

ARTICLE

SOCIAL CHOICE, CRYPTO-INITIATIVES, AND POLICYMAKING BY DIRECT DEMOCRACY

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I. INTRODUCTION

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

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1. For an overview of the history of initiatives and political parties, see Daniel A. Smith, *Was Rove Right? The Partisan Wedge and Turnout Effects of Issue 1, Ohio's 2004 Ballot Initiative to Ban Gay Marriage* (Jan. 2005) (unpublished manuscript presented at the Symposium on the Impact of Direct Democracy, University of California, Irvine, Jan. 14–15, 2005), at http://lawweb.usc.edu/cs/lp/conferences/direct_democracy_05/documents/smith.pdf.

2. Elisabeth R. Gerber, *Legislative Response to the Threat of Popular Initiatives*, 40 AM. J. POL. SCI. 99 (1996).

3. See ELISABETH R. GERBER, *THE POPULIST PARADOX: INTEREST GROUP INFLUENCE AND THE PROMISE OF DIRECT LEGISLATION* (1999) [hereinafter GERBER: *THE POPULIST PARADOX*]; JOHN G. MATSUSAKA, *FOR THE MANY OR THE FEW: THE INITIATIVE, PUBLIC POLICY AND AMERICAN DEMOCRACY* (2004) [hereinafter MATSUSAKA, *FOR THE MANY*]; Elisabeth R. Gerber & Arthur Lupia,

A few scholars, however, have found reason to pause in their celebration of the initiative, finding shortcomings in its process, its outcomes, or both.⁴ In this Article we argue that initiatives will only infrequently improve the public's welfare. We begin with a survey of the basic social choice and public choice critiques of the initiative process. We argue that, despite recent rigorous scholarly attention on the effects of initiatives,⁵ we find little reason yet to reject the social and public choice criticisms of policymaking via direct democracy. We then offer a series of anecdotes about the rise of "crypto-initiatives," which are initiatives that use direct democracy as an instrument to achieve nonpolicy-related goals. Finally, we conclude that the problems inherent in the initiative process are being magnified by the increase in crypto-initiatives and the rise of the crypto-political machines, the new 527⁶ political action committees ("PACs"), that sponsor them. Increasingly, the public welfare may be only an incidental consideration in the sponsorship, passage, and implementation of initiatives.⁷ This in turn implies that we consider anew limiting or amending the initiative process.

Campaign Competition and Policy Responsiveness in Direct Legislation Elections, 17 POL. BEHAV. 287 (1995); Gerber, *supra* note 2; Elisabeth R. Gerber, *Pressuring Legislatures Through the Use of the Initiative: Two Forms of Indirect Influence*, in CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES 191–208, (Shaun Bowler et al. eds., 1998); D. Roderick Kiewiet & Kristin Szakaly, *Constitutional Limitations on Borrowing: An Analysis of State Bonded Indebtedness*, 12 J.L. ECON. & ORG. 62 (1996); Arthur Lupia & John G. Matsusaka, *Direct Democracy: New Approaches to Old Questions*, 7 ANN. REV. POL. SCI. 463 (2004); John G. Matsusaka, *Fiscal Effects of the Voter Initiative: Evidence from the Last 30 Years*, 103 J. POL. ECON. 587 (1995) [hereinafter Matsusaka, *Evidence*]; John G. Matsusaka, *Fiscal Effects of the Voter Initiative in the First Half of the 20th Century*, 43 J.L. & ECON. 619 (2000); John G. Matsusaka & Nolan M. McCarty, *Political Resource Allocation: Benefits and Costs of Voter Initiatives*, 17 J.L. ECON. & ORG. 413 (2001).

4. See DAVID S. BRODER, *DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY* 1, 3–5 (2000); ELISABETH R. GERBER, ARTHUR LUPIA, MATHEW D. MCCUBBINS & D. RODERICK KIEWIET, *STEALING THE INITIATIVE: HOW STATE GOVERNMENT RESPONDS TO DIRECT DEMOCRACY* 4–5 (2001); Bruce E. Cain & Roger G. Noll, *Principles of State Constitutional Design, in CONSTITUTIONAL REFORM IN CALIFORNIA: MAKING STATE GOVERNMENT MORE EFFECTIVE AND RESPONSIVE* 9, 20–21, 23–26 (Bruce E. Cain & Roger G. Noll eds., 1995); Elizabeth Garrett, *Who Directs Direct Democracy?*, 4 U. CHI. L. SCH. ROUNDTABLE 17, 18 (1997); Elisabeth R. Gerber, Arthur Lupia & Mathew D. McCubbins, *When Does Government Limit the Impact of Voter Initiatives? The Politics of Implementation and Enforcement*, 66 J. POL. 43 (2004); Mathew D. McCubbins, *Putting the State Back into State Government: The Constitution and the Budget*, in CONSTITUTIONAL REFORM IN CALIFORNIA: MAKING STATE GOVERNMENT MORE EFFECTIVE AND RESPONSIVE, *supra*, at 353, 353–55.

5. See Lupia & Matsusaka, *supra* note 3.

6. See I.R.C. § 527 (2000).

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

II. POLICIES, INITIATIVES, AND THE LEGISLATURE

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

Although we will later discuss the rise of crypto-initiatives, for which policy is not the primary goal, let us begin by considering initiatives for which policy change is the primary goal. We assume that there is someone who wants to change policy, and as a starting point, we assume a simple spatial model of policy choice, as is common in the literature.⁸ We assume

8. See DUNCAN BLACK, *THE THEORY OF COMMITTEES AND ELECTIONS* (1958); ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957); Kenneth A. Shepsle, *Institutional Arrangements and Equilibrium in Multidimensional Voting Models*, 23 AM. J. POL. SCI. 27 (1979). In particular, as in Kenneth Shepsle's work, we use six assumptions to model agenda setting in the legislature. First, there are K policy dimensions or issues that can be adjusted by the legislature. Both status quo policies and policy proposals (bills) are represented as points in K -dimensional Euclidean space. Second, there are M members in the legislature, whose preferences over the policy dimensions are additively separable and who vote strategically. Specifically, on any given dimension k , legislator j has a unique ideal point on that dimension, x_k^j , which is common knowledge. The utility that legislator j derives from a given policy vector, $z = (z_1, \dots, z_n)$, declines with the sum of the distances between x_k^j and z_k : $u_k(z) = -\sum_j |x_k^j - z_k|$. We assume that members seek to maximize the utility that they derive

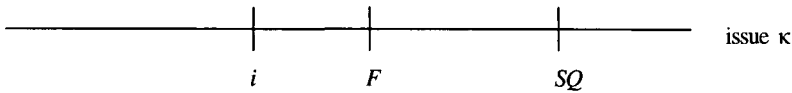
from the final policy choice of the legislature (in other words, they seek to minimize the summed distances between their ideal points and the final choices on each dimension). A consequence of this assumption is that the model of policy choice is, in essence, reduced to a series of independent unidimensional choices. Third, any legislator may introduce a bill dealing with any single issue dimension. Such bills may or may not be allowed onto the floor, depending on the actions taken at the agenda-setting stage. Fourth, there exist agenda-setting agents who have the right to block bills from reaching the floor within their (fixed) jurisdictions. Fifth, the legislative sequence consists of only four stages: (1) members introduce bills; (2) some agent selects (or some agents select) the bills that the floor will consider (more specifically, the agents veto the bills they wish to veto and the remainder are thereby selected for floor consideration); (3) the floor then considers the bills presented to it, one by one, amending them as it sees fit; and (4) the floor then votes on final passage of each bill (as amended if amended). Sixth, we focus on the special case in which all bills are considered under open rules, subject only to a germaneness restriction, as this is the simplest case to posit.

Shepsle suggests that there are three possible agenda-setting agents in the legislature: the Committee of the Whole, legislative parties, and committees. See Shepsle, *supra*, at 31–32. The third possibility, wherein autonomous and independent committees set the floor agenda, is the topic of Shepsle and Barry Weingast's classic analyses. Kenneth A. Shepsle & Barry R. Weingast, *Structure-Induced Equilibrium and Legislative Choice*, 37 PUB. CHOICE 503 (1981). Gary Cox and Mathew McCubbins's focus is on the agenda-setting powers of the first two agents listed: the floor as a whole and the parties, the majority party in particular. GARY W. COX & MATHEW MCCUBBINS, *SETTING THE AGENDA: RESPONSIVE PARTY GOVERNMENT IN THE U.S. HOUSE OF REPRESENTATIVES* (2005). For our analysis here it does not matter who we think is the legislative agenda setter.

that each policy dimension is separable and that legislators, initiative sponsors, and voters have preferences that are separable by dimension. Let SQ_k be the status quo policy on dimension k . Policy can change in one of two ways: (1) either the legislature enacts a new policy, Z_k , which in a one-dimensional model, by Black's Theorem,⁹ would move policy to F_k , the floor median; or (2) the people can pass an initiative, i_k . If policy remains unchanged then SQ_k is the final policy outcome.

We further assume that actions are costly. That is, it is costly to lobby the legislature to get them to take up issue $\kappa \in [1, \dots, K]$ and change policy on that issue to F_k .¹⁰ The legislature can handle far fewer than K issues per term, and thus, in simplest terms, lobbyists must pay those who control the legislative agenda to induce them to incur the opportunity costs of acting on issue κ . We will ignore the game that this creates among lobbyists, as that is the topic of another paper.¹¹ If a policy advocate with an ideal point $x_k = i_k$ seeks to change policy on issue κ , as illustrated in Figure 1 (where we have dropped the subscript k), and is able to pay the cost to have the legislature put it on the agenda (denoted C_L), then the legislature will adopt F_k , on issue κ , even though the sponsor would prefer i_k .

FIGURE 1. Placement of policy if legislature acts



9. BLACK, *supra* note 8.

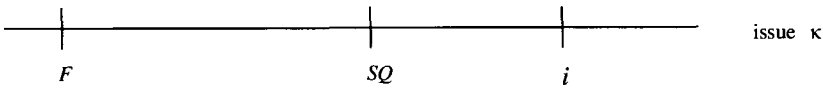
10. F may differ on each issue, but for simplicity and without loss of generality, we drop the issue subscripts here. In addition to those mentioned above, our model makes the following assumptions: (1) there is no more than one group actively lobbying on one issue κ in each year; (2) voters view the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

11. A more traditional model of lobbying might posit that the interest group pays a fee in order to shift the legislative floor's ideal point from a position that perfectly represents constituents to a corrupted ideal point that is closer to the interest group's goal. Indeed, this sort of corruption of legislatures by lobbyists is precisely what motivated many Progressives to push for direct democracy in the first place. KEVIN STARR, *INVENTING THE DREAM: CALIFORNIA THROUGH THE PROGRESSIVE ERA 199-234* (1985). Whether the policy passed by the floor (F), however, reflects the floor's true ideal point, or instead a revealed preference influenced by the lobbyists' efforts, does not change the subsequent finding of our model, which is that groups will only pursue costly initiatives when they move policy much farther away from the status quo than the legislature would have.

Notice that the legislature will not be able to guarantee the adoption of a policy other than the floor median, F_k . Once the legislature brings a proposal to the floor on issue κ , majoritarian influences will move policy to the floor median, F_k . Coherent, concerted majorities may be able to pass a policy different than F_k , using closed rules or disciplined voting, but they will not be able to always guarantee this outcome.

Therefore, a policy advocate has to judge whether F_k is sufficient, given the lobbying costs, or whether an initiative should be sought in an attempt to force the enactment of i_k , given the costs of qualifying and passing an initiative (denoted C_I) and the probability (denoted p) of passing an initiative located at i_k .¹² Dropping the subscripts for ease of exposition, notice that if i is to the right of SQ , as in Figure 2, the policy advocate will never lobby the legislature for access as the policy will end up at F , making the policy advocate worse off than leaving the policy at SQ .

FIGURE 2. Initiative sponsor will not lobby legislature



If it is indeed more costly to qualify and pass an initiative than it is to lobby the legislature for consideration of a new policy on issue κ , then we will see only two types of initiatives.¹³ First, as in Figure 1, if i is close to F , then it will not be worth the extra cost (relative to the cost of lobbying) of qualifying and passing an initiative, and the initiative sponsor will choose a lobbying strategy or will sit out the policymaking process and accept whatever the legislature produces. Thus, only initiatives that are

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

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

extreme *relative to F*, the legislative median, will be brought to the public as proposed policy changes.¹⁴ If the probability, p , of passing an initiative declines the further i is from SQ , then there will exist a tradeoff between the costs of passing an initiative, C_i , and the probability of getting it passed, which will impart a pressure on the policy advocate to move the proposed policy away from the ideal point and closer to SQ . This tradeoff creates a limit on how extreme policy advocates will make their initiatives.

Second, if i is on the other side of SQ from F , as in Figure 2, then policy advocates will never pursue a lobbying strategy and will instead "go public" with an initiative to change policy. Such an action, however, would seem to be discouraged by strategic calculations, since the legislature could then respond by placing a referendum on the ballot to move policy back to F or to the voting median, V , if the median voter prefers i to F and SQ (and if V is closer to F than is i).¹⁵ The condition for an initiative of this sort to be placed on the ballot is that V must be on the same side of SQ as is i and on the opposite side of F . Presumably, by Black's Theorem, V wins if it is offered to the people as a referendum, so the question for the policy advocate is whether it is worth the costs of proposing an initiative on this issue in order to get V . If V is close to SQ , then the answer is almost surely that it is not worth it. So, again, only extreme initiatives will be proposed.¹⁶

Extreme policies seem unlikely to enhance the public welfare, but they need not necessarily be bad. If the transactions costs associated with enforcement, however, grow with the distance of the policy change from SQ , then we may begin to think otherwise. Numerous transaction costs arise from the process of enforcing a new rule: the cost of investigating violations of the rule, the costs of bringing suits alleging violations of the rule, the administrative costs of the agency enforcing the rule, the public's cost of monitoring the government agency that enforces the rule, the costs of the losses that occur due to undeterred violations of the law, the costs of policing opportunistic behavior, and the costs associated with new behaviors that arise as people seek to get out from under the rule's effects. The larger the policy change, the higher the dead weight losses associated with it (because the more you are taking, the harder people will try to avoid

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

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

16. We will ignore the costs of getting the legislature to implement initiative policies that are far from F . For a review of that thorny issue, see GERBER ET AL., *supra* note 4, at 12-25.

it, and the easier it will be to avoid, the more expensive will be the enforcement, and so on). It seems reasonable to assume that transaction costs increase monotonically (if not faster) with the distance of the policy change from SQ .¹⁷ There is a point, then, at some distance from SQ , where the transaction costs of a policy change exceed the sum of utility gains (if any) for society, even if the policy change is otherwise favored by the voting median, V .¹⁸

The problem is exacerbated for initiatives, as the electoral environment in which voters make their decisions lacks informational cues about these transactions costs.¹⁹ In the legislative process, by comparison, lobbyists, agencies, and constituents can inform legislators about dead weight losses more effectively, and political parties have positions about both acceptable dead weight losses and who should bear them. The implication of this reasoning is that policy proposals that end up on the ballot as initiatives are likely to lead to lower social welfare than policies enacted through the legislative process.²⁰

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

17. Essentially, we are assuming that, in developed states, we are past the point of increasing returns to scale in coercion and are decreasing returns to scale in coercion. John Wallis and Douglas North show that transactions costs grew as a percent of GNP in the United States over the twentieth century. John J. Wallis & Douglas C. North, *Measuring the Transaction Sector in the American Economy, 1870–1970*, in *LONG-TERM FACTORS IN AMERICAN ECONOMIC GROWTH* 95 (Stanley L. Engerman & Robert E. Gallman eds., 1986). This appears to be true for other developed countries in Europe and for Japan as well.

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

19. As evidence for this proposition consider that many initiatives start out with high voter approval that declines as the opposition campaign gets started and that heavy spending can defeat almost any initiative. Often ad campaigns sell initiatives as good for everyone or bad for everyone, obscuring their true costs. Occasionally, campaigns highlight that the policy is good only for a few beneficiaries. Rarely do initiative campaigns highlight the direct transfer of resources from one group to another. When the costs are highlighted, the opposition message may get out in enough ways to make the losses seem large.

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

III. WHO BENEFITS FROM INITIATIVES?

Initiative campaigns are costly. In 2002 over \$173 million was spent on campaigns for 117 initiatives.²¹ The most expensive initiative campaign in 2002 was the “Yes on Arizona 202” campaign on behalf of Indian gaming, which cost over \$21 million.²² This comes nowhere close to the record \$92 million spent on the 1998 initiative campaign for California Proposition 5, which was also about Indian gaming.²³ This money has to come from somewhere. What types of policies are most likely to generate sufficient returns so that the benefits exceed the costs of taking an initiative to the public? It is fairly standard to categorize public policy according to how diffuse or concentrated its benefits and costs are.²⁴ Some policies have diffuse benefits, or benefits that spread widely in small amounts over the population, while others have concentrated benefits that are more narrowly targeted to an easily identifiable set of benefactors. National defense, clean air, and clean water are examples of policies with diffuse benefits, while farm price supports or the bail out of Chrysler or Lockheed are seen as examples of concentrated benefits. Costs can be similarly concentrated or diffuse. The most commonly used examples of concentrated costs are luxury taxes or zoning laws, while value-added taxes are considered diffuse. It is also well known that when benefits or costs are diffuse, collective action is difficult.²⁵ If benefits or costs are concentrated, then there exists a private entrepreneur, a privileged person, group or party, who will bear the cost of collective action. Thus, all else constant, as has long been discussed in the lobbying literature, lobbying should take place only on policies where there are concentrated benefits or costs. If the same logic holds for initiatives, only those with concentrated benefits will be proposed and financed.

21. GALEN NELSON, *BALLOT FUNDING.ORG, A BUYER'S GUIDE TO BALLOT MEASURES: THE ROLE OF MONEY IN 2002 BALLOT INITIATIVE CAMPAIGNS* (2003), available at http://www.ballotfunding.org/Buyer's_Guide_to_Ballot_Measure_Funding_2002.pdf.

22. Cal. Sec'y of State, *Financing California's Statewide Ballot Measures: Campaign Receipts and Expenditures Through Dec. 31, 1998*, at http://www.ss.ca.gov/prd/bmprimary98_final/bmprimary_final_mainpage.htm (last visited May 5, 2005).

23. *Id.* The willingness to expend such sums of money on the campaigns suggests that there are significant gains for the sponsors of Indian gaming initiatives.

24. See, e.g., RANDALL B. RIPLEY & GRACE A. FRANKLIN, *CONGRESS, THE BUREAUCRACY AND PUBLIC POLICY* (5th ed. 1991); *THE POLITICS OF REGULATION* (James Q. Wilson ed., 1980).

25. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 126–27 (2d ed. 1971).

It is also clear from the literature on initiatives that a vigorous opposition will almost always sink an initiative at the ballot.²⁶ Policies and initiatives with concentrated costs will be more likely to draw organized opposition, all else constant. Thus, from our typology of initiatives, policies with concentrated benefits will be most likely to make it on the ballot, and those with diffuse costs, and thus lacking organized opposition, will be most likely to pass, all else constant.²⁷

IV. THE INITIATIVE INFORMATION ENVIRONMENT

The conclusion about the types of initiatives that will make it on the ballot has important implications for our understanding of how voters make decisions on these issues. One of the common findings in models of voter decisionmaking is that in complete information settings, the majority, represented by the median voter, is made better off by an initiative process. The problem is that voters typically do not have complete information or ready substitutes. Arthur Lupia shows that voters can use cues and information shortcuts to substitute for complete information.²⁸ Elisabeth Gerber and Lupia show, however, that this conclusion does not hold in an incomplete information environment in which voters (1) do not know the policy implications of an initiative and (2) cannot or chose not to seek opinions of credible endorsers.²⁹ Furthermore, Lupia and McCubbins find that the credibility of an endorsement requires that one of four conditions for trust exist, the principal one being that there are two endorsers, each

26. GERBER, *THE POPULIST PARADOX*, *supra* note 3, at 10–11. *But see* John M. de Figueiredo, Chang-Ho Ji & Thad Kousser, *Why Do Initiative Backers Waste Their Money? Revisiting the Research on Campaign Spending and Direct Democracy* (Apr. 2005) (unpublished manuscript presented at the Conference on Direct Democracy in the West: Historical Roots and Political Realities, Stanford University, April 14–15, 2005, on file with authors) (providing new evidence challenging this finding).

27. We recognize that there are exceptions to this rule. In California, policy entrepreneurs such as Howard Jarvis (Proposition 13 in 1978) have brought initiatives with diffuse benefits to the ballot. Such initiatives, however, will only qualify in the rare circumstance that a “privileged group” solves the inherent collective action problem. *See* OLSON, *supra* note 25, at 49–50. This state has also provided instances of initiatives with concentrated benefits and costs, such as the battles between Indian tribes with gaming operations and Las Vegas casinos (Propositions 68 and 70 on the November 2004 ballot). But note that both initiatives faced well-funded opposition campaigns and lost badly.

28. Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63 (1994). On some issues, such as taxation and social issues, voters may not acquire any information during the campaign process because they already have well-formed preferences. For other issues, however, that appear on the ballot (such as nuclear power, the lottery, Indian gaming, school reform, health insurance, and the sale of state land, among others) voters may need the campaign process to serve informational purposes. It is to these types of issues that this section is addressed.

29. Gerber & Lupia, *supra* note 3.

believed to be knowledgeable and each competing on opposing sides.³⁰ Moreover, voters must believe that these competing endorsers are strictly adversarial, analogous to opposing attorneys in a legal setting. If this is not the case, then the statements made by the initiative competitors may not be trustworthy and may not be credible to voters. If none of these information conditions are met, scholars have recognized that policy outcomes from the initiative process may not improve outcomes relative to the status quo.³¹ Given that the ability of voters to make informed decisions depends crucially on the type of information environment in which voters make choices, the relevant question becomes: how likely is it that an initiative campaign will produce the conditions for trust that allow voters to use cues from endorsers as substitutes for full information?

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

Second, it is unlikely that advertising campaigns will present voters with information about the tradeoffs between initiatives (either across time or across items on the same ballot), which means that the initiative campaigns are unlikely to satisfy the condition regarding knowledge of

30. ARTHUR LUPIA & MATHEW D. MCCUBBINS, *THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW?* 85–86 (1998). Lupia and McCubbins derive and experimentally test several conditions required for learning. The first of these conditions is the knowledge condition, which will only be met if the person receiving information believes that an endorser has knowledge or expertise about what he says. The second general condition is the trust condition, which will only be met if a person believes that the endorser is trustworthy. In order for this person to believe that an endorser is trustworthy, however, one of four additional conditions must also be met: (1) the person and endorser must have common interests; (2) there must be a threat of verification imposed on the endorser; (3) the endorser must face penalties for lying; or (4) there must be observable, costly effort on the part of the endorser. *See id.* at 54–59.

31. “The conclusion that the majority is always better off having the initiative and referendum available is a fairly general property of complete information models but does not necessarily hold with incomplete information.” Lupia & Matsusaka, *supra* note 3, at 477.

policy implications. With numerous initiatives on the ballot, even if voters can gain knowledge about each choice individually, they may not be able to predict the consequences of their actions when the interactive effects of all initiatives are taken together. Providing information about the tradeoffs among initiatives or providing information about policy interactions would seem unlikely to help a campaign, while running the very real risk of creating opponents out of otherwise indifferent campaigns.

The argument just presented provides good reason to believe that initiative campaigns will rarely approximate conditions whereby voters can gain knowledge about their initiative choices. Indeed, Lupia's study of five 1988 California insurance initiatives, which pitted trial lawyers against insurance companies, seems more like an exception than the rule.³² In that year there were multiple ballot measures all addressing the same general concerns and both opponents and proponents of the initiatives had a strong incentive to campaign for their side. The generation of vigorous opposition and support campaigns suggests that the stakes in this election were massive because it made sense to run an initiative even in the face of guaranteed opposition.³³ This provided an environment that was likely to create the conditions for voters to make informed decisions, as Lupia found, but it is not clear that this empirical example translates to the typical election year and to the typical initiative environment, given the conclusions derived from the typology of initiatives above.³⁴ Furthermore, voters must also solve the information problem presented by having many initiatives at many different levels of government (city, county, and state).³⁵

32. Lupia, *supra* note 28.

33. *See id.* at 64–65. The expectation of opposition changes the probability of qualifying and passing an initiative, but if the stakes are high enough the sponsor may still continue with the initiative process.

34. Most of the literature, including this argument, is directed primarily at statewide campaigns. The full information conditions seem less likely to occur in the many city, county, or regional initiatives that change local government charters. For instance, imagine a proposal to change from a weak to strong mayoral form of government. Is it likely that both sides will be organized and run campaigns? On the other hand, local initiatives that deal with land use issues probably will tap issues with concentrated costs and benefits, and thus spur serious campaigns on both sides. Because of this, however, they are more likely to lose.

35. Between 60% and 70% of the U.S. population lives in a city with an initiative process, and between 70% and 75% of the U.S. population lives in either a city or a state with an initiative process. *See* John G. Matsusaka, Initiative and Referendum Inst., Univ. of S. Cal., *I & R in American Cities: Basic Patterns*, at <http://www.iandrinstute.org/New%20IR1%20Website%20Info/I&R%20Research%20and%20History/I&R%20at%20the%20Local%20Level/I&R%20in%20American%20Cities.pdf> (last visited May 5, 2005).

Lupia and McCubbins, as previously discussed, derive and test the conditions necessary for trust and learning from an information source.³⁶ Recent empirical work on the informational aspects of initiatives³⁷ has not explored whether or not these conditions are present in initiative campaigns and thus whether voters are able to make welfare-enhancing choices. The implication of experimental research on trust is that simply identifying the presence of information in the form of advertisements or endorsements does not allow one to draw the conclusion that voters have learned from the information. Although the empirical work in this field is of great interest and has made strides in beginning to identify some effects of the initiative process, the studies have not yet incorporated the conditions for trust and learning into their models of the effects of campaigns. Furthermore, demonstrating that exposure to an initiative campaign increases the proportion of people who vote, give campaign contributions, or correctly answer information questions is not equivalent to showing that voters regularly make choices that improve welfare.

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

V. WHO IS SETTING THE AGENDA?

We have just argued that initiatives are likely to be extreme and particularistic policies with concentrated benefits and diffuse costs, and that

36. LUPIA & MCCUBBINS, *supra* note 30.

37. See, e.g., SHAUN BOWLER & TODD DONOVAN, DEMANDING CHOICES: OPINION, VOTING AND DIRECT DEMOCRACY (1998); Caroline J. Tolbert, Ramona S. McNeal & Daniel A. Smith, *Enhancing Civic Engagement: The Effect of Direct Democracy on Political Participation and Knowledge*, 3 ST. POL. & POL'Y Q. 23 (2003); Caroline Tolbert, *The Ballot Measure/Citizen Interest Link: Information, Engagement and Participation* (Jan. 2005) (unpublished manuscript presented at the Symposium on the Impact of Direct Democracy, University of California, Irvine, Jan. 14–15, 2005), at http://lawweb.usc.edu/csfp/conferences/direct_democracy_05/documents/tolbert.pdf. This empirical work typically measures a dependent variable of interest across a variety of states, say voter turnout or survey responses, and then compares noninitiative states to initiative states. A positive relationship between being an initiative state and turnout is interpreted as an effect of the initiative. States with initiatives, however, may not be a random sample of all states, in which case a stronger research design would have an observation of our dependent variable before the initiative was implemented to definitively conclude that the initiative caused the change in the variable of interest. Studies like one showing that increased usage of the initiative process within initiative states leads to higher levels of turnout go part of the way toward solving this challenge to inference. See, e.g., Caroline J. Tolbert, John A. Grummel & Daniel A. Smith, *The Effects of Ballot Initiatives on Voter Turnout in the American States*, 29 AM. POL. RES. 625 (2001) [hereinafter *Effects of Ballot Initiatives*].

there is a significant chance that voters will lack the information necessary to make informed decisions. So, the odds that initiatives will improve social welfare seem small. In this section we further question the beneficial effects of initiatives by considering a variety of social choice critiques that seem particularly pernicious with respect to the initiative process, critiques that have largely escaped comment in the literature on initiatives.

A. THE UNIDIMENSIONAL INITIATIVE

One of the key problems with initiatives, and one that leads to a host of subsequent problems, is that they are likely to be one-dimensional policy moves with multidimensional repercussions.³⁸ First, in twelve of the twenty-three states that allow initiative petitions there are single-subject rules with regards to proposed initiatives.³⁹ These rules almost guarantee that initiatives will only address a single issue, such as increasing school funding, without presenting voters with the other (obvious) dimensions of the policy change: increased taxes or decreased spending in another area. Second, even in the absence of a single-subject rule or where it is loosely enforced, initiative sponsors will prefer to propose one-dimensional policies. The addition of a second, third, or fourth dimension is political suicide because it increases the possibility of generating opposition. Because opponents of initiatives are more likely to be successful in their campaign than proponents, there is a strong incentive not to incite more opponents than necessary. Because of this tactical concern, voters are likely to see one-dimensional policy moves and be asked to make “yes” or “no” decisions about a multitude of single dimension ballot measures, which has important consequences for the results of the initiative process.

B. INABILITY TO MAKE TRADEOFFS

One of the key features of the legislative process, particularly during the appropriations stage, is that legislators make tradeoffs between

38. It is important to note that in legislative bodies where voting is largely one-dimensional there is reason to believe that the existence of a single dimension is the result of the legislative process collapsing many dimensions into a single dimension. Given that the initiative process lacks the institutions that generate this outcome, it is unreasonable to expect a similar outcome from initiatives. See KEITH T. POOLE & HOWARD ROSENTHAL, *CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING* 51–57, 227–32 (1997).

39. Initiative and Referendum Inst., Univ. of S. Cal., *Comparison of Statewide Initiative Process*, at <http://www.iandrinstute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Requirements/A%20Comparison%20of%20Statewide%20I&R%20Processes.pdf> (last visited May 5, 2005).

priorities both within a given year's budget and across time.⁴⁰ In the models of voter decisionmaking during initiative campaigns, however, voters are presumed to be choosing between "yes" and "no" votes on a single initiative along a single dimension.⁴¹ In such a situation these models typically find that initiatives either make the legislature more responsive to the median voter or that only those policies favored by the median voter will be approved.⁴² One limit to these models is that they do not address how voters make tradeoffs between different initiatives. Consider that in many elections there are multiple issues on which to vote, and voters must not only be able to consider the tradeoffs for a particular initiative, but they must also weigh initiatives against each other. For voters to calculate these tradeoffs (that is, to determine what they think they will have to give up in order to get the policy proposed by the initiative) they must do the following:

- (1) have a good idea about how each policy proposal will be financed (what do they have to give up to get it?), or how it will otherwise affect the status quo;
- (2) know the externalities associated with each proposition (doing one thing may preclude doing other things or may enable or disable the successful implementation of other policies);
- (3) have knowledge about all of the ballot proposals; and
- (4) be able to determine the probability that each of the other proposals will pass (so they can calculate an expected combined effect for their actions on each ballot initiative), and these probabilities must be common knowledge so that all voters act on similar expectations.

Only when all of these conditions are satisfied can voters make decisions that aid in moving policy toward their most preferred position. At the same time, the fact that all the conditions for making a successful policy choice must be met does not, however, imply that they will never be

40. Mathew D. McCubbins & Daniel B. Rodriguez, *Canonical Construction and Statutory Revisionism: The Strange Case of the Appropriations Canon*, J. CONTEMP. LEGAL ISSUES (2005).

41. See Gerber & Lupia, *supra* note 3, at 290-91; Gerber, *supra* note 2, at 101-06; Lupia, *supra* note 28, at 65-69; Matsusaka & McCarty, *supra* note 3, at 416.

42. It is worth considering the assumptions contained within these models, because it suggests how rarely all the conditions will be met. For example, Gerber assumes: (1) a simple binary agenda; (2) no substitute initiatives; (3) both "yes" and "no" campaigns for verification purposes or voter knowledge of the policy implications of the initiative; (4) a single-stage game that ends; (5) one dimension of policy; and (6) 100% voter turnout. Gerber, *supra* note 2, at 101-06.

able to do so. Of course, the greater the number of initiatives and the worse the knowledge environment is for each, the worse off voters will be.

For voters to weigh the policy choice of prisons versus schools, for example, they must know not only the costs of each policy, but also how the two policies affect each other. We know that, in the absence of a tradeoff between services or tax levels, voters will prefer more of almost all government services, or the same level of services with lower taxes.⁴³ So, the relevant question about the information environment is whether voters will receive and use the information, or substitute cues, to choose between initiatives focused on schools, jails, lottery, insurance, and nuclear power. Will cues be sufficient to help voters weigh these perhaps conflicting policies against each other and to account for the costs of each proposed policy change? It is difficult to imagine that initiative supporters will provide this type of universal tradeoff information. The proponents of a hypothetical measure A are unlikely to argue against measure B (if they are about different issues), because doing so will likely lead to a response from the proponents of measure B. Because the opposition has the upper hand in initiative campaigns, it would appear to be a poor strategy to take action that increases the likelihood of generating opponents.

Moreover, voters will not even receive information about the costs of an initiative itself when there is no opposition to that initiative. This is the case for a great many initiatives, especially the concentrated benefits, diffuse cost proposals we expect to see on the ballot. Furthermore, our observation living in California is that information about how the goals of one initiative interact with the goals of another is unlikely to be widely available. If voters lack information about how the passage of two initiatives will affect each other or the general policy environment, it is easy to have outcomes that lead to non-Pareto improvement, and thus do not enhance welfare.

C. INITIATIVES AS SEQUENTIAL ELIMINATION AGENDAS

Yet another problem with initiatives relates to what social choice theorists dub “sequential elimination agendas.”⁴⁴ Sequential elimination agendas occur when votes are held one after another, defeated options are removed from consideration, and the winning issue moves on to the next

43. Earl R. Brubaker, *How Big a Budget Do the People Prefer?*, 3 INDEP. REV. 211, 212–13 (1998).

44. Peter C. Ordeshook & Thomas Schwartz, *Agendas and the Control of Political Outcomes*, 81 AM. POL. SCI. REV. 179 (1987).

round of voting. The core problem with sequential elimination agendas is that they do not allow citizens to compare directly all of the alternatives and, therefore, do not allow them to make tradeoffs among their options. It is this inability to make tradeoffs that often leads to suboptimal outcomes, and as Peter Ordeshook and Thomas Schwartz emphasize, "as soon as the feasible agendas are allowed to include . . . sequential elimination agendas . . . sincere voting can lead practically anywhere" in the policy space.⁴⁵

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

	1	2	3
First	<i>Q</i>	<i>A</i>	<i>B</i>
Second	<i>C</i>	<i>Q</i>	<i>A</i>
Third	<i>B</i>	<i>C</i>	<i>Q</i>
Fourth	<i>A</i>	<i>B</i>	<i>C</i>

The game proceeds as follows.⁴⁶ First, there is a vote between policy *A* and the status quo, *Q*. Next the new status quo (either *A* or *Q*) is pitted against *B*. Then, the new *SQ* (either *A*, *B*, or *Q*) goes against *C*. If this voting game were to be actually played out the winner is *C*, *despite the fact that Q is unanimously preferred to C* (thus *C* is Pareto inferior to *Q*). The movement to *C* is clearly non-welfare enhancing as no possible majority would choose *C* over *Q*, and no one would have wanted to end up with *C*, having started at *Q*.

Although scholars have considered sequential elimination agendas when analyzing various voting procedures,⁴⁷ they have not yet applied this concept to the initiative process, a process that we argue is particularly

45. *Id.* at 192.

46. See PETER C. ORDESHOOK, *GAME THEORY AND POLITICAL THEORY: AN INTRODUCTION* 68 (1986).

47. Peter C. Fishburn, *Paradoxes of Voting*, 68 AM. POL. SCI. REV. 537 (1974); Ordeshook & Schwartz, *supra* note 44, at 182.

plagued by the pathologies of sequential elimination agendas. Not only does the initiative process satisfy the conditions just listed above (insofar as multiple initiatives are voted on over time and initiatives are not pitted against all other initiatives), but this process also makes it particularly difficult for citizens to make tradeoffs over time. As the example illustrates, when proposals are pitted against each other in a sequential or serial process and the losing proposal is removed from consideration, it can generate outcomes that no one would prefer.

To see how sequential elimination agendas and the inability to make intertemporal tradeoffs play out in real world initiative processes, consider the following examples from Oregon and Massachusetts. In 1990, the citizens of Oregon passed an initiative that sought to reduce property taxes, and then, in 1996, they passed another measure that limited the revenue available for schools and other services that had been funded by property taxes.⁴⁸ Just four years later in 2000, citizens passed an initiative that established a “sufficiency standard” for funding based on the Oregon Quality Education Model that required a significant increase in state spending on education.⁴⁹ It is easy to see that following multiple ballot measures to reduce taxes with one that instructs the legislature to increase education spending may be mutually inconsistent.

Similar contradictory initiatives occurred in Massachusetts. For example, in 1982, citizens voted to restrict radioactive waste disposal, but then in 1988, they failed to ban the electric power plants that produced such nuclear waste.⁵⁰ Needless to say, citizens in these two time periods passed measures that were largely at odds with each other—with the 1988 result perpetuating the problem that the 1982 initiative sought to solve.⁵¹

The above anecdotes suggest that the theoretical problems of sequential elimination agendas have an empirical basis in the initiative process. Indeed, these anecdotes demonstrate that when citizens must choose alternatives over time without the ability to compare them directly, they are unlikely to consider tradeoffs and are, therefore, almost certain to

48. See Initiative and Referendum Inst., Univ. of S. Cal., *Oregon: Initiative Historical Listing*, at <http://www.iandrinstitute.org/Oregon.htm> (last visited May 5, 2005); Or. State Legislature, *Ballot Measure 1: Report from the Legislature, 2001–2003 Education Budget*, May 2003, at <http://www.leg.state.or.us/comm/commsrvs/educationfunding.pdf>.

49. See Or. State Legislature, *supra* note 48.

50. See Initiative and Referendum Inst., Univ. of S. Cal., *Massachusetts: Initiative Historical Listing*, at <http://www.iandrinstitute.org/Massachusetts.htm> (last visited May 5, 2005).

51. See *id.*

pass contradictory measures that have deleterious economic, social, or political consequences.⁵²

D. WHO IS SETTING THE AGENDA?

Another problem with the initiative process is that it does not allow for careful selection of those who set the agenda. Social choice theorists and game theorists have long noted that agenda setters can be, for all intents and purposes, “dictators” when it comes to determining political outcomes;⁵³ they have also emphasized that under certain conditions, there is a risk that agenda setters, through strategically setting the agenda, can induce outcomes that diverge from the preferences of the median voter⁵⁴ and, in fact, are Pareto inferior.⁵⁵ This possibility seems particularly acute in the initiative setting, given that we previously established that initiatives will generally be extreme relative to the floor median of the legislature. Given the existence of such a risk, scholars have analyzed real world instances of agenda setting and have discussed the ways that agenda setters can be constrained to be faithful agents of those they represent.⁵⁶ Although there are, of course, many ways to constrain agenda setters, most relevant to this Article are screening and selection mechanisms.

Screening and selection mechanisms are important because they help to ensure that faithful agenda setters are chosen in the first place. As many

52. As an example of a deleterious political consequence, consider a legislature charged with implementing contradictory initiatives. When faced with such contradictions, the legislature will be unable to satisfy the conflicting demands of citizens, and will therefore partially implement the initiatives, perhaps generating frustration with government and spawning more initiatives that also cannot be implemented.

53. See THOMAS SCHWARTZ, *THE LOGIC OF COLLECTIVE CHOICE* (1986); Richard D. McKelvey, *General Conditions for Global Intransitivities in Formal Voting Models*, 47 *ECONOMETRICA* 1085 (1979); Thomas Romer & Howard Rosenthal, *Bureaucrats Versus Voters: On the Political Economy of Resource Allocation by Direct Democracy*, 93 *Q.J. ECON.* 563, 563–64 (1979) [hereinafter Romer & Rosenthal, *Bureaucrats*]; Thomas Romer & Howard Rosenthal, *Political Resource Allocation, Controlled Agendas, and the Status Quo*, 33 *PUB. CHOICE* 27 (1978) [hereinafter Romer & Rosenthal, *Political Resource Allocation*].

54. Romer & Rosenthal, *Bureaucrats*, *supra* note 53; Romer & Rosenthal, *Political Resource Allocation*, *supra* note 53.

55. McKelvey, *supra* note 53.

56. See GARY W. COX & MATHEW D. MCCUBBINS, *LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE* (1993) [hereinafter COX & MCCUBBINS, *LEGISLATIVE LEVIATHAN*]; GARY W. COX & MATHEW D. MCCUBBINS, *SETTING THE AGENDA* (forthcoming 2005) [hereinafter COX & MCCUBBINS, *SETTING THE AGENDA*]; D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, *THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS* (1991); DAVID W. ROHDE, *PARTIES AND LEADERS IN THE POSTREFORM HOUSE* (1991); Kaare Strøm & Wolfgang C. Müller, *Political Parties and Hard Choices, in POLICY, OFFICE, OR VOTES? HOW POLITICAL PARTIES IN WESTERN EUROPE MAKE HARD DECISIONS 1* (Wolfgang C. Müller & Kaare Strøm eds., 1999).

scholars note, *ex ante* screening and selection are particularly important, for it can be very costly to sort good agenda setters from bad ones and remove the bad ones after they have been selected.⁵⁷ For this very reason, legislators worldwide consider the past performance of potential agenda setters when selecting them and promote only those who have demonstrated their competence and responsiveness.⁵⁸

With the initiative process, however, it is impossible to screen and select faithful agenda setters because any individual or group with sufficient resources can place an initiative on the ballot. This aspect of the initiative process allows virtually anyone to become an agenda setter, and it is this direct democracy aspect of the initiative process that is frequently lauded as one of its greatest strengths.⁵⁹ The one mechanism designed to screen out initiative agenda setters—the requirement that they collect a specified number of signatures in order to qualify for the ballot—does not in any way guarantee that sponsors have the public interest in mind. The industry of paid signature gathering, nearly as old as direct democracy itself,⁶⁰ now guarantees that whoever has the requisite amount of money (now more than \$1 million in California)⁶¹ can qualify virtually any initiative for the ballot. As the above discussion of screening and selection makes clear, however, allowing anyone with sufficient resources to become an agenda setter is problematic, for there is then no mechanism to select agenda setters who will pursue policies that benefit a majority of citizens. Furthermore, with the rise of crypto-initiatives, there will be an increasing number of agenda setters that use the initiative process to manipulate outcomes to serve their ends.

E. CONSEQUENCES

As a result of these flaws in the initiative process we believe that initiatives are likely to lead to deleterious outcomes. They might bust a state's budget or require lawmakers to balance the budget by cutting

57. See KIEWIET & McCUBBINS, *supra* note 56; A. MICHAEL SPENCE, MARKET SIGNALING: INFORMATIONAL TRANSFER IN HIRING AND RELATED SCREENING PROCESSES (1974).

58. See COX & McCUBBINS, LEGISLATIVE LEVIATHAN, *supra* note 56; COX & McCUBBINS, SETTING THE AGENDA, *supra* note 56; Strøm & Müller, *supra* note 56.

59. GERBER, THE POPULIST PARADOX, *supra* note 3, at 44–45; MATSUSAKA, FOR THE MANY, *supra* note 3, at 143.

60. See RICHARD J. ELLIS, DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA 47–49 (2002).

61. See Eugene C. Lee, *The Initiative Boom: An Excess of Democracy*, in GOVERNING CALIFORNIA: POLITICS, GOVERNMENT, AND PUBLIC POLICY IN THE GOLDEN STATE 117, 117–18 (Gerald C. Lubenow & Bruce E. Cain eds., 1997).

services, raising fees, moving programs and their costs off-budget, or moving the programs as unfunded mandates to lower levels of government or to the private sector—moves which, if included explicitly in the initiative, probably would have made it fail at the polls.⁶² This outcome is easy to predict given the previous pathologies: low information, inability to make tradeoffs, sequential elimination of agenda items, and no selection process for agenda setters. The budget-busting effect may be limited by the legislature's ability to avoid implementation.⁶³ This may provoke further initiatives by policy advocates, however, who want their policies implemented. One can see this degenerating into a spiral of initiative passage, poor implementation, initiative passage, poor implementation, and so on. Given that initiatives are going to hand the legislature extreme and conflicting policies to implement, the legislature will do its best to ignore its instructions. For example, even though in 1986 California voters passed Proposition 63, the "English Only" initiative, the legislature never actually implemented it.⁶⁴ In fact, Attorney General John Van de Kamp argued that by his reading, the initiative only required that official publications were available in English, not that they were to be limited to English.⁶⁵ When voters pass laws that tie the legislature's hands it further complicates policymaking. It seems unlikely that further disguising the effects of policy is likely to improve its quality.

Even if legislatures are able to get around initiatives, each time they do so they lose degrees of freedom. California responded to the legislative staffing cuts mandated by Proposition 140 by cutting their expert staff in half, but leaving political staff largely intact,⁶⁶ and by moving the state library out of the legislature and to the Department of Education. These one-time moves had serious consequences for the operation and staffing of

62. John Matsusaka, Nolan McCarty, and Gerber argue that states with the initiative process have different outcomes on a variety of policy variables than states without initiatives, and that this difference is due to the presence of the initiative process. See GERBER, *supra* note 3, at 121–36; MATSUSAKA, FOR THE MANY, *supra* note 3, at 3; Gerber, *supra* note 2, at 121; Matsusaka, *Evidence*, *supra* note 3, at 590; Matsusaka & McCarty, *supra* note 3, at 413–14. Matsusaka's comprehensive analysis finds that initiative states spend less, controlling for other factors. We agree that this important question deserves further empirical study. Matsusaka, *Evidence*, *supra* note 3. In addition to spending less, initiative states also have much less flexibility in their spending. California's Proposition 98 and Colorado's "Taxpayers' Bill of Rights," for example, severely restrict the abilities of state governments to react to fiscal shocks by locking in spending on education (Proposition 98) and restricting total spending (Taxpayers' Bill of Rights).

63. GERBER ET AL., *supra* note 4, at 15–26.

64. *Id.* at 34–37.

65. *Id.* at 36.

66. BRUCE E. CAIN & THAD KOUSSER, PUB. POLICY INST. OF CAL., ADAPTING TO TERM LIMITS: RECENT EXPERIENCES AND NEW DIRECTIONS 38–39 (2004).

the legislature and the library that limit future policy tradeoffs. This may have been of small import previously, but, with the increasing use of initiatives to change policy and reform constitutions, further constraints may be placed on legislative activity. Indeed, as direct democracy ties up the legislatures, we may begin to run afoul of Article 4, § 4 of the Constitution, which guarantees every state a republican form of government.⁶⁷ Central to this question will be what we believe are the necessary conditions for republican government. Is it just an elective government? Or, must the elected representatives have the ability to also change policy? This is not a question for us to answer, but it is one that will be important as initiatives increasingly tie the hands of state legislatures.

VI. THE RISE OF CRYPTO-INITIATIVES

During the 2004 general elections, there were 162 ballot measures in thirty-four states. California led the pack with sixteen total ballot measures, twelve of which qualified by the initiative process.⁶⁸ Although final figures are not yet tallied, estimates are that more than \$600 million was spent nationally on initiative campaigns and more than \$192 million was spent in California alone.⁶⁹ Many scholars, somewhat naively, tend to see these initiatives as attempts by citizens to change public policy.⁷⁰ But, as the following anecdotes from 2004 illustrate, a large and increasing number of initiatives are designed by agenda setters, often from outside the state or locality in which the initiative is being run, who have other goals in mind; for them, affecting policy is often at most a secondary concern. We term

67. See Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution's Guarantee Clause*, 80 TEX. L. REV. 807 (2002).

68. Initiative and Referendum Inst., Univ. of S. Cal., *Election 2004 Preview*, BALLOTWATCH, Sept. 2004, at [http://www.iandrinstute.org/BW%202004-1%20\(Preview\).pdf](http://www.iandrinstute.org/BW%202004-1%20(Preview).pdf).

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

70. Other scholars have long recognized that initiatives often have purposes beyond their policy applications. For a survey of the literature on this point, see Smith, *supra* note 1. In recent years, the Republican Party has directed much financial support to Grover Norquist's "Americans for Tax Reform" in order to back tax limitation, right to work, and paycheck protection initiatives aimed at spurring conservative mobilization in California, Colorado, and Oregon. Daniel A. Smith, *Special Interests and Direct Democracy: An Historical Glance*, in *THE BATTLE OVER CITIZEN LAWMAKING* 59, 67 (M. Dane Waters ed., 2001). Even an examination of Colorado's 1912 direct democracy campaigns revealed that "the mechanisms of the initiative and popular referendum were easily manipulated during the Progressive Era." Daniel A. Smith & Joseph Lubinski, *Direct Democracy During the Progressive Era: A Crack in the Populist Veneer?*, 14 J. POL'Y HIST. 349, 369 (2002). While such works have examined the behavioral effects of crypto-initiatives, they have not yet probed the social choice consequences of the intentions of their backers.

these crypto-initiatives. The hidden aspects of crypto-initiatives are the motives of their sponsors and their connections to political parties.

In many cases, the initiatives of 2004 had their roots in prior elections. In 2000, George W. Bush beat Al Gore in Ohio by a slim margin—less than 170,000 votes out of more than 4.5 million votes cast. As the 2004 election between President Bush and John Kerry crystallized, it was clear that Ohio would again be a very close race and it would be one of the few states to decide the election. Democrats campaigned extensively in Ohio to improve their odds of winning the state.⁷¹ State Republican leaders coordinated with the White House on one of the “defense of marriage” initiatives, which they hoped would increase Republican turnout and help Bush carry Ohio.⁷² Leading up to the election it seemed that this strategy had a reasonable chance of securing Bush the win because, although Kerry would likely beat Bush in urban areas, the marriage initiative was projected to have a significant effect on the electorate, amounting to a 2% to 3% increase in turnout, with the largest increase coming in the conservative Christian demographic.⁷³ As it turned out, Bush indeed won Ohio and the presidency. While the evidence is not conclusive as to the effect of Ohio’s defense of marriage initiative,⁷⁴ after the election Ohio

political analysts credit[ed] the ballot measure with increasing turnout in Republican bastions in the south and west, while also pushing swing voters in the Appalachian region of the southeast toward Mr. Bush. The President’s extra-strong showing in those areas compensated for an extraordinarily large Democratic turnout in Cleveland and in Columbus, propelling him to a 136,000-vote victory.⁷⁵

71. See David D. Kirkpatrick, *Gay Marriage Becomes a Swing Issue With Pull*, N.Y. TIMES, Aug. 14, 2004, at A7. The group America Coming Together had spent \$1.1 million and deployed 700 employees in Ohio by the end of April 2004 to oppose President Bush’s reelection. DEREK WILLIS, CTR. FOR PUB. INTEGRITY, VOTER TURNOUT GROUP FOCUSES ON OHIO: AMERICA COMING TOGETHER PUTS HUNDREDS OF EMPLOYEES INTO BUCKEYE STATE (2004), at <http://www.publicintegrity.org/527/report.aspx?aid=333&sid=300>.

72. Kirkpatrick, *supra* note 71.

73. John C. Green, *Ohio: The Heart of It All*, 2 FORUM 1 (2004).

74. See Smith, *supra* note 1 (finding that voter support for Ohio’s defense of marriage initiative had an insignificant effect on county-level turnout but did significantly affect a county’s vote for Bush). This last result is the best test of the effect of the initiative on Bush’s vote.

75. James Dao, *Same-Sex Marriage Issue Key to Some G.O.P. Races*, N.Y. TIMES, Nov. 4, 2004, at P4. Smith, however, in his analysis of county-level data, did not find that Ohio’s gay marriage amendment had significant effects on voter turnout in Ohio. Smith, *supra* note 1. At the same time, all that may be necessary for the spread of such crypto-initiatives is the perception among relevant political actors that they can affect turnout or election outcomes.

While Karl Rove⁷⁶ may be the only one who knows if this account is accurate, Ohio's defense of marriage initiative was a key factor in Bush's reelection.

A defense of marriage initiative also appears to have affected political outcomes in Kentucky. This time the likely beneficiary of the initiative was Republican Senator Jim Bunning, who barely retained his Senate seat. Bunning had been in the midst of running what may be one of the worst political campaigns of all time.⁷⁷ His twenty-point lead in the polls evaporated during the campaign, and some of his behavior and statements led Democrats to directly question his sanity.⁷⁸ "Supporters of the [defense of marriage initiative] used extensive church networks to persuade people to vote," and the support of conservative voters may have helped Bunning secure victory.⁷⁹ To help Bunning, Republicans tried to tie opposition to the initiative around the neck of Democratic candidate Daniel Mongiardo.⁸⁰ Bunning eventually overcame his own campaign to win reelection. Although there is not yet definitive empirical evidence regarding the effects of the different defense of marriage initiatives, the proponents appear to have intended effects beyond mere policy change.⁸¹ In the November 2004 election, eleven states (Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah) considered defense of marriage initiatives, and they all passed. Bush and

76. In 2004, Rove was a senior advisor and chief strategist to President Bush.

77. According to one report,

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

Sheryl Gay Stolberg, *A Onetime Senate Shoo-in Now Struggles to Hold on*, N.Y. TIMES, Oct. 29, 2004, at A20.

78. Ryan Alessi, Delano Massey & Karla Ward, *Bunning Win Harder than Expected, Race Was Contentious, Personal*, LEXINGTON HERALD-LEADER, Nov. 3, 2004, at AAi.

79. Dao, *supra* note 75, at 4.

80. *Id.*

81. David Karol and Edward Miguel argue that the defense of marriage initiatives had no effect on the vote for Bush, but they do not take account of the strategic use of initiatives or the possibility that they have different effects in different states. See David Karol & Edward Miguel, *Iraq War Casualties and the 2004 U.S. Presidential Election* (Apr. 2005) (unpublished manuscript), at http://emlab.berkeley.edu/users/emiguel/miguel_iraq.pdf. First, turnout may only be an important aspect of the initiative in certain states (such as Ohio), whereas in other states (like Mississippi) the initiative may have other goals. Second, the goal may not be to increase turnout for the national election but instead for state or local elections. Smith finds little support for the contention that the Ohio defense of marriage initiative increased Republican turnout, although he does find that the initiative affected a county's vote for Bush. Smith, *supra* note 1.

other Republican candidates either won or did better than previously expected in these states.

On the other side of the political spectrum, Democrats have also been using initiatives to try to bolster registration and turnout. In 2004, the Association of Community Organization for Reform Now ("ACORN"),⁸² through a PAC called Floridians for All, spent millions of dollars to support an initiative to raise the state's minimum wage. The group chose the minimum wage as its instrument because, according to an internal document acquired by the *Washington Times*, their "plan concluded that initiatives increase voter turnout and that 'minimum wage initiatives can significantly increase the turnout of supporters without increasing turnout from the opposition.'"⁸³ ACORN declared its three major goals to be "driving heightened Democratic turnout, passing the initiative, and building permanent political capacity for future gains."⁸⁴ In addition to targeting a proposed initiative at its ideal audience, Floridians for All registered more than 200,000 initiative signers as voters,⁸⁵ which boosted their signature count and the number of registered voters who supported their petition, possibly having a significant effect on statewide elections this year and into the future. These efforts have drawn scrutiny from the Florida Department of Law Enforcement, which is investigating to determine whether or not ACORN engaged in illegal registration activity.⁸⁶

82. In a clear, but perhaps overly humble, statement of their activity, ACORN declares, "When most community organizations still believed in sitting on the sidelines on election day, ACORN was leading the way in voter registration, education, and mobilization. In the most recent election cycle, ACORN registered over 200,000 new voters, and made over 1 million non-partisan contacts to infrequent voters encouraging them to vote."

Acorn.org, *Who is Acorn?*, at <http://www.acorn.org/index.php?id=2> (last visited May 5, 2005). One might question the "non-partisan" nature of its contacts, given the information above. According to their Web site, www.acorn.org, in recent years ACORN has led ballot initiative campaigns in San Francisco, Phoenix, Pine Bluff City, and Kansas City. They work closely with their "sister" organization, Project Vote, to build "voter registration, education and mobilization networks" to turnout "new and infrequent voters around issues that are important to their families and communities, thus giving previous non-voters a reason to vote." ASS'N OF CMTY. ORGS. FOR REFORM NOW, 2003 ANNUAL REPORT 24 (2003), at http://www.acorn.org/fileadmin/ACORN_Reports/ACORN_ANN_REPT2_copy.pdf.

83. Jerry Seper, *Liberals Target Bush with Florida Wage Initiative*, WASH. TIMES, Oct. 25, 2004, at A3. It is richly ironic that in 1995 ACORN sued the state of California because having to pay their own workers a minimum wage would reduce the number of employees they could hire. Associated Press, *Critics Point to Effort by ACORN to Dodge Minimum Wage in '96*, MIAMI HERALD, Aug. 11, 2004, available at <http://www.miami.com/mld/miamiherald/news/state/9375352.htm?1c>.

84. Seper, *supra* note 83.

85. *Id.*

86. This begs the question, of course, about the actual effect of the initiative on voter turnout.

In Colorado, during the 2004 election cycle, donors and the Democratic Party also utilized the initiative process to affect the state and national elections. Most national attention focused on the wealthy president of a Brazilian university who spent millions in a vain attempt to pass an initiative that would have allocated Colorado's electoral votes on a proportional basis.⁸⁷ Other lesser noticed initiatives, however, may have been far more important in the 2004 election in Colorado. The Democratic Party, after its losses in 2002, started to plan a series of initiatives to drive turnout and change voting patterns. Using extensive databases to tie together political, demographic, consumer, and other information, political operatives sought to identify areas in the state, and the individuals living within them, that "under-performed" in the 2002 election.⁸⁸ That is, they wanted to find likely Democratic voters who either did not turnout or who turned out but voted Republican. Through waves of phone surveys, personal interviews, and shopping mall focus groups, the political strategists discovered a demographic that was unhappy and highly motivated about transportation (they complained bitterly about their daily commutes to and from downtown Denver). In response, these Democratic Party activists helped sponsor an initiative in 2004: FasTracks, which increased mass transit funding.⁸⁹ One of the critical aspects of this strategy was getting Republicans, such as Governor Bill Owens, to oppose the measure, which would provide a cue to the targeted voters that their interests were more similar to Democrats than Republicans. As expected, Governor Owens publicly opposed the transit initiative. When the \$3.5 million campaign for the transit initiative was done and the election results were counted, it appeared that the Democratic strategy had worked on multiple fronts. First, although the initiative was designed to be instrumental in generating turnout, the policy proposal also passed. Second, while the rest of the country was electing Republicans, Colorado elected Democrats to the U.S. Senate, U.S. House, and Colorado Assembly. Indeed, Democrats now have control of the Colorado legislature for the first time in over forty years.⁹⁰

87. Susan Greene, *Group Pushes for Vote Switch: Colo. Would Split Presidential Tally*, DENVER POST, June 15, 2004, at A1.

88. This information is based on interviews with an anonymous source who worked with the Colorado Democratic Party.

89. See Kevin Flynn, *Transit Tax Hike Full-Speed Ahead*, ROCKY MOUNTAIN NEWS, Nov. 3, 2004, at 7A, available at http://www.rockymountainnews.com/drmn/election/article/0,1299,DRMN_36_3301207,00.html.

90. Lynne Bartels & Peggy Lowe, *The Politics of Power: After 4 Decades, Democrats Regain Legislative Control*, ROCKY MOUNTAIN NEWS, Jan. 8, 2005, at 23A.

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

In what follows we show that initiatives are indeed known to affect voter turnout and we provide a model of how wedge and jack issues do so. These forms of crypto-initiatives are particularly problematic because they are a form of political pork and the combination of 527s and party involvement is likely to increase their use. Finally, we argue that the implicit analogy between the initiative market and economic markets is not applicable and does not eliminate the problems we have raised throughout this Article.

A. INITIATIVES ARE KNOWN TO AFFECT TURNOUT

We have been using the term crypto-initiatives to refer to cases where the proponents' primary goal is to affect political outcomes rather than policy. Such initiatives—also discussed by Garrett and Smith⁹¹—often achieve their goals by reshaping the electorate. For an initiative to influence elections by shifting the composition of the electorate in a way that favors a party's candidates, it must boost turnout or bring out a different type of voter. This would not be the case if initiatives like FasTracks or the defense of marriage initiatives turned out new voters who represented a random draw from those who do not typically participate in American elections. Smart political actors do not spend millions to turn out a random selection of nonvoters. Their efforts are targeted in two ways: they want to get voters who support their candidates to the polls, and they aim their message at those who are likely to be most receptive. The first tactical consideration partly explains why, even though nonvoters have demographic characteristics that might link them to the Democratic Party, elections with higher turnout do not consistently benefit Democratic candidates. A long scholarly literature⁹² rebuts the conventional wisdom that higher turnout will shift the electorate leftward. If Republican groups

91. See Elizabeth Garrett, *McConnell v. FEC and Disclosure*, 3 ELECTION L.J. 237, 242 (2004); ELIZABETH GARRET & DANIEL A. SMITH, VEILED POLITICAL ACTORS: THE REAL THREAT TO CAMPAIGN DISCLOSURE STATUTES (USC-Caltech Ctr. for the Study of Law and Politics, Working Paper No. 13, 2002), at <http://lawweb.usc.edu/cslp/papers/cslp-wp-013.pdf>; Smith, *supra* note 1.

92. See Jack Citrin, Eric Schickler & John Sides, *What If Everyone Voted? Simulating the Impact of Increased Turnout in Senate Elections*, 47 AM. J. POL. SCI. 75 (2003); Benjamin Highton & Raymond E. Wolfinger, *The Political Implications of Higher Turnout*, 31 BRIT. J. POL. SCI. 179 (2001).

run a strong mobilization effort, then a boost in turnout could bring more of their party's adherents to the polls. Studies of election outcomes⁹³ show that there is no consistent partisan bias when turnout increases.

The second tactical consideration for mobilizing turnout is to choose issues that are likely to resonate with nonvoters, which may lead to turnout different than a simple random sample of nonvoters. As a whole, nonvoters are less politically interested and less partisan than voters. The nonvoters who are most receptive, however, to a campaign's "get out the vote" drive—especially one based on an initiative's policy effects—are likely to be the most politically engaged, educated, and partisan members of that group. Campaigns conducting "strategic mobilization"⁹⁴ target these voters, whose sense of the stakes of politics and psychological attachment to one of the "teams" allow them to see the benefits of turning out. Turnout initiatives that seek to tempt voters to the polls by offering a policy that they strongly favor could attract a subset of nonvoters that is unrepresentative of the mass of nonvoters.

Recent works on initiatives and turnout suggest that this is, in fact, often the case. First, Caroline Tolbert, John Grummel, and Smith⁹⁵ show that a greater number of initiatives on the ballot boosts turnout in both presidential and midterm elections, controlling for a host of other factors. But what types of voters are brought to the polls by propositions? Todd Donovan and Smith⁹⁶ examined the results of exit polls in three states to see how the voters who said that initiatives motivated them to turn out differed from other voters. The differences vary across states, but are generally consistent with the notion that these mobilized voters look very different from the overall set of those who do not regularly vote. "Partisan identifiers (Democrats in Arizona and Colorado; strong partisans of both parties in Colorado), those with self-identified ideological predispositions (in Colorado), older (in Oregon and Colorado), and better educated (in Colorado) respondents were most likely to say that initiatives figured heavily in their decisions to participate in an election."⁹⁷

93. See James DeNardo, *Turnout and the Vote: The Joke's on the Democrats*, 74 AM. POL. SCI. REV. 406 (1980); Jack H. Nagel & John E. McNulty, *Partisan Effects of Voter Turnout in Senatorial and Gubernatorial Elections*, 90 AM. POL. SCI. REV. 780 (1996).

94. STEVEN J. ROSENSTONE & JOHN MARK HANSEN, *MOBILIZATION, PARTICIPATION, AND DEMOCRACY IN AMERICA* (1993).

95. See *Effects of Ballot Initiatives*, *supra* note 37.

96. TODD DONOVAN & DANIEL A. SMITH, *TURNING ON AND TURNING OUT: ASSESSING THE INDIVIDUAL-LEVEL EFFECTS OF BALLOT MEASURES* (USC-Caltech Ctr. for the Study of Law and Politics, Working Paper No. 32, 2004), at <http://lawweb.usc.edu/csllp/papers/csllp-wp-032.pdf>.

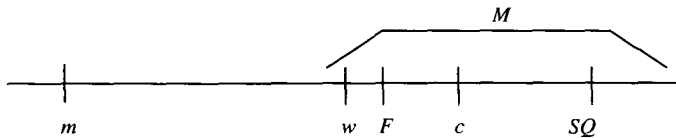
97. *Id.* at 18.

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

B. WEDGE INITIATIVES

We use the term “wedge initiatives” to describe those that are designed to split the opposing party and help one’s own party by drawing support from the opposition. The following two conditions are necessary for a wedge issue: first, the status quo must be favored by the other party, and particularly the status quo must help extreme members of the other party; second, a change in status quo must benefit the party looking to use the initiative. Figure 3 presents this situation spatially. M represents the dispersion of ideal points within the majority party, which is protecting the SQ even though it is far from the floor median, F . The minority party, m , can use a wedge, w , to induce a portion of the majority party to support a change in policy on this dimension (everyone to the left of c will prefer w to SQ , and thus w drives a wedge, at c , into the majority party). To insure the support of F , the minority will offer a new policy that is at or near F ’s ideal point. The possible shifts in alliances generated by this dynamic create a situation akin to William Riker’s coalition model of politics.⁹⁸

FIGURE 3. Model of wedge issues



One such example of a wedge issue is Proposition 187, which California Republicans actively supported in 1994. This initiative helped convince some Democrats, whose party opposed the initiative, to abandon

98. WILLIAM H. RIKER, *THE THEORY OF POLITICAL COALITIONS* (1962).

their party in the gubernatorial race and support the Republican candidate, Pete Wilson, who sponsored the initiative.

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

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

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

C. JACK INITIATIVES

A "jack initiative" is designed to help a party's candidates by increasing turnout in one targeted portion of the electorate.⁹⁹ The growth of jack initiatives is particularly troubling. These policies are likely to have highly concentrated benefits and diffuse costs, which helps increase turnout only among beneficiaries. Geographically targeted projects, such as new roads, rail lines, and schools, for example, seem to be ideal policies that have this effect at the local level. The passage of FasTracks and minimum wage initiatives are prototypical examples of this type of statewide policy. The ACORN document that discussed the Florida minimum wage strategy makes the targeted benefits clear: "Giving our constituency an opportunity to vote themselves a raise is probably the most compelling reason to go to the ballot box."¹⁰⁰ It is hard to think of a more direct, targeted benefit than the ability to vote yourself a raise, paid for by a highly diffuse set of consumers and businesses. The minimum wage issue was also important because it had a differential effect on turnout. It did not generate unified business opposition (many businesses already pay wages well above the minimum wage and so had little incentive to oppose it), and therefore the opposition campaign did not motivate its likely supporters. Considered in this light, jack initiatives look a lot like a new form of distributive politics, which has been well and thoroughly discussed in the Congressional and policy literature.¹⁰¹ Initiatives that fall into this category not only have effects on the larger political process, but they also act to increase the

99. Jacks and wedges may not be mutually exclusive categories for any given policy. That is, a defense of marriage initiative may be a wedge in one state and a jack in another. It will depend on the configuration of political interests in each environment.

100. Seper, *supra* note 83.

101. See CLYDE I. BROWNING, *THE GEOGRAPHY OF FEDERAL OUTLAYS* (1973); MORRIS P. FIORINA, *REPRESENTATIVES, ROLL CALLS, AND CONSTITUENCIES* (1974); R. Michael Alvarez & Jason L. Saving, *Deficits, Democrats, and Distributive Benefits: Congressional Elections and the Pork Barrel in the 1980s*, 50 *POL. RES. Q.* 809 (1997); Carol F. Goss, *Military Committee Membership and Defense-Related Benefits in the House of Representatives*, 25 *W. POL. Q.* 215 (1972); Eric Helland, *The Waiver Pork Barrel: Committee Membership and the Approval Time of Medicaid Waivers*, 17 *CONTEMP. ECON. POL'Y* 401 (1999); Joseph P. Kalt & Mark A. Zupan, *The Apparent Ideological Behavior of Legislators: Testing for Principal-Agent Slack in Political Institutions*, 33 *J.L. & ECON.* 103 (1990); Steven D. Levitt & James M. Snyder, Jr., *Political Parties and the Distribution of Federal Outlays*, 39 *AM. J. POL. SCI.* 958 (1995); James T. Murphy, *Political Parties and the Porkbarrel: Party Conflict and Cooperation in House Public Works Committee Decision-Making*, 68 *AM. POL. SCI. REV.* 169 (1974); Brian E. Roberts, *A Dead Senator Tells No Lies: Seniority and the Distribution of Federal Benefits*, 34 *AM. J. POL. SCI.* 31 (1990); Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 *J.L. ECON. & ORG.* 1 (1995).

amount of pork in the political environment.¹⁰² Therefore, the effects of jack initiatives must include the additional pork that they introduce into politics and the effect that pork has on the quality of policy.

A good jack issue will only cause a targeted group of potential supporters to turn out to the polls, likely because a proposal has concentrated benefits and diffuse costs. In this environment there is unlikely to be organized opposition to the initiative. Without an opposition, the campaign environment does not meet the conditions for full information¹⁰³ or trust,¹⁰⁴ so there is no reason to believe outcomes will improve on the status quo. These jack issues are not designed for the greater public good. Indeed, extensive polling was done in Colorado to find issues that had concentrated benefits and diffuse costs, and that drive turnout up for one party but not the other. Policy is not the point; good public policy would only be a fortunate, if unlikely, accident.

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

While the use of crypto-initiatives is not new,¹⁰⁵ we seem to be witnessing a new trend as political parties, individuals, and interest groups are all scouring the policy space to find niche issues for the purpose of affecting elections or rewarding or punishing candidates and parties. This trend, coupled with the rise of 527s¹⁰⁶—so called silent partners—who can

102. Shaun Bowler and Donovan discuss distributive logrolls as a new twist on initiatives, but in their formulation these initiatives are still about passing policy, not some nonpolicy goals such as increasing voter turnout. See BOWLER & DONOVAN, *supra* note 37. Because of this difference the critical issue for jack initiatives may not be how people vote on the actual proposal, but whether or not its presence has differential effects on turnout.

103. See Elisabeth R. Gerber & Arthur Lupia, *Term Limits, Responsiveness and the Failures of Increased Competition*, in LEGISLATIVE TERM LIMITS: PUBLIC CHOICE PERSPECTIVES 87, 87–99 (Bernard Grofman ed., 1996).

104. See LUPIA & MCCUBBINS, *supra* note 30, 79–93.

105. See Daniel A. Smith & Caroline J. Tolbert, *The Initiative to Party: Partisanship and Ballot Initiatives in California*, 7 PARTY POL. 739 (2001) (discussing the role of political parties in the California initiative process and finding that parties appear to be more prominent in the process than intended by initiative supporters). We do not contest Smith and Tolbert's findings but we do emphasize the increase in these crypto-initiatives and the role that newly formed 527s will have on crypto-initiatives.

106. Garrett & Smith, *supra* note 91, at 47–51.

spend tens, if not hundreds, of millions of dollars in relative obscurity¹⁰⁷ for campaign activities (527s spent a combined \$544 million in the 2003–2004 election cycle) may turn an already impaired method of policymaking and institutional reform into the tool of twenty-first century party machines and their operatives, where the social good is at most a remote thought.

VII. THE EFFICIENT INITIATIVE MARKET?

Although scholars are ambiguous about why positive outcomes will occur via the initiative process, they appear to have something in mind like an “efficient initiative hypothesis” (“EIH”), which they consider to be an analogy to the efficient market hypothesis (“EMH”). Although there is no well-developed analogy between markets and initiatives, Matsusaka most clearly compares the initiative process to the market by briefly considering how two hallmarks of markets—dispersed information and competitive forces—can be applied to the initiative process.¹⁰⁸ As he makes clear, neither of these approaches have been sufficiently elaborated on to be very useful in understanding the initiative process. Nonetheless, it seems that, from the literature on initiatives, scholars have an implicit version of the EIH in mind, in which outcomes are positive as long as voters support them (notice all of the results in the literature referring to surveys finding that the median voter favors enacted initiatives). Because the comparison is not well developed, we present what we think is the most likely way scholars are thinking of the initiative process, and then we consider why the analogy between initiatives and markets is inappropriate.

It seems to us that the most likely model implicit in the literature is one in which policy entrepreneurs propose different products, and then voters acting as policy consumers choose which ones to purchase by casting their scarce votes. In the EMH, price conveys all publicly available information about an asset, given the decisions of well-informed and rational market traders.¹⁰⁹ Consumers purchase only the products that serve their goals, and guided by the invisible hand, the aggregate outcome is

107. Each state has different reporting requirements and 527s tend to share money so that resources can end up where the party needs them, but in such a way that it is difficult to determine, at least prior to the election, which group is funding which initiatives and how much they are spending.

108. See MATSUSAKA, FOR THE MANY, *supra* note 3.

109. See, e.g., John H. Cochrane, *Volatility Tests and Efficient Markets: A Review Essay*, 27 J. MONETARY ECON. 463 (1991); Eugene F. Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 J. FIN. 383 (1970); Michael C. Jensen, *Some Anomalous Evidence Regarding Market Efficiency*, 6 J. FIN. ECON. 95 (1978); J. S. Jordan, *On the Efficient Markets Hypothesis*, 51 ECONOMETRICA 1325 (1983); A. Craig MacKinlay, *Event Studies in Economics and Finance*, 35 J. ECON. LITERATURE 13 (1997).

welfare enhancing, or efficient. If this is the analogy being used, then we presume that the collective decisions of market participants are represented by the median voter, and policy entrepreneurs are equivalent to marketers who introduce new products. If this is the appropriate analogy, then we conclude that policies supported by the median voter must improve welfare.

The basic analogy, however, between efficient markets and initiatives is not reasonable. First, what in the EIH plays the role of price in the EMH? One cannot simply gloss over the absence of something equivalent to price, because prices, and the information they convey, are the heart of the EMH.¹¹⁰ So, unless there is a suitable analog in the initiative process, then the analogy between the EMH and the EIH simply makes no sense. Second, there is no clear theory about how selecting the median voter's ideal point on a series of one-dimensional issues is likely to improve net welfare. Is there something equivalent to the invisible hand of the median voter? Third, for reasons already discussed, voters will often lack the information necessary to make decisions equivalent to the decisions of consumers in a market (who base their choices on price, which is absent in the EIH). In situations that do not qualify as complete information, such as when there are not credible endorsers on both sides of a policy or there are multiple initiatives with multiple endorsers, we do not know whether voters will act to become informed or not; we suspect they will not. We are betting our democracy and the quality of our lives on a hunch, an undeveloped analogy, that politicians will not lie to us. Fourth, when making consumption decisions, people are able to make decisions simultaneously on multiple dimensions and can thus make tradeoffs among their various choices. But such decisions are difficult, if not impossible, in choosing among initiatives.¹¹¹

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

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

Fifth, we have spent many pages demonstrating how, in the end, policy can be Pareto inefficient, even when the median favors each policy choice dimension by dimension. Sixth, the initiative process can be manipulated by agenda setting, which determines what options voters see and the order in which they are considered. Neither of these last two problems with the initiative process have an analog in markets. Seventh, there seems to be a common theme among initiative proponents that simply having more options makes voters better off. There is not a clear theory of how aggregating voters' decisions across a variety of political dimensions improves policy outcomes. Such an assumption is based on something akin to the invisible hand of economic markets, but there is not an analog to price, which would have to exist for us to believe there is an invisible hand for the initiative market. Furthermore, the problems with the initiative information environment that we discussed earlier also make it unlikely that simply offering a multitude of options will improve social welfare. For these reasons it seems unreasonable to use the EMH to understand initiatives.

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

VIII. CONCLUSION

Lupia and Matsusaka faithfully report that "recent breakthroughs in theory and empirical analysis paint a comparatively positive picture of the initiative and referendum."¹¹² We have attempted to provide more troubling empirical examples along with theoretical reasons to be less sanguine. Throughout this Article we have presented a variety of reasons why the initiative process in general, and crypto-initiatives in particular, are unlikely to improve policy outcomes. In fact, all of the institutional solutions to social choice problems that scholars have studied¹¹³ are

such disciplining constraint is in place, allowing them to always pick the more costly option without forcing them to consider the costs of their choices.

112. Lupia & Matsusaka, *supra* note 3, at 463.

113. See Shepsle, *supra* note 8; Shepsle & Weingast, *supra* note 8; George Tsebelis, *Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism*, 25 BRIT. J. POL. SCI. 289 (1995); Gordon Tullock, *Why So Much Stability?*, 37 PUB. CHOICE 189 (1981).

insufficient in the initiative context. This should be a strong indication that outcomes are unlikely to be positive, as we demonstrated in our discussion of social choice problems for initiatives. Furthermore, it is clear that information problems will plague the initiative process, particularly when initiatives are chosen so as not to arouse opposition. Despite the possibility of negative social effects, political activists have picked up on the success of crypto-initiatives in 2004 and are encouraging others to use initiatives to set their own agendas in 2005 and beyond. The deleterious consequences of partisan manipulation of the initiative agenda is further affected by the rise of 527 crypto-PACs. Crypto-initiatives will tend to be particularistic and will typically not foster the creation of a voter-friendly information environment or a social-welfare enhancing choice environment. The combined effect of crypto-initiatives and crypto-PACs seems very unlikely to improve social welfare.

Our conclusion about the potentially grave flaws in the initiative process begs the question of whether the legislative process is a better way to make law. Legislative lawmaking includes the ability to make tradeoffs through the budget process, greater resources to study and determine possible effects of policy change, and, compared to constitutional amendments, creates law that is less permanent. Despite the advantages of the legislative process, we do acknowledge that there are times when the legislature may be corrupt or captured by special interests. In those circumstances, the initiative may be a useful way to change policy, but it should be made more difficult to change policy via initiatives so that political actors use them only when the legislature is particularly ineffective.

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

passed constitutional amendment. For these two reasons, the legislature seems to provide more hope for comprehensive and responsive lawmaking than the initiative process.

Since initiatives, campaign finance reform, and the other imperfect reforms of the twentieth century seem here to stay, we offer three proposals that we believe would improve the outcomes of the initiative process. First, require initiatives to meet the “pay as you go” standard, in which new policy proposals must either contain a funding source or explain what is to be cut in the budget to fund the new program. The adoption of this proposal makes the tradeoffs more explicit and also increases the probability of generating opposition, which is more likely to meet the conditions necessary for voters to become informed. Second, initiatives should be subject to amendment by the legislature. Every other type of policymaking in the United States is subject to checks and balances. In California, and in many localities, no such legislative or executive checks and balances exist for initiatives. This condition will force initiative sponsors to recognize the implementation difficulties faced by the legislature and may also constrain extreme initiatives because they can be more easily moderated. Third, initiatives should contain sunset provisions that require the voters or the legislature to reconsider the policy and determine if they wish to keep it after a specified time period. This would reduce the permanence of the constitutional changes and make it easier to roll back ineffective or negative policies. These three additions to the initiative process will force initiative sponsors to anticipate the reactions of voters and legislatures to the tradeoffs inherent in their proposals, and would make it more likely that initiatives would enhance welfare, even if it makes them less common.