

Popular ‘Medicine’: Policymaking by Direct Democracy and the
Medical Marijuana Movement of the 1990s

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On November 5, 1996, California voters launched an assault on the drug control regime that generations of American politicians, bureaucrats, and citizens had carefully constructed and defended. The ratification of Proposition 215, which permitted patients with illnesses ranging from AIDS and cancer to anorexia and migraine to use medical marijuana with a physician’s recommendation, marked the most significant challenge to America’s longstanding “war on drugs” since at least the 1970s. Despite the federal government’s staunch opposition to the medical marijuana ballot initiative, over five million California voters rejected appeals from the likes of President Bill Clinton, Senator Bob Dole, and drug czar Gen. Barry McCaffrey and approved Proposition 215 by a margin of 56 percent to 44 percent.

In the four years after the passage of Proposition 215, seven additional states and the District of Columbia followed in California’s footsteps (Arizona also passed a medical marijuana initiative in 1996). Alaska, Oregon, Washington, Nevada, and the District of Columbia ratified similar initiatives in 1998; Maine did so in 1999, and Colorado followed suit in 2000.¹ Meanwhile, in 2000 Hawaii became the first state to

¹ According to exit polls, 69% of District of Columbia voters supported Ballot Initiative 59 in 1998, but through the Barr Amendment Congress banned medical marijuana and prohibited the District from implementing the initiative. In addition, the Arizona legislature has prevented the implementation of that state’s Proposition 200, and it has faced significant legal hurdles because it allows physicians to *prescribe* – not recommend – medical marijuana *and* other Schedule 1 substances to patients, thus explicitly requiring state doctors to violate federal law in order to comply with the initiative results. Nevada voters approved a

approve a medical marijuana measure through the legislative process, and other state legislatures and governors have considered such measures as well.² The average percentage of “yes” votes on the eight statewide ballot initiatives that appeared from 1996 to 2000 was nearly 60 percent, and the average margin of victory was almost 20 points. While broader drug policy liberalization measures have not fared as well, in the last ten years no state has rejected an initiative that solely addressed medical marijuana.³

Table 1: Statewide Votes for Medical Marijuana

State	Year	Number	Yes	No
California	1996	Proposition 215	56%	44%
Arizona	1996	Proposition 200	65%	35%
Alaska	1998	Question 8	58%	42%
Oregon	1998	Measure 67	55%	45%
Nevada	1998	Question 9	59%	41%
Washington	1998	Initiative 59	59%	41%
Maine	1999	Question 2	61%	39%
Colorado	2000	Amendment 20	54%	46%

The dissertation examines the features, functions, and implications of the ballot initiative as a policymaking institution by investigating the electoral success of the medical marijuana movement of the 1990s. Drawing on case studies of initiative campaigns in California and Maine, interviews with key actors, and document analysis, I explore the role that institutional control, issue framing, and policy entrepreneurs played

medical marijuana initiative in 1998, but by law the constitutional measure had to be passed twice before it could be enacted. Question 9 was approved a second time in 2000, by a margin of 65% to 35%.

² In May 2003 the Republican Governor of Maryland, Robert Ehrlich, signed medical marijuana bill. But this measure was more limited than medical marijuana initiatives because it was restrictive and defensive (in allowing medical marijuana patients to raise a defense of medical necessity at trial) rather than broad and affirmative (the initiatives explicitly permit marijuana use and often cultivation by qualified patients).

³ Other unsuccessful measures have sought a broader liberalization of drug policy. The most notable example is the Drug Medicalization Prevention and Control Act of 1997 (Initiative 685) in Washington state. That measure would have legalized the medical use of marijuana as well as other Schedule 1 drugs and prescribed treatment and education programs instead of incarceration for people convicted of simple drug possession charges. Despite campaign contributions totaling \$1.5 million, the proposition was rejected by voters. Editorial, “WA, Time is Now for Medical Marijuana, Group Says,” *Seattle Post-Intelligencer*, September 2, 1997, at <http://www.mapinc.org/drugnews/v97/n374/a03.html>. Accessed March 20, 2003.

in the success of statewide medical marijuana initiatives. I also develop a quantitative model of initiative adoption that applies the state politics literature on policy adoption to the institutional context of direct democracy campaigns. The model evaluates how factors including public opinion, ballot access, interest group involvement, and previous legislative policy considerations and actions influence state initiative adoption.

In this paper, I review the key findings from the three empirical chapters and apply those findings to an evaluation of two normative issues related to the direct democracy process: the appropriateness of direct democracy in a representative system, and to what extent it allows the possibility of deliberation that is more traditionally thought to typify legislative chambers. I conclude that the medical marijuana story illustrates the usefulness of the ballot initiative as a policymaking device under certain conditions, but also illuminates some of its weaknesses. Ballot petitioners and representative officials alike could benefit from working to correct the defects of the initiative process and forging stronger connections between initiative and legislative policymaking.

A Brief Overview of Direct Democracy

The idea of direct democracy rests upon the notion of an enlightened, informed citizenry capable of self-government and accountable for keeping representative institutions responsive to the popular will. Direct democracy comes in many forms, including the recall, which allows voters to remove representatives from office, the referendum, by which voters can ratify or reject laws adopted by legislatures, and the ballot initiative, which citizens can use to formulate and enact public policy. The twenty-

four initiative states, most of which are located in the West, allow a specified number of voters to petition to propose statutes or constitutional amendments that are then adopted or rejected by voters at the polls.

In the United States, direct democracy was born out of Populist and Progressive frustration with the institutions of representative government and was part of the broad reform movement that shaped American politics from 1890 to 1920.⁴ Supporters pointed to the Swiss experience with direct democracy and native experiences in the American colonies, the New England town meeting, and popular approval of changes to state constitutions to support the use of the initiative as a way of bypassing corrupt and unresponsive legislatures that were preventing needed social and economic reform. For Progressives, direct democracy offered a correction for the failures of representative government, a way of reducing special interest influence and making legislative institutions more responsive to the people. In *Progressive Democracy*, Herbert Croly wrote that “an exclusively representative government is to many [friends of direct government] a perfectly satisfactory form of democratic political organization. It is objectionable only because it has failed to be really representative.”⁵ Woodrow Wilson imagined that the initiative and referendum would serve as the “gun behind the door,” but that the majority of legislative activity would continue to be conducted by legislative assemblies. Progressives envisioned the initiative not as a way of undermining the legislative process or representative government, but of redeeming them.⁶

⁴ Thomas Goebel, *A Government by the People: Direct Democracy in America, 1890-1940* (Chapel Hill: University of North Carolina Press, 2002).

⁵ Herbert Croly, *Progressive Democracy* (New York: Macmillan, 1914).

⁶ Ibid.

American political philosophy and history evince a strong, justified preference for policymaking that occurs in traditional institutions. At least at the federal level, the Founders' system of representative democracy was intended to provide sound government through a system that allowed representatives to "refine and enlarge" the public's views. American political institutions would be responsive to public opinion without being driven purely by popular passions. Some contemporary observers worry that the spread of direct democracy threatens the system of representation, elevating rhetoric over substance in policy debate, discouraging deliberation, and threatening representative institutions and the public's faith in their ability to solve problems.

The Progressives never envisioned that direct democracy would replace representative government, and they surely could not have imagined the kinds of resources that would be necessary to effectively contest modern initiative campaigns. Populists and Progressives championed direct democracy as a salve for representative institutions that had, at the turn of the twentieth century, become distant, corrupt, and unresponsive. Direct democracy was seen as a way of correcting the defects of representative institutions, as a "safety valve" that could enhance and redeem the responsiveness of representative institutions. Just as representative government does not function exactly as the Founders intended, the practice of direct democracy does not perfectly align with the Progressive ideal. The case of medical marijuana illustrates both the usefulness of and the challenges associated with modern initiative policymaking.

Key Findings

Polymaking by ballot initiative takes place in a campaign context and before a public audience that lacks many of the information cues available in other types of campaigns. Initiative polymaking also allows interest groups with sufficient funds and political sophistication to wage multi-state campaigns that target states with sympathetic public audiences, ballot access rules, and other favorable conditions. These features shape the nature of the polymaking process in a way that benefits policy entrepreneurs with particular skills and resources. In traditional institutions, policy formulation, compromise, coalition-building, and deliberation often occur among an elite audience of policy experts. Direct democracy places tremendous emphasis on fundraising, advertising, and effective public marketing of a policy idea. Using medical marijuana as a case study, the dissertation has explored the features, functions, and policy implications of the initiative process and the decisions and behavior of ballot petitioners who must negotiate its demands. By identifying some of the reasons for the medical marijuana movement's electoral success in the 1990s, the dissertation offers an important contribution to the drug control policy literature. In addition, by integrating case studies and a duration model of initiative adoption, the study applies a methodological pluralism approach in advancing the direct democracy, state politics, and policy diffusion literatures.

Much of the direct democracy literature focuses on procedural questions such as the role of money and voter competence in initiative campaigns, or on normative concerns about minority rights in initiative outcomes and the appropriateness of direct democracy in a representative system. This study approaches direct democracy primarily from the standpoint of ballot petitioners, exposes the decision-making process by which

they weigh whether to contest an issue through the initiative process, and offers a new perspective from which to engage normative debates about direct democracy. In the next section I draw on the findings from the medical marijuana case to identify some of the conditions under which the use of the initiative may be desirable, for example, in the case of legislative stalemate or institutional blockage and to address certain kinds of issues that representative actors tend to ignore.

Together, the case studies and the quantitative model presented in the dissertation suggest that Americans for Medical Rights – the group that sponsored seven of the eight successful medical marijuana initiatives – used its considerable political skills and resources to activate public opinion and other favorable conditions in states perceived to be predisposed to support medical marijuana initiatives. The dynamics of direct democracy policymaking allowed a well-funded national organization to probe public opinion about medical marijuana and, circumventing political parties, state legislators, and governors, spearhead a series of state initiative campaigns. Through effective policy marketing, AMR was then able to exploit and reinforce the public support it had already identified.

The dissertation has shown that the campaign context in which ballot petitioners craft and market public policy ideas enhances the importance of factors such as free and paid media, advertising, endorsements, public opinion, and issue framing vis-à-vis traditional policymaking institutions. The features of the initiative process in turn offer an advantage to policy entrepreneurs who possess particular skills and resources, including money and campaign savvy. Not least important, through effective policy

marketing entrepreneurs can capitalize on and reinforce existing public support for an issue like medical marijuana.

Existing research on issue framing tends to focus on large-scale shifts in policy subsystems or small changes in public opinion that occur when policy entrepreneurs manipulate the way issues are understood and discussed. Other work analyzes the content of policy entrepreneurs' issue framing efforts that take place within representative institutions. The dissertation probes the most important sources of voter information in initiative campaigns to provide a detailed account of the substance and execution of issue framing efforts. Such efforts are particularly important because initiative politics lacks traditional heuristics and voter cues but requires a great deal of knowledge for voters to align preferences with voting decisions. By marketing their campaign frames through ballot pamphlet arguments, endorsements and coalition-building efforts, position papers, and television and radio advertisements, ballot petitioners lower the cost of information-gathering and simplify voter choice. In initiative politics, frames serve both as a campaign strategy and as a means of conveying information. Effective framing can allow ballot petitioners to activate preexisting public support for a policy issue, making people more comfortable with voting their opinions and preferences and softening a position that may be controversial.

The findings also shed light on other aspects of initiative policymaking that have received a great deal of attention in the literature, including the role of money and the professionalization of initiative campaigns. Rather than manufacture approval, I find that the application of money and professionalism in initiative campaigns amplifies the impact and facilitates the political expression of existing grassroots and public support

that themselves lay the groundwork for money's effectiveness. Ballot petitioners can use these critical initiative resources to craft and market issue frames that raise the salience of existing support and make it electorally relevant to a public that might not otherwise act on its views. Consistent with some other research, I find that money is more influential in providing access to the initiative process than in determining initiative outcomes.⁷ Future research may explore further the dynamics of public support for initiative issues before and after the professionalization of initiative campaigns.

The results show that the initiative process can also produce policy effects that differ significantly from outcomes that emerge from representative institutions. Contrasting policy images and subsystems can flourish in a federal system that allows subnational electorates to ratify policy changes that are in opposition to federal law. The institutions of direct democracy have allowed these separate policy tracks on the state and national levels to be created and sustained without being resolved. Since Proposition 215 was passed in 1996, the federal government has attempted to prevent its implementation by threatening to revoke the prescription licenses of physicians who recommend marijuana and by closing many of the state's most prominent cannabis buyers' clubs. However, Americans for Medical Rights has shown little concern for the federal government's opposition to medical marijuana initiatives. In comments in a 2000 e-mail message to a state medical marijuana advocate, an AMR official confidently argued that, "The feds are a paper tiger on this issue. They have the power to solve the medical marijuana issue. But they don't have the resources, backbone or political support to do

⁷ Elisabeth R. Gerber, *The Populist Paradox: Interest Group Influence and the Promise of Direct Legislation* (Princeton: Princeton University Press, 1999).

anything that really stops progress in the states.”⁸ In order for initiative implementation to be successful, state and federal governments must cooperate to clarify and streamline the meaning, intent, and execution of ratified ballot measures. Instead, because in many states initiative policymaking and implementation take place apart from the normal policymaking process, there is little incentive for government actors to collaborate. The possibility of federal-state conflict therefore lurks in the background. As policy entrepreneurs increasingly look to the institutions of direct democracy to resolve all kinds of public problems, conflicts between state and federal law and policy may become more common.

In the next section, I investigate two common criticisms of the initiative process: that it is inconsistent with the principles of representative government, and that it fails to promote the deliberation that we see in representative institutions. The lessons of the medical marijuana story suggest that we ought not to reject the ballot initiative, even with its imperfections. I carve out a middle ground in the debate between direct democracy proponents and opponents, arguing that despite its shortcomings the ballot initiative can serve a useful purpose in a representative system and that future researchers should further specify the conditions under which initiative policymaking may be desirable.

Direct Democracy and Representative Government

In the early twenty-first century, the debate over direct democracy in the United States has reached a fever pitch. With the 2003 recall of California Governor Gray Davis, the election of Arnold Schwarzenegger, and the unrelenting march of groups and

⁸ E-mail communication, February 2000. Received from telephone interview subject (Arkansas), February 11, 2004.

individuals interested in placing initiatives on statewide ballots, the direct democracy process has become an important and influential feature of state government. In this section I draw on the lessons from the medical marijuana story to evaluate arguments about the appropriateness of direct democracy in a representative system.

The crux of the debate over direct democracy in the United States comes down to this: ballot initiatives contain the promise of more democracy and greater civic engagement. Not only are ballot measures ratified by the public; pre-campaign polling and focus groups also allow ballot petitioners to take account of public opinion in the crafting of initiative language and provisions.⁹ Direct democracy can bring public policy in line with public opinion when representative officials are reluctant to support the majority will. But ballot propositions may also threaten representative democracy and the public's faith in its ability to solve public problems, as groups increasingly view direct democracy as a preferable alternative to the messier (if less costly) world of legislative policymaking. The medical marijuana story reveals the conditions under which the use of direct democracy may be acceptable but also urges caution in duly expanding the application of the ballot initiative.

We might imagine several conditions under which limited use of the initiative process is desirable and perhaps even makes a positive contribution to representative government. First, the initiative can offer a constructive alternative to institutional blockage. Many issues that enjoy strong public backing result in legislative stalemate, inaction, or failure to follow the majority will. For example, “governance” policies that

⁹ In telephone and personal interviews I heard again and again about the extensiveness of Americans for Medical Rights's pre-initiative polling and focus groups that helped determine state publics' receptivity to a potential medical marijuana ballot initiative. In many cases not only the idea of medical marijuana but the very language used in the initiative itself was poll-tested.

seek to change the procedures and operation of representative government (such as term limits, supermajority requirements, and campaign finance reform) often run counter to the self-interests of elected officials. In the case of campaign finance, for instance, popular support for regulations may not lead to laws that limit contributions. While legislators have little incentive to support such measures, voter approval may mitigate the fundraising advantage of incumbents and diminish perceptions about the bloated role of money and special interests in campaigns and government.¹⁰ Indeed, Tolbert has shown that the presence of the initiative process is associated with a greater likelihood that a state has adopted policies that regulate how legislatures function, including term limits, supermajority requirements, and tax and expenditure limits.¹¹ Even when initiatives are unsuccessful or challenged in court, they can enhance the legislative process not only when it becomes stuck, but in a preemptive way by making legislators aware of the threat of an initiative responsive to constituent preferences. Gerber finds that the threat of an initiative can spur legislators into action and make the initiative process itself unnecessary.¹² In this sense, both the availability and the application of the initiative option can overcome legislative stalemate and heighten the responsiveness of the policymaking process.

¹⁰ Pippin, Bowler, and Donovan note that between 1984 and 2000 30 initiatives on campaign finance rules have been placed before voters in 11 initiative states, with a 61% passage rate, far higher than the history average of around 40%. John Pippin, Shaun Bowler, and Todd Donovan, "Election Reform and Direct Democracy: Campaign Finance Regulations in the American States," *American Politics Research* 30 (6) (2002): 559-585.

¹¹ Caroline J. Tolbert, "Changing Rules for State Legislatures: Direct Democracy and Governance Policies," in Shaun Bowler, Todd Donovan, and Caroline J. Tolbert, eds., *Citizens as Legislators* (Columbus: Ohio State University Press, 1998): 171-190.

¹² Elisabeth R. Gerber, "Legislative Response to the Threat of Popular Initiatives," *American Journal of Political Science* 40(1)(1996): 99-128; Elisabeth R. Gerber and Simon Hug, "Legislative Responses to Referendum," in Matthew Mendelsohn and Andrew Parkin, eds., *Referendum Democracy: Citizens, Elites, and Deliberation in Referendum Campaigns* (Toronto: Palgrave), 191-210.

Second, issues that threaten the interests of key groups or legislative constituencies, including tobacco taxes and insurance regulation reform, may find resolution through the initiative process. Gerber has found that the 1988 passage of Proposition 99, the Cigarette and Tobacco Tax, in California followed the measure's defeat in the state Senate when tobacco industry groups blocked legislative attempts to increase cigarette taxes.¹³ In 1998, California's Proposition 226, the Paycheck Protection Act, would have required state unions to obtain annual written permission from members for the use of dues for any political purpose. The initiative, which was defeated, came about because supporters knew it had no chance in the Democratic legislature, despite popular support for making union members' political contributions voluntary. In cases like these, the initiative process can serve as a way of circumventing the power of special interests that can use their money, influence, and political skills to block policy change through the legislative process that the broader public may support.¹⁴

Questions involving morality or culture may also be well-suited to discussion or resolution through the initiative process. A number of studies have found that policymakers respond more directly to citizen values on morality policy issues than to citizen opinions on nonmorality issues.¹⁵ Since morality issues tend to be nontechnical and salient, Mooney and Lee argue, "citizens have both the incentive and the ability to

¹³ Elisabeth R. Gerber, "Legislatures, Initiatives, and Representation: The Effects of State Legislative Institutions on Policy," *Political Research Quarterly* 49 (2): 263-286; see also Edith D. Balbach, Michael P. Traynor, and Stanton A. Glantz, "The Implementation of California's Tobacco Tax Initiative: The Critical Role of Outsider Strategies in Protecting Proposition 99," *Journal of Health Politics, Policy, and Law* 25 (4): 689-715.

¹⁴ Indeed, some research has found that citizens' views about the initiative process are structured in part by their conception of the power of special interests in legislative settings. Shaun Bowler, Todd Donovan, and Jeffrey Karp, "Popular Attitudes Toward Direct Democracy," Paper presented at the 2003 Annual Meeting of the American Political Science Association, Philadelphia, Pa.

¹⁵ Donald P. Haider-Markel and Kenneth J. Meier, "The Politics of Gay and Lesbian Rights: Expanding the Scope of Conflict," *The Journal of Politics* 58 (2): 332-349; Christopher Z. Mooney and Mei-Hsien Lee,

make their views known to their representatives,” causing policymakers to reflect the values of constituents in a responsive, direct way.¹⁶ But the availability of the initiative process in twenty-four states suggests why policymakers may sidestep morality issues rather than simply defer to citizen preferences. Issues such as medical marijuana, physician-assisted suicide, and gay marriage are simple, politically salient, and not technically complex, features that diminish the value of information or expertise in opinion formation. Because morality issues engage questions of core values, they are not usually amenable to the bargaining and compromise of the legislative process. The public often holds strong, polarized opinions on moral issues, making it easier to draw lines of accountability and assign credit and blame to political actors.¹⁷ As a result, even if they take the majority position, representative actors are likely to face criticism from passionate, attentive opponents. Citizens may be as likely to visit electoral punishment on policymakers who make unpopular decisions as they are to reward officials who demonstrate responsiveness to their concerns. Some observers have even questioned whether American democracy is capable of mediating differences and conflicts as deep as those that exist on cultural or moral issues.¹⁸ Aware of the no-win situation they face in staking out a position on gay rights or medical marijuana, for example, political actors may prefer to leave morality issues to the initiative process.

Because it was in part a moral issue for proponents and opponents and for other reasons as well, medical marijuana was an issue appropriately resolved through the

“Legislating Morality in the American States: the Case of Pre-Roe Abortion Regulation Reform,” *American Journal of Political Science* 39 (3): 599-627.

¹⁶ Christopher Z. Mooney and Mei-Hsien Lee, “The Influence of Values on Consensus and Contentious Morality Policy: U.S. Death Penalty Reform, 1956-82,” *The Journal of Politics* 62 (1): 223-239, 223.

¹⁷ R. Douglas Arnold, *The Logic of Congressional Action* (New Haven: Yale University Press, 1990).

¹⁸ James Davison Hunter, *Before the Shooting Begins: Searching for Democracy in America’s Culture War* (New York: Macmillan, 1994).

initiative process. Despite strong public support, the failure of the legislative process to ratify a medical marijuana measure left advocates no other institutional venue in which to make their appeals but the initiative process. Gerber and her colleagues argue that policy entrepreneurs may be attracted to the direct democracy process because the issue they sponsor is unpopular among majority parties, offensive to key legislative constituencies, or considered “too hot to handle” by reelection-minded state legislators,¹⁹ all conditions that apply to the politics of medical marijuana. Many individuals I spoke with in Maine and California argued that elected officials would prefer to “punt to the population” when it comes to medical marijuana.²⁰ One Maine proponent explained:

I don’t think they [the legislature] have the backbone to make a hard decision. And this was, I’m sure, in the well of the House, seemed to be a really hard decision. My opinion of most politicians is they get elected to be re-elected. The House doesn’t want to be responsible for making a decision. And it’s not only on medical marijuana; whenever it’s a really good issue, they yearn for the citizen initiative.²¹

Asked to clarify what he meant by a “really good issue,” this individual explained that political officials would prefer to avoid “controversial” or “polarizing” issues “that might cost [them] being re-elected.”²² A former Maine state legislator criticized her colleagues’ reluctance to support medical marijuana: “People become irrational, particularly politicians, because they don’t want to be looked at as somebody who’s soft on drugs.”²³ A California medical marijuana supporter identified a similar dynamic in the California and federal legislatures:

Well, one of the biggest political problems is just the stigma associated with marijuana. And our natural allies in the state and

¹⁹ Gerber et al., *Stealing the Initiative*.

²⁰ Personal interview, Portland, Me., May 22, 2003; Telephone interview (Maine), August 6, 2003.

²¹ Personal interview, Portland, Me., May 22, 2003.

²² Ibid.

²³ Personal interview, Portland, Me., May 21, 2003; Personal interview, Bangor, Me., May 21, 2003.

federal legislatures would be the Democrats, but they are often reluctant, particularly in Washington, you know – no Democrat’s going to support medical marijuana and make them look soft on drugs, that’s really what it comes down to.²⁴

Salient morality issues that provoke strong reactions from proponents and opponents alike may present a no-win situation for elected officials who have little to gain from taking a stand.

Apart from the policy outcomes it can bring about, the initiative process offers other benefits as well. In particular, direct democracy invites the possibility of public deliberation about important policy issues. The final, best, or only outcome of the initiative process need not be viewed as the *resolution* of a policy issue. Even when signature drives are unsuccessful or ballot measures fail, the initiative process performs a valuable function in simply facilitating public discussion – perhaps even deliberation – about policy issues. Dinan notes that in cases in which legislators are more beholden to their own particular interests or to special interests than to the public interest, the initiative may be valuable not only as an alternative venue for the *resolution* of policy issues, but as a way of allowing the public to *register* their opinions to representatives who are inadequately attuned to public opinion.²⁵

The initiative process can help bring public policy more in line with public opinion in cases of legislative stalemate or inaction, overcome special interest influence in state legislatures and allow the political expression of the majority will, and facilitate public deliberation on policy issues. But when political actors choose to “punt to the population” rather than confront controversial or difficult issues that could cost them re-

²⁴ Personal interview, West Hollywood, Calif., January 27, 2003.

election, the effect of direct democracy may also be to enervate the capacity of representative institutions to solve public problems. Still, while the application of the initiative imposes costs on the practice and authority of representative government, the benefits and political access it can offer to disaffected citizens, interest groups, and policy issues outweigh its shortcomings.

In addition to its implications for representative government, opponents of direct democracy have cited low levels of voter information, the length and complexity of initiative ballots, and the inflexibility that successful measures impose on legislatures as flaws of the initiative process. Some observers argue that initiative politics weakens political parties, encourages single-issue politics, and fails to safeguard minority rights. While we should take all of these criticisms seriously, they ought not lead to a wholesale rejection of the initiative process. Taken together, the criticisms of the initiative process reinforce the message that we should be cautious rather than celebratory in its application, and that proposals to enhance the role of representative institutions in the initiative process merit serious consideration. In the meantime, future researchers might attempt to further specify the conditions under which direct democracy can be useful in a representative system.

Direct Democracy and Deliberation

Criticisms of the Deliberative Potential of Direct Democracy

One of the most intriguing claims about direct democracy from the standpoint of democratic theory is that it can stimulate political participation and civic engagement for

²⁵ John J. Dinan, *Keeping the People's Liberties: Legislators, Citizens, and Judges as Guardians of Rights* (Lawrence, Kans.: University Press of Kansas, 1998), Chapter 5.

voters disillusioned with “politics as usual.” But “in order for referendums to function as devices for popular sovereignty,” Jenkins and Mendelsohn caution, “the public must be active participants in the discourse.”²⁶ The public deliberation that might take place in initiative campaigns differs from the Founders’ conception of deliberation in which leaders are insulated from public opinion in order to refine and filter its better elements within representative institutions.²⁷ Can initiative politics, in fact, encourage sound public deliberation, promoting dialogue, enhancing participation, and producing legitimate and reasonable policy outcomes?²⁸ Perhaps, to the extent that opinion expressed in initiative campaigns is informed and reflective about the policy options at stake such that argumentation and a “politics of discourse” is possible.²⁹ In addition, initiative policymaking may stimulate the interest of inattentive voters better than representative institutions, which are inclined to favor more politically attentive publics.³⁰ Even imperfectly informed voters can use cues in initiative campaigns, such as the positions of relevant interest groups, to make decisions as if they had complete information.³¹ While these shortcuts do make the initiative process more penetrable for

²⁶ Richard Jenkins and Matthew Mendelsohn, “The News Media and Referendums,” in Mendelsohn and Parkin, eds., *Referendum Democracy*: 211-230, 229.

²⁷ For an overview of deliberative democracy, see Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge: Harvard, 1996); James Fishkin, *Deliberation and Democracy: New Directions for Democratic Reform* (Yale, 1991); Alan Brinkley, “The Challenge to Deliberative Democracy,” in Alan Brinkley, Nelson W. Polsby and Kathleen M. Sullivan, eds., *New Federalist Papers: Essays in Defense of the Constitution* (New York: W.W. Norton & Company, 1997): 23-27; Joseph M. Bessette, *The Mild Voice of Reason: Deliberative Democracy and American National Government* (Chicago: University of Chicago Press, 1994); Jon Elster, ed., *Deliberative Democracy* (Cambridge: Cambridge University Press, 1998). I am less concerned in this discussion with debates over the procedures and principles that ought to guide deliberation than with the possibility of deliberation in initiative campaigns.

²⁸ Simone Chambers, “Constitutional Referendums and Democratic Deliberation,” in Mendelsohn and Parkin, eds., *Referendum Democracy*: 231-255.

²⁹ Simone Chambers, *Reasonable Democracy: Jurgen Habermas and the Politics of Discourse* (Ithaca: Cornell University Press, 1996).

³⁰ Arnold, *The Logic of Congressional Action*.

³¹ Arthur Lupia, “Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections,” *American Political Science Review* 88 (1) (1994): 63-76; Arthur Lupia and

overwhelmed or busy voters, their very existence may discourage extensive public dialogue about the policy issues at stake in initiative campaigns.

Chambers raises important concerns about the possibility of deliberation in constitutional referendums, arguing that the features of initiative politics, including its “extreme majoritarianism” and image of inflexibility and irreversibility, act as disincentives to deliberation.³² The messy processes of compromise and negotiation that are central to deliberative democracy are absent in initiative politics, a politics that tolerates immoderation.³³ In a sense, initiative policymaking attempts not only to circumvent representative institutions, but also the deliberation they can allow. After all, the easy solution to public disillusionment with representative institutions and processes is to invoke the people’s right to self-government and embrace direct democracy, with its veneer of greater simplicity and finality.

As Cain and Miller note, the initiative process can also undermine the possibility of deliberation by precluding “opportunities for refinement, informed deliberation, consensus building and compromise.”³⁴ While the initiative process produces policy decisions by popular vote, legislative lawmaking requires that those making the decisions “function in an institutional setting that fosters collective reasoning about common concerns.”³⁵ Deliberation in legislatures does not preclude manipulation or strategic

Richard Johnston, “Are Voters to Blame? Voter Competence and Elite Maneuvers in Public Referendums,” in Jenkins and Mendelsohn, eds., *Referendum Democracy*: 191-210.

³² Chambers, “Constitutional Referendums and Democratic Deliberation.”

³³ Brinkley, “The Challenge to Deliberative Democracy.”

³⁴ Bruce E. Cain and Kenneth P. Miller, “The Populist Legacy: Initiatives and the Undermining of Representative Government,” in Larry J. Sabato, Howard R. Ernst, and Bruce A. Larson, eds., *Dangerous Democracy? The Ballot Over Ballot Initiatives in America* (Lanham, MD: Rowman & Littlefield, 2001): 33-62.

³⁵ Bessette, *The Mild Voice of Reason*, p.2.

voting, but it allows different sides to be heard, settlements to be reached, and learning to take place.³⁶

Another difficulty with deliberation in initiative politics is that much of the argumentation in ballot proposition campaigns is filtered through the media, an imperfect institution in fostering thoughtful conversation and reasoned debate. While some ballot efforts do still originate at the grassroots level, the professionalization of the initiative process generally has led to a greater emphasis on free and paid media as tools for message communication. Many studies of the mass media and American politics have noted that professional news norms and values and an increasingly competitive news environment favor profit-oriented, sound bite-driven coverage rather than sober consideration of substantive policy issues, particularly in the context of political campaigns.³⁷ Media coverage of initiative campaigns resembles coverage of general elections, with its emphasis on narrative description of daily activities, strategic frames, and competitive schema.³⁸ The news media may allow citizens to vote in a way consistent with their pre-existing preferences, but they may not facilitate a process of “democratic deliberation in which citizens can constructively challenge one another’s beliefs in a search for understanding.”³⁹ Those who look to the media to provide the

³⁶ For more information on legislative deliberation, see, for example, Alan Rosenthal, *The Decline of Representative Democracy: Process, Participation and Power in State Legislatures* (Washington, D.C.: Congressional Quarterly Press, 1998); Richard J. Ellis, *Democratic Delusions: The Initiative Process in America* (Lawrence: University Press of Kansas, 2001).

³⁷ See, for example, Thomas E. Patterson, *Out of Order* (New York: Vintage Books, 1994); Joseph N. Cappella and Kathleen Hall Jamieson, *Spiral of Cynicism: The Press and the Public Good* (Oxford: Oxford University Press, 1997); Joseph N. Cappella and Kathleen Hall Jamieson, “News Frames, Political Cynicism, and Media Cynicism,” *The Annals of the American Academy of Political and Social Science* 546 (July 1996), Special Issue on The Media and Politics: 71-84.

³⁸ Jenkins and Mendelsohn, “The News Media and Referendums.”

³⁹ *Ibid.*, 211.

information and opportunity for public dialogue and deliberation about ballot initiatives might direct their gaze elsewhere.

Voting choices in initiative elections are not necessarily unsound, unreflective, and uninformed, but even many supporters of direct democracy agree that initiative campaigns could do a better job of fostering public enlightenment or collective deliberation. This is particularly true vis-à-vis the role that representative institutions might play in mediating public opinion and allowing its more deliberative elements to be expressed. In their influential volume, Mendelsohn and Parkin conclude that “referendum democracy appears to be a democracy that shuns the deliberation inherent in the legislative process in favor of a majoritarian process of the aggregation of individual opinions.”⁴⁰ Direct democracy extends the possibility of public deliberation. But in practice, the features of the initiative process and the institutions through which it is mediated may not promote the kind of deliberation that initiative supporters envision or that representative government allows.

The Possibility of Deliberation

The bifurcated view in which direct democracy and representative government are seen as hostile to one another informs the critique of the deliberative potential of direct democracy. The philosophical and institutional foundations of the American national republic were designed to enhance the possibility of institutional deliberation. While the Founders rejected direct democracy at the federal level, their views did not foreclose the possibility of initiative, referendum, and recall in the states. And throughout the course

⁴⁰ Matthew Mendelsohn and Andrew Parkin, “Introduction: Referendum Democracy,” in Mendelsohn and Parkin, eds., *Referendum Democracy*, 1-24.

of American political history, representative democracy has not been as ideal – and direct democracy has not been as imperfect – as critics of the ballot initiative would have us believe.

Direct democracy is certainly not without its weaknesses, but the same could be said of the legislative process, which too often fails to safeguard minority rights and is beholden to moneyed, organized interests. Cronin, Commager, and others have pointed out that historically legislators have often failed to safeguard minority rights. They cite as examples censorship, anti-evolution, and anti-communist laws, as well as injustices against African-Americans and other racial and ethnic minority groups.⁴¹ Another study found only a marginal difference between the capacity of republican and populist institutions to secure rights across a variety of issue areas during the twentieth century.⁴² Much is made of the bloated role of money in ballot initiative campaigns. But if the practice of initiative politics does not mirror the Progressive ideal, this could also be said of representative government when entrenched, moneyed interests enjoy greater access to the legislative process than do less powerful groups and when millions of dollars are often required to contest a campaign for statewide office.⁴³

Supporters of representative democracy overstate the extent to which deliberation takes place in legislative settings. In his defense of legislative deliberation, Bessette acknowledges its limitations: members of Congress are often caught up in fundraising efforts, delegate responsibility to staff, and hold opinions that are not malleable based on

⁴¹ Thomas E. Cronin, *Direct Democracy: The Politics of Initiative, Referendum, and Recall* (Cambridge: Harvard University Press, 1989); Henry Steele Commager, *Majority Rule and Minority Rights* (Gloucester, Mass.: Peter Smith, 1958).

⁴² Dinan, *Keeping the People's Liberties*, Chapter 6.

⁴³ For information about the money raised to contest statewide elections, consult the nonpartisan Institute on Money in State Politics at www.followthemoney.org

debate and persuasion.⁴⁴ At the subnational level, the possibility of deliberation in state houses is even less due to the institutional realities of state legislatures. Scholars have documented the rise in state legislature resources and professionalism since the 1960s.⁴⁵ But state governments continue to face constraints in policymaking due in part to their lack of resources (including salary, staff time, and time to deliberate to acquire policy expertise) compared with those available to members of Congress. Legislative sessions, which tend to be very short (usually lasting only a few months), constrict the amount of deliberation that can take place on complicated issues. With a few notable exceptions, legislative salaries are low, reflecting a clear preference in most states for a “citizen legislature.”⁴⁶ Finally, the recent adoption of legislative term limits in many states limits the time in which legislators can develop policy expertise, forcing them to rely on staff, interest groups, and other policy experts as sources of information and opinions. The institutional realities of state legislatures may limit their deliberative potential.

In addition, some of the issues that are suited to initiative politics, such as questions of morality policy, are precisely the issues around which public deliberation may be most likely to occur. Our assessment of the possibility of public deliberation in initiative campaigns depends in part on how we evaluate the capacity of ordinary citizens to formulate and express their opinions. Dinan has pointed out that early supporters of direct democracy believed that initiatives and referenda would be subject to adequate deliberation, “albeit of a different character than in the [republican] regime.”⁴⁷

⁴⁴ Bessette, *The Mild Voice of Reason*.

⁴⁵ Alan Rosenthal, “The Legislative Institution: Transformed and at Risk,” in Carl E. Van Horn, ed., *The State of the States* (Washington, D.C.: CQ Press, 1989); Christopher Z. Mooney, “Measuring U.S. State Legislative Professionalism: An Evaluation of Five Indices,” *State and Local Government Review* 26(1994): 70-78; Lori Fritz, unpublished Ph.D. dissertation, University of Virginia, 2004.

⁴⁶ Lori Fritz, unpublished Ph.D. dissertation, University of Virginia, 2004.

⁴⁷ Dinan, *Keeping the People’s Liberties*, 93.

At the time of the Founding, proponents of representative government believed that deliberation would occur through the functioning of institutions rather than through reasoning, persuasion, and debate among citizens. Many people do lack the time, interest, information, or education to reason collectively on issues facing the nation. But the “reasoning voter” school has shown that even absent these political resources, it is possible for people to form opinions that are consistent with their interests and to vote in a way that reflects their underlying preferences.⁴⁸ With regard to “easy” issues that are salient and nontechnical, the possibility of manipulation by ballot petitioners diminishes and the likelihood that individuals can form, defend, and vote on opinions consistent with their underlying beliefs is enhanced. The public deliberation that takes place in initiative campaigns may be no less imperfect than that which takes place among representative actors.

Direct democracy may not foster deliberation as well as representative institutions, and it certainly ought not to be seen as a substitute for representative government. But direct democracy invites the possibility of involving attentive and inattentive publics in policy discourse to a greater extent than a more insular, special interest-driven legislative policymaking process. Cues or heuristics are not ideal tools for deliberation, but they do provide political access to imperfectly informed voters and enable them to evaluate policy proposals in light of their interests and preferences.

The lesson that emerges from this discussion of the appropriateness of direct democracy, its deliberative potential, and the medical marijuana story is that direct

⁴⁸ Paul M. Sniderman, Richard A. Brody, and Philip E. Tetlock, *Reasoning and Choice: Explorations in Political Psychology* (Cambridge, UK: Cambridge University Press, 1991); Samuel L. Popkin, *The Reasoning Voter: Communication and Persuasion in Presidential Campaigns* (Chicago: University of Chicago Press, 1994).

democracy works best when it is used in concert with the legislative process that ought to remain the primary policymaking venue. Still, the greatest challenge for advocates of direct democracy is to better articulate how the initiative process can exist alongside representative government without fundamentally undercutting it. One of the most compelling criticisms of direct democracy is that the initiative will come to be seen – as many in California argue it already has – as preferable or even superior to the messiness and compromise of the legislative process. Many students of direct democracy have found that the presence of the initiative alters the nature of the representative process, for example, by affecting the decisions and behavior of state legislators and shaping the policy outcomes that initiative states produce.⁴⁹ More ominously, overuse and inappropriate use of the ballot initiative threaten to sap the authority and legitimacy of representative institutions and the public's faith in the ability of those institutions to solve problems.

While we must treat such criticisms seriously, the discussion in this paper and throughout the dissertation suggests several conditions under which the initiative process can play a vital role in a representative system. There is no avoiding the fact that state legislatures sometimes ignore politically unpopular or untouchable issues or resolve those issues in a way that opposes the majority will. The initiative process opens up a new

⁴⁹ Gerber et al., *Stealing the Initiative*; Elisabeth R. Gerber, "Legislative Response to the Threat of Popular Initiatives," *American Journal of Political Science* 40 (1) (1996): 99-128; Elisabeth R. Gerber, "Legislatures, Initiatives, and Representation: The Effects of State Legislative Institutions on Policy," *Political Research Quarterly* 49 (2) (June 1996): 263-286; John G. Matsusaka, "Fiscal Effects of the Voter Initiative: Evidence from the Last 30 Years," *The Journal of Political Economy* 103 (3) (1995): 587-623; Elisabeth R. Gerber and Arthur A. Lupia, "Campaign Competition and Policy Responsiveness in Direct Legislation Elections," *Political Behavior* 17 (1995): 287-306. For an opposing argument (that the initiative process does not make for more responsive policy), see Edward L. Lascher, Jr., Michael G. Hagen, and Steven A. Rochlin, "Gun Behind the Door? Ballot Initiatives, State Policies and Public Opinion," *The Journal of Politics* 58 (3) (August 1996): 760-775; Joseph Camobreco, "Preferences, Fiscal Policies, and the Initiative Process," *The Journal of Politics* 60(3) (1998): 819-829.

avenue of access for policy advocates whose efforts are frustrated in representative institutions. The task for direct democracy proponents, then, is to make the initiative *available* to disaffected citizens and groups without making it *attractive*. This could both discourage state representative officials from looking to the ballot initiative to resolve issues they would prefer not to address, and preserve the initiative as an option for policy advocates who are dissatisfied with the outcomes of the legislative process.

When representative institutions produce an outcome that is inconsistent with the expressed majority will, direct democracy can allow issues to be discussed and resolved in an alternative institutional venue. And the public discussion or airing of policy issues is an important but often overlooked function of the initiative process since the majority of proposed ballot measures fail either at the qualification or ratification stage. Informed by the Progressive justification for direct democracy, the ballot initiative embodies a hope that an enlightened, informed electorate will keep representative institutions and actors accountable to the people. The deliberative potential has always existed in the institutional design and philosophical justification for direct democracy. It is the initiative's historical and institutional development that has led us to question that potential.

Representatives, initiative petitioners, and other actors who wish to preserve the availability of direct democracy can do so by working to better address its shortcomings. Policymakers must construct initiative laws and regulations that impose barriers high enough to discourage casual initiative use, but low enough to allow access to ballot petitioners frustrated by legislative stalemate, inaction, or countermajoritarian policy outcomes. Greater involvement by state legislatures in the initiative drafting, campaign,

and implementation processes could mollify many concerns about the initiative process by providing a link between representative and direct democracy institutions that enhances the responsiveness, flexibility, and accountability of each. At the least, representative institutions might provide more opportunities for deliberation and citizen engagement within initiative campaigns by sponsoring public hearings or improving and publicizing useful sources of voter information (such as the state ballot pamphlet) other than the mass media.

Initiative petitioners, too, must take some responsibility for corrupting the process of direct democracy and some stake in improving it – for their own self-interest if not for more altruistic reasons. Like modern political parties and candidates, too often ballot petitioners tailor their rhetoric and messages to those who already agree with them rather than reach out to try and mobilize the apathetic or convert opponents.⁵⁰ Americans for Medical Rights spearheaded campaigns in states it identified as hospitable settings for medical marijuana initiatives. Rather than simply exploit existing public sympathy for their cause, policy entrepreneurs could commit to fostering a sensible, deliberative discussion about the issues that does not engage only the most passionate voices. This would be a riskier strategy, perhaps, but for most entrepreneurs it would be preferable to eliminating the ballot initiative as a policymaking option. The responsiveness of direct and representative democracy could be enhanced if representative actors and initiative petitioners acknowledged one another's legitimacy and co-dependence.

Hunter has argued that cultural conflict has an inherently antidemocratic impulse that is manifested in one of two ways: either when claims are posited as fundamental rights that transcend the democratic process, or in the ways in which activists frame their

positions on issues as beyond discussion or debate.⁵¹ Such techniques may be seductive to initiative petitioners who expect to use money, advertising, and other resources to simply barrel their way through the direct democracy process uncontested. Real reform of the initiative process will occur not only through institutional or procedural changes, but through attitudinal shifts that embrace the ballot initiative as a policymaking instrument that is not purely hostile to republican government, but one that can complement it as well.

⁵⁰ Christie Whitman, "The Vital Republican Center," *New York Times*, January 12, 2004: A23.

⁵¹ Hunter, *Before the Shooting Begins*.