring that policy to widespread discussion and decision. Parental notification, a policy that the Legislative Council found to be supported by approximately 80% of Alaskans, was embattled throughout its time in the state legislature. Concerned citizens on both sides of the argument with the time and means to flock to the remote state capital to make their case regarding the proposed policy did so, but the underlying political goals of a precarious bipartisan Senate committee and a governor torn between the national spotlight and her own agenda for the state prematurely shut off consideration of a bill that had already piqued public interest in the state and agitated its electorate.

If anything, the Alaskan case study shows that the purported benefits of direct legislation are not as simple as a lack of civic involvement on one side and a flourishing public discourse on the other. To argue this would be to disregard the level of public discourse that must already be

⁹⁹ Meyer, Michelle. Personal telephone interview. 8 February 2012.

present in order for a proposed measure to even make its way onto the ballot. However, the case does exemplify the nature of democratic governance firmly laid out in the previous chapter by Arkansas Family Council president Jerry Cox: if the people see a policy as worthwhile of their time and energy, they will stop at nothing to ensure that it gets the attention they believe it deserves. Direct legislation is not the key that initially turns the engine of heightened democratic engagement – that happens long before the petitions are printed and the volunteers gathered. Rather, it is pedal which uses the energetic potential of the engine of engagement to drive the interests of the community forward - to accomplish the real task of people-powered governance.

Regardless of one's own stances on abortion policy itself, it seems important to compare the two potential scenarios that may have happened in Alaska: one of a reticent, docile public compliantly observing the politics-as-usual wheeling and dealing in the remote capitol building while stifling its own interest in the policy; or one of grassroots-style activism, civic discourse and political engagement that extends far beyond the timeframe of the legislative session and reaches the homes and families of more than those who can afford to spend their day in the intimidating halls of the capitol. One would be hard-pressed to argue that the former more fully carries the ideals of American democratic governance than does the latter.

While the case of Alaska adds depth and strength to the argument for the use of direct legislation in certain cases, it admittedly also offers a warning about the ways interest groups should pursue their goals within the process. The type of messaging utilized by both campaigns in the time leading up to the Measure 2 election serves as a textbook model of the median voter theory proposed by Downs. Namely, both sides found it a strategic imperative to play to a crowd not generally associated with either pro-life or pro-choice politics. As it so happens, both groups chose very similar messaging schemes in order to achieve this goal. Taking a page from *An*

Economic Theory of Democracy, both sides of the campaign began to more closely resemble one another in order to vie for the middle-of-the-road voters that would decide the fate of the initiative (Downs 116-117). In many ways, the case of the parental notification law in Alaska closely mirrored the nature of political discourse surrounding the proposed ban on abortion funding in Arkansas. However, whereas in the case of Arkansas groups were incentivized to provide the public with a diverse variety of competing information and rhetorical approaches to the issue at hand, in Alaska groups from both sides of the debate approached the problem of luring moderate voters to their camp with the same solution.

Until now, this study has used evidence from the experience of Arkansas and Alaska to argue that the salutary benefits of increased citizen engagement and rich public debate can indeed be achieved through the direct legislation of abortion policy. However, the interest groups that formed in the Alaska case and the types of messages they chose to wield had an unavoidable impact on the kind of discourse that existed in the months leading up to the 2010 primary election. Thus, the events and experience of Alaska's parental notification debate sound an important caveat to the overarching argument of this study. The specific obstacle to be overcome pertains to the choices made by interest groups who arguably lead the debate and shape the terms of public discourse: for the optimally beneficial effects of direct legislation to be realized, political messaging needs to be broad enough to encourage citizens to engage in dialogue with one another using a diverse array of political and ideological approaches - as was the case in Arkansas. When this happens, more citizens feel a stake in the issue, are encouraged to take it upon themselves to become educated and enlightened about the nuance and complexity of the matter at hand, and our system of democracy benefits all the more. As John Stuart Mill would argue, the more multi-faceted and oppositional arguments over an issue that are brought to

light, the better the chances for overcoming potentially misleading partial information, and ultimately, the more just and wise is the result.

In that this approach also encourages more citizens to feel that a certain message resonates with them, one can imagine that it would also benefit the interest groups who seek the support of these undecided individuals. In Alaska, however, the quality of debate surrounding the policy was kept more narrow than it ideally should have been in terms of providing the largest amount of information possible to a population with diverse interests, backgrounds and needs. Indeed, although libertarian adversity to government intervention is popular in the state, it by no means makes up the full spectrum of political ideologies held by Alaskans. As one citizen, for instance, wrote to the Anchorage Daily News during the 2009 legislative session: “I’m grateful that Gov. Sarah Palin supports my right to parent my daughters and I sincerely hope our legislators feel fit to restore my right to parent my own children.”¹⁰⁰ Another mused over a recent anti-consent law op-ed, arguing that it had advised Alaskan parents “to vote away our children’s right to be parented.”¹⁰¹ It is clear that many citizens backed their support of the bill because they felt it would assert a positive, state-protected right to parental knowledge and involvement.

However, as soon as Alaskans for Parental Rights – the name implying, of course, a negative right *from* government *intervention* rather than a positive one *to* government *protection* – this angle was all but lost from the public discourse. As one writer fumed once the ballot initiative debate was in full swing, “[w]e want as little government in our personal lives as possible...The Parental Notification ballot does nothing more than ensure that organizations like

¹⁰⁰ Halterman, Anita. Letter. “Parental consent measure overdue.” Anchorage Daily News. 31 March 2009. Web. 11 March 2012.

¹⁰¹ Syren, Tehrese. Letter. “Patkotak wrong about consent.” Anchorage Daily News. 11 April 2009. Web. 11 March 2012.

Planned Parenthood have no more right to meddle in a personal life than the government.”¹⁰²

Another rejoined, “The government cannot mandate something all pregnant teens need: a safe family with good communication,” and in this situation, bringing in the government would only worsen bad or even potentially harmful family situations.¹⁰³

The lively and multi-faceted debate over Proposed Amendments 65 and 68 made Arkansas a shining example of the potential benefits of direct legislation – namely, through encouraging a diverse population to participate in the American political sphere and providing an environment of agonal deliberation that serves to prevent the “fragmentation” of these disparate individuals and interests into “insular communities” that avoid communicating or collaborating with one another (Goi 60). The case of Alaska, however, leaves one to ponder the limits of the potential for direct legislation to provide these benefits when polling results and political strategies lead both parties to focus outreach and mobilization efforts on just one segment of the entire electorate. In turn, this effectively isolates one coveted group from the rest of citizens whose interests are just as much at stake, and in terms of the resulting policy, arguably ends up in a decision that does not truly reflect the will of the community at large. As both the case of Arkansas and Alaska have shown, the effect of opposing interest groups’ messaging and outreach strategies have the potential to do a significant amount of either harm or good in terms of the nature of public discourse it creates; beneficial effects, however, depend fully on not only the public excitement but the inclusion of citizens’ diverse interests and ideals.

¹⁰² Yeager, Ron. Letter. “Planned Parenthood meddles.” Anchorage Daily News. 6 June 2010. Web. 11 March 2012.

¹⁰³ Brink, Barbara. Letter. “Girls could be harmed.” Anchorage Daily News. 9 July 2010. Web. 11 March 2012.

CHAPTER 4

The Journey and the Destination: The Democratic Ideal Revisited

When Alexis de Tocqueville set out for the United States in order to investigate the nature of American democratic governance and citizenship, he found a myriad of institutions that held strong in the United States and served to shape the success of American democracy: the religious beliefs of the American people; the rural, sprawling nature of the country's demographics; and most famously, the strength of intermediary "associational" groups - now often referred to in political literature as "civil society." One typically overlooked section of *Democracy in America*, however, details de Tocqueville's musings regarding the role of the citizen jury in the American judicial system as a vital institution that strengthens American citizenship and the legitimacy of democratic rule. "If it entered into my present purpose to inquire how far trial by jury...contributes to insure the best administration of justice, I admit that its utility might be contested," he writes. The jury, however, is not purely juridical in function – that is, its sole purpose is not so simple as to fairly decide the fate of accused criminals or to negotiate civil grievances.

Rather, citizens are asked to serve on a jury so that they may be educated in the law and appreciate the responsibilities of active citizenship. Thus, the jury as an institution is first and foremost political, and "it must be regarded in this light in order to be duly appreciated" (791). As de Tocqueville reasons, the individual or group of individuals put in charge of punishing infractions of the law is "the real master of society" – thus, as a political institution, the citizen jury invests the people with a great power, "with the direction of society" itself (792). The way in which the institution of the jury successfully vests in American citizens this great power is through the process of education. Because the jury "serves to communicate the spirit of the

judges to the minds of all the citizens,” it instills in those citizens abilities that beforehand were exclusive to those in the position of judging. Namely, it teaches the average citizen to reason and to think critically about the application of a given law to a specific case. As such, de Tocqueville argues, the jury “is the soundest preparation for free institutions” and for the health of a society whose fate is ideally determined by a citizen-led democratic form of governance.

Furthermore, participation in a jury “teaches men to practice equity” as “every man earns to judge his neighbor as he would himself be judged” and instills a sense of responsibility for political action, making citizens “feel the duties which they are bound to discharge toward society. By obliging men to turn their attention to affairs which are not exclusively their own, it rubs off that individual egotism which is the rust of society” (798). Most importantly, de Tocqueville concludes, “[t]he jury contributes most powerfully to form the judgment and to increase the natural intelligence of a people, and this, in my opinion, is its greatest advantage.” Every juror learns of his or her rights and is given the opportunity to work with learned and experienced judges, not simply being taught by them but working hand-in-hand to accomplish the goal of bringing about justice to fellow citizens. The juror “becomes practically acquainted with the laws of his country,” forming relationships with fellow citizens in the process (799).

While de Tocqueville’s analysis of the jury system came before the introduction of direct legislation to the United States, much can be argued about the conclusions he drew from the example and its close similarity to the initiative and referendum process today. The primary function of the jury, as de Tocqueville saw it, is not simply to bring about a more just result for the parties in question (although this may indeed be one felicitous side-effect of calling a defendant before a diverse group of his or her peers, rather than one all-powerful member of the elite and learned class, to be judged). Rather, the primary purpose of the citizen jury lay not in

the immediate *result* it brings about on the quality and fairness of the judicial system, but rather in the very *process* of educating citizens, acquainting them with the language and the application of the law, and instilling in them the values that will encourage a lifetime of public service and a culture of democratic engagement.

As the wheels of history continue to turn, citizens should become more enlightened as the empowering impact of jury participation spreads to wider segments of the population, ultimately increasing the “natural intelligence” of the nation’s people. Soon enough, judgments will become more sound, the law better understood and the relations between juror, judge and defendant more equitable and fair. Though justice is not the original purpose, as de Tocqueville would argue, given time it shall serve this great benefit to all. Similarly, the system of direct legislation can be said to act first and foremost as an institution that by its very participatory nature educates the public and forms them into responsible and intelligent individuals capable of making sound judgments about the matter at hand. However, this argument is not limited to the benefits of the process itself; it also has a salutary effect on the ability for democratically ordained laws and policies to truly reflect the real interests of the people. Deliberative democrats argue today that over time, the quality of the decisions made by the public will be better simply by the very same transformation de Tocqueville argued takes place within the jury system.

This improved result in law-making, these scholars argue, does not necessarily imply that particularly “good” or “bad” laws would be made, but that as citizens continue to learn through experience and inhabit a position of great power with their hands at the helm of society, the policies decided upon would come to better represent citizens’ real interests – not simply those interests that they are persuaded by others with more power to believe are their own. Indeed, in the same way that de Tocqueville argued that the uncertain fate of an accused criminal at the

hands of the less-educated public would be worthwhile in the end when a more enlightened and responsible public would emerge (thus making latter judgments all the more fair and reasonable to accused criminals or to the parties of a civil case in the future), the eventual improvement in the nature of laws passed is deemed by deliberative democrats to be certainly worth the initial risk of placing the public in power in the first place.

Thus, while direct legislation may not initially have the most beneficial effect on the actual laws being passed, it does wield a salutary force on the intelligence and competence of the citizens in charge of creating and passing those laws. Over time, these citizens will learn from experience over each and every electoral cycle, forming them into all the more reasoned and skilled lay policy-makers. Though perhaps unwittingly, Jerry Cox of the Arkansas Family Council echoed this point in his own words when he said that the Council uses the initiative process not so much an instrument by which to change public policy as one that has the most potential to influence public opinion. If the ultimate goal of direct legislation (*vis à vis de* Tocqueville's parallel analysis of the goal of the citizen jury) is to bring about an enlightened and responsible public more capable of understanding and advocating for their own real interests, it then follows that these real interests cannot be fully known prior to beginning the process of debate and deliberation.

Political theorist Jürgen Habermas explains in depth the normative role of this discourse-driven system of citizen policy-making in "Three Normative Models of Democracy." In the view of law-making as one primarily guided by community dialogue and exploration of individual and community interests, "democratic will-formation" – or the process by which citizens come to understand their own position on a given policy – "draws its legitimating force not from a previous convergence of settled ethical convictions but both from the communicative

presuppositions that allow the better arguments to come into play in various forms of deliberation and from the procedures that secure fair bargaining processes” (239).¹⁰⁴ In other words, the act of participatory democracy does not simply entail a formal vote by an individual on preconceived positions of his or her interest and opinion; rather, the very act of discourse and deliberation with others facing the same political question is itself crucial in order for direct democracy to reflect accurately the real will of the people. Through deliberation and discussion with others, an individual becomes aware that the community surrounding him or her faces the same problems, gets “a clear sense of commonalities and differences” within the community, and ultimately comes to a better understanding of him or herself and who he or she “would like to be” (229).

Following from this, the citizen comes to understand the kind of policies that would serve not only him or herself well, but be beneficial to those in the community whose interests he or she holds in common, “who owe their identities to the same traditions and similar formation processes” (239). Indeed, one will note that in both Arkansas and Alaska, the typically narrow scope of rhetoric and organizing strategies utilized by interest groups on both sides of the abortion debate was considerably widened to include a more diverse group of individuals who discussed the issues with one another on terms that stretched beyond the limits familiar to abortion policy debate in the representative system. As citizens of disparate backgrounds and ideologies were encouraged to voice their opinions and interests regarding the proposed policy to one another, social bridges were forged and community values and needs were realized – an occurrence that was hardly evident to have occurred in the context of indirect law-making.

¹⁰⁴ Habermas, Jürgen. “Three Normative Models of Democracy.” *Theories of Democracy: A Reader*. Ed. Ronald J. Terchek and Thomas C. Conte. Lanham, MD: Rowman & Littlefield Publishers, Inc, 2001. 236-243. Print.

As John Dunn quoted Greek statesman Pericles, “we Athenians decide public questions for ourselves or at least endeavor to arrive at a sound understanding of them, in the belief that it is not debate which is a hindrance to action, but rather not to be instructed by debate before the time comes to action” (Dunn 27). Citizens are, in every sense of the term, *instructed* by the very process of debate that will go on to instruct the law of the land. The very reason for citizens to be able to inhabit a position of power is to first learn from this power before being truly able to wield it with the most effectiveness and responsibility possible. These newly empowered citizens of democracy may not even know their own interests until they are first given an opportunity to discuss important issues in an arena in which their decisions are given a sense of influence and weight. In the words of John Dewey, “[a]n American democracy can serve the world only as it demonstrates in the conduct of its own life the efficacy of plural, partial, and experimental methods in securing and maintaining an ever-increasing release of the powers of human nature, in service of a freedom which is cooperative and a cooperation which is voluntary” (167).¹⁰⁵ From the stories of Arkansas and Alaska, it is clear that citizens do take on the responsibility of law-making with earnestness and, through the process, do grow as participants in a thriving democracy.

In addition, as a so-called “Type 4” electoral contest between two parties interested in issues of public morality and social justice (as delineated by Donovan, Bowler, McCuan and Fernandez in *Citizens as Legislators*) the issue of abortion indeed attracts lower levels of campaign spending – spending that could otherwise potentially outweigh the very benefits of direct legislation argued in this study. Alaskans for Parental Rights reported a final budget of

¹⁰⁵ Dewey, John. “Democratic Ends Need Democratic Methods for Their Realization.” *Theories of Democracy: A Reader*. Ed. Ronald J. Terchek and Thomas C. Conte. Lanham, MD: Rowman & Littlefield Publishers, Inc, 2001. 167-168. Print.

\$180,082 by election day while Alaskans Against Government Mandates raked in \$594,682. Even this number, however, pales in comparison to other ballot measures Alaskans have faced in recent years: a law that would ban public donations from unions and other related organizations saw a total of \$1,447,333 raised between the two campaigns, the majority made up by organized labor interests. A 2006 organization proposing a cruise ship tax elicited \$8,457 while their industry opponents spent \$1,357,424; a group in favor of raising water quality regulations spent \$2,926,507 to opposed mining interest groups' \$8,921,542. Similarly, in Arkansas, a 2004 term limit initiative saw a combined budget of \$1,531,460 and a 2008 measure that would set up a new lottery system took in \$1,894,111, in both cases the interested opponents outspending proponents heavily.¹⁰⁶

In these cases, the amount of funds that are raised in order to pump out highly visible media campaigns and gain celebrity endorsements matters less than does the salience of the issue at hand and a driving passion on behalf of citizens involved in its debate. The case of Alaska does specifically warn of the limits of a fully inclusive public discourse when the desire to tap into a nation-wide trend overpowers the value of reaching out to a more diverse set of interests; it also highlights the importance of interest groups and their messaging strategies and admonishes these groups to pursue campaigns that incorporate broad and diverse areas of public interest and ideology - if not for the sake of American democracy more generally, than likely for the sake of the interest group's own electoral success and its ability to stay competitive. In both states, however, contending groups acted as a "check" on one another, serving as watchdogs to potentially misleading information while providing a basis of knowledge and language with

¹⁰⁶ "State Overviews." *Follow the Money*. National Institute on Money in State Politics, 2012. Web. 8 April 2012.

<<http://www.followthemoney.org/database/search.phtml?searchbox=arkansas>>.

which everyday citizens could discuss the matter with one another. Even within the relatively narrow context of dialogue in Alaska, the tremendous effect of engaging voters to discuss current political matters with one another and express their opinions in public arenas such as newspapers and rallies was undeniably felt.

FINAL THOUGHTS: ENDING ON A PERSONAL NOTE

The stories of everyday citizens and seasoned political professionals alike rallying for and against controversial and compelling abortion-related legislation in their home states do not make up the dominant narrative of direct legislation in the academic world. Indeed, many scholars on the subject have come to all but fully disregard direct legislation as only a tool for high-powered monetary interests and slick marketing campaigns to sway voters to make a decision that might be against their own interests as citizens and as tax-payers, as families and as community members. As a passionately engaged citizen and pro-choice activist well-versed on the issue of abortion policy, I too approached the subject of direct legislation with caution for the potential havoc it might wreak on the delicate balancing act of American democratic governance and with disdain for those voters who possess the power to wreak such havoc by voting without adequate education on the subject or under the misleading drive of cleverly crafted advertising. The cases of Alaska and Arkansas, however, told me a different story.

I have come to realize through this study that the process of direct legislation can have a positive impact not only on the health of civic engagement and community political discourse more generally, but on the very nature of the actual laws it serves to pass. Numerous academic studies have observed Congress and state legislatures becoming increasingly polarized over recent years, and the latest onslaught of extreme abortion-related policies up for debate in state

legislatures speaks to this trend.^{107 108} Whereas the context of direct legislation served as a moderating influence on the scope of the laws proposed and on the terms of debate with which they were discussed, the process of representative law-making in the age of increasing political polarization only encourages more extreme measures. These laws not only have pervasive and wide-ranging impacts on issues of health, equity and justice, but only serve to further to widen the gulf of understanding and compromise between citizens and law-makers on either side of the abortion debate. Regardless of where one stands on the issue of abortion itself, an ever-increasing rift between the two sides of this discussion will have nothing but negative consequences on the overall health of our democracy and on our country's ability to effectively and compassionately govern its citizens.

In both Arkansas as in Alaska, the desire of a group of citizens to effect political change is potent, and arguably necessary, from the very beginning of the process. This first spark of interest, however, can only do so much in the absence of a system which institutionalizes and legitimizes the placing of political power in the hands of everyday citizens and which truly entrusts them with the responsibility of becoming more enlightened and engaged individuals through this process. As Dewey argued, "the man who wears the shoe" must be given a means of recourse when he realizes "that it pinches" – he must know that his actions to alleviate the issue at hand will be duly felt and processed. Only then can advocacy groups and citizen leaders on both sides gather and consolidate efforts, build resources and work to include a larger and more diverse population of newly empowered citizens in order to form a coherent, lively and all

¹⁰⁷ Weisman, Jonathan. "2 House Democrats Defeated After Opposing Health Law." New York Times. 26 April 2012: A1. Print.

¹⁰⁸ Raasch, Chuck. "Abortion restrictions gain steam in the states" USA Today. 26 April 2012. Web. 26 April 2012. <<http://www.usatoday.com/news/health/story/2012-04-25/states-anti-abortion-legislation/54538866/1>>.

the more equitable public discourse from its humble grassroots beginnings. The role of advocacy groups is to band citizens together and set the stage for a discourse in order to discover exactly “where it pinches,” and finally to work together with others in the community to approach the problem with a solution that would serve the newly discovered interests of the public at large.

In 1984’s *The Future of Democracy*, Italian philosopher Norberto Bobbio regards the work of John Stuart Mill and his view of participatory democracy: through political discussion, Mill saw, “the worker transcends his repetitious work within the narrow confines of the factory, and is able to understand the relationship between distant events and his own interests, and have contact with citizens different from those he has dealings with in everyday life and thus consciously become a member of the community” (195).¹⁰⁹ The greatest lesson that can be taken from the states of Alaska and Arkansas is that the initiative and referendum process, while imperfect, plays a vital role in transforming the average worker, mother or student into an exemplary citizen who is more in touch with others in the community, aware of the complexity of the American system of law and of the responsibility and thought needed to wield the power to change this law justly. As is the case with de Tocqueville’s observed citizen-jury, the point is not that the institution should function perfectly from the outset; rather, the essential hope and driving ideal of direct legislation as an integral democratic institution is thus: that through the very process of political empowerment, engagement, civic education and experience, the institution, the citizens who act within it, and the Union bound to follow the direction of the laws those citizens enact are in a constant state of becoming all the more perfect.

¹⁰⁹ Bobbio, Norberto. Selection from *The Future of Democracy. Theories of Democracy: A Reader*. Ed. Ronald J. Terchek and Thomas C. Conte. Lanham, MD: Rowman & Littlefield Publishers, Inc, 2001. 188-200. Print.

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