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## Introduction

*“Pure democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths.”*

James Madison, *Federalist 10*

The framers of the U.S. Constitution, it is fair to say, were not advocates of direct democracy. In crafting the Constitution, the framers opted instead for a *representative* democracy. Elected officials representing the interests of their constituents were to make laws. The framers’ preference in part reflected the nation’s large size. They recognized that it would be physically impossible to bring large numbers of people together to participate effectively in national governance. But the framers also believed that citizen lawmaking would empower turbulent and contentious majorities and trample the rights of political minorities. Representative government would guard against these dangers. Elected officials would be responsive to constituents’ interests but remain insulated from the immediate and unrefined passions of popular majorities. In the framers’ view, representative – not direct – democracy was the key to effective governing.

Yet direct democracy is alive and well in the form of statewide ballot initiatives. Twenty-four states presently allow individuals and groups to propose laws for direct voter consideration at the ballot box, and election-day lawmaking is at an all-time high.<sup>1</sup> Many states, of course, also use some variant of the ballot *referendum* – a process by which the state legislature submits a constitutional amendment or legislative measure to voters for approval.<sup>2</sup> But state ballot referendums are a decidedly less “pure” form of direct democracy than are state ballot initiatives. Whereas ballot referendums begin with legislation crafted by the state legislature, ballot initiatives typically begin with proposals crafted by individuals or groups *outside* of the legislature. As the most direct of direct democracy institutions, ballot initiatives are the primary focus of this book.

Ballot initiatives have had a profound influence on public policy. The most well-known ballot initiative is no doubt Proposition 13. Passed by California voters in 1978, Proposition 13 slashed local property taxes and restricted the ability of localities to impose future tax increases. The effect of Proposition 13 on California’s public sector – and indeed on the political culture of California and the nation as a whole – has been

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<sup>1</sup> Four types of ballot initiatives exist: direct statutory, direct constitutional, indirect statutory, and indirect constitutional. Of the 24 direct democracy states, most use *direct* initiatives and allow for the consideration of both statutory and constitutional measures. A small number of states use *indirect* statutory and/or constitutional initiatives. The difference between direct and indirect initiatives is that indirect initiatives must be submitted to the legislature prior to being placed on the ballot. The legislature may then typically respond in one of three ways: (1) adopt the measure, (2) place the measure on the ballot for voter approval, or (3) revise the law and place the revised version on the ballot for voter approval. With both direct and indirect initiatives, representative government is largely sidestepped.

<sup>2</sup> Every state but Delaware requires voters to approve state constitutional amendments. In addition, twenty-four states allow state legislatures to submit legislation to voters for approval, nineteen require legislatures to get voter approval for certain types of fiscal legislation (such as debt authorization and bond issues), and twenty-three allow citizens to force (via petition) an issue passed by the legislature onto the ballot for voter approval (Bibby and Holbrook, 1996).

nothing less than transformative.<sup>3</sup> Yet the policy effects of direct legislation have reached far beyond the realm of taxation. In direct democracy states, the ballot initiative process has also been used to force substantial policy changes in areas such as health care, gay marriage, euthanasia, immigration, land conservation, affirmative action, criminal sentencing, medical use of marijuana, and the legalization of gambling. Moreover, by ushering in legislative term limits and comprehensive campaign finance reform in many states, ballot initiatives have fundamentally altered the political playing field.<sup>4</sup> Importantly, ballot initiatives can also influence public policy *indirectly*. As political scientist Elizabeth Gerber points out, interest groups can force state legislatures to respond favorably to group concerns by threatening to draft ballot measures for direct voter consideration.<sup>5</sup>

Although the impact of state ballot initiatives on state public policy is beyond question, the propriety of passing laws in this manner has been fiercely debated. Proponents of the initiative process argue that ballot initiatives serve as an important tool of “last resort” when legislatures fail to act in the public interest. They also maintain that initiatives allow the popular will to be expressed directly without the “distortion” of representative politics or “special” interests. What’s more, argue proponents, ballot initiatives encourage change, reduce citizen alienation, heighten voter awareness, and eliminate corruption endemic to the legislative process.

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<sup>3</sup> For an analysis of the impact of Proposition 13 on California, see Peter Schrag, *Paradise Lost: California's Experience, America's Future* (New York: The New Press, 1998).

<sup>4</sup> Caroline J. Tolbert, “Changing Rules for State Legislatures: Direct Democracy and Governance Policies.” In *Citizens as Legislators: Direct Democracy in the United States*, edited by Shaun Bowler, Todd Donovan, and Caroline J. Tolbert (Columbus: Ohio State University Press, 1998).

<sup>5</sup> Elisabeth R. Gerber, *The Populist Paradox: Interest Group Influence and the Promise of Direct Legislation* (Princeton, NJ: Princeton University Press, 1999).

To counter these arguments, critics of the ballot initiative offer a litany of complaints about the conduct and propriety of the process. For example, many critics claim that political consultants and moneyed interests now exercise far too much influence in ballot campaigns, polluting a process originally intended to give citizens a greater voice in policymaking. Other critics claim that voters possess neither the knowledge nor the expertise to understand and evaluate the measures on which they are voting. Still other critics have blasted the ballot initiative process for producing poorly written laws and facilitating the passage of legislation that disregards minority rights. Finally, many critics of ballot initiatives lament the shrill, uncompromising, and manipulative discourse typically found in contemporary ballot initiative campaigns. Such discourse, they argue, is a poor substitute for the deliberation and compromise that accompany serious legislative debate.

Our goal in this book is to evaluate the ballot initiative process and recommend some sensible reforms. Our analysis draws on both academics and practitioners, with academics writing the book's primary chapters and campaign professionals contributing insightful responses. In our view, both the study and practice of politics benefit when academics and practitioners exchange ideas. It is our hope that these benefits are evident throughout this book.

### *The Chapters*

An understanding of modern initiative politics must begin with an understanding of its foundations. Toward this end, Howard Ernst opens the book with an essay outlining trends in American initiative politics. His chapter begins with an important observation

about the persistent advancement of direct democracy in the United States: while many states have adopted the ballot initiative process, none have ever repealed it. Employing a useful typological scheme to categorize some sixteen-hundred statewide initiatives considered between 1904 and 1995, Ernst then provides a coherent overview of ballot initiative trends in the 20<sup>th</sup> century. His analysis shows that while use of the ballot initiative has ebbed and flowed throughout the 20<sup>th</sup> century, the types of interests using the process – as well as the passage rates within interest categories – have remained remarkably stable. Importantly, moreover, Ernst shows that narrow-material interests have always been – and continue to be – at an electoral disadvantage in initiative politics. By providing readers with a historical sketch of trends in direct democracy, Ernst’s analysis sets the stage for an evaluation of contemporary ballot initiative politics in the United States.

In Chapter 2, Todd Donovan, Shaun Bowler, and David McCuan describe and respond to popular criticisms of the modern “initiative industrial complex.” Although campaign professionals have long been involved in ballot initiatives, the authors note, their involvement in direct legislation campaigns has become increasingly institutionalized. Initiative sponsors now employ political professionals at every step. They hire political lawyers to draft a proposal’s language, and they rely on an array of campaign professionals to gauge public support, build electoral coalitions, secure endorsements, and provide advice during title and summary negotiations. Moreover, with ballot qualification in most initiative states now virtually impossible to achieve through purely volunteer efforts, groups regularly retain high-priced petition management firms. Indeed, the authors note that petition costs are frequently the largest single expense for

initiative proponents, and they observe that initiative opponents are increasingly hiring firms to wage costly *anti*-qualification campaigns. Finally, once proposals are qualified for the ballot, campaign professionals play a major role in designing and producing advertisements in ballot initiative campaigns.

The growth of this initiative industrial complex has alarmed reformers. In critics' eyes, the campaign professionals who orchestrate ballot campaigns are mercenaries who care little about public policy. To maintain a winning record, consultants employ manipulative tactics to mislead voters. With no partisan cues to guide their decisions, voters in ballot contests are especially susceptible to consultants' machinations. Worse yet, critics claim, profit-motivated campaign professionals generate business for themselves by pitching ballot measures to well-heeled interest groups that have the ability to bankroll them (and, in the process, make consultants rich). This tactic, in the view of critics, has led to an explosion of ballot initiatives. With political consultants dominating every step of the process, contemporary ballot initiatives are a far cry from the grassroots ideal that progressives and populists had in mind.

While acknowledging some excesses associated with the initiative industrial complex, Donovan, Bowler, and McCuan suggest that many of the concerns raised by critics are exaggerated. Their survey of initiative professionals shows that ideology plays a significant role in consultants' decisions about which ballot campaigns to work for – a finding that belies critics' claims about consultants' lack of principles. The authors also point out that initiative professionals are severely limited in their ability to manipulate or mislead voters. For one, voters report relying more heavily on official ballot summaries and media coverage than on campaigns ads for information on ballot measures.

Moreover, the authors observe, voters glean important information about endorsements and group support for a ballot measure (which serve as powerful voting cues) even from the most manipulative ads. Finally, as a practical matter, disseminating outright misinformation through campaign ads is likely to lead to considerable voter backlash, resulting not only in defeat at the polls but also in a tarnished reputation for the initiative sponsors and the offending consultants. Needless to say, such consequences are undesirable for political professionals and advocacy groups seeking to retain influence in state politics.

Donovan, Bowler, and McCuan are particularly skeptical of the claim that profit-motivated consultants, by crafting ballot measures designed to attract funding from moneyed interest groups, have helped cause an explosion in ballot initiatives. First, critics making this claim have relied on a few isolated incidents, and there is little evidence to suggest that the practice is widespread. In fact, very few campaign professionals in the authors' survey report that they actively seek out business for their firms. Rather, groups or individuals sponsoring ballot initiatives typically initiate contact with consultants. As a matter of logic, moreover, the authors note that there is little reason to *expect* that consultants can enrich themselves by getting well-heeled groups to sponsor initiatives. After all, with ballot initiative pass rates so low, why would any group care to invest in such schemes? As the authors put it, "the assumption of huckster consultants depends on the existence of a number of well-heeled dupes." Finally, the authors argue that initiative professionals don't need to *create* demand for their services. Over the past two decades, the flourishing of interest groups adept at playing initiative politics has created more than adequate demand for consultants' services. In sum, while the authors acknowledge that

contemporary direct democracy campaigns are a long way from the grassroots ideals of progressives and populists, they also argue that the initiative industrial complex is much more benign than most critics would have it.

In Chapter 3, Elisabeth Gerber challenges many of the claims made by direct democracy's critics. Underlying Gerber's approach is the belief that any consideration of ballot initiative reform must be based on sound, empirical knowledge of what the problems with the initiative process really are – and what they are not. Without such knowledge, reformers risk enacting solutions to problems that do not exist (and in the process, creating new problems), risk neglecting problems with the process that do exist, and risk implementing reforms that fail to solve the problems they are intended to address.

Gerber begins by identifying the five most popular criticisms of the contemporary ballot initiative process:

1. well-heeled economic interest groups exercise undue influence in the ballot initiative process;
2. voters lack the knowledge to understand and evaluate the policies on which they are being asked to vote;
3. the ballot initiative process results in poorly written laws;
4. the ballot initiative process constrains the functioning of representative government;
5. the ballot initiative process too often produces laws inimical to ethnic, racial, and social minorities.

Although reformers make these claims with increasing regularity, the empirical evidence cited by Gerber suggests that many of them simply do not stand up to rigorous analysis.

For example, the vast financial resources held by well-heeled economic interest groups clearly do not translate into the ability to *pass* initiatives. Indeed, economic interest groups, well aware of their limits in passing direct legislation, attempt mainly to defeat ballot initiatives they oppose. Only during the qualifying stage, Gerber contends, where



costly petition management firms are now standard practice, can moneyed interests use their financial resources to gain advantage in the initiative process. Similarly, little empirical evidence supports the claim that voters lack competence to make policy choices in ballot contests. Rather, several studies show that when voters have information about an initiative's supporters and opponents – which is most likely to be true when ballot campaigns are competitive – they are able to discern quite accurately the measure's likely policy implications. Finally, while Gerber acknowledges that the initiative process has curtailed the functioning of representative government and facilitated the passage of laws inimical to minorities, she qualifies these criticisms. Constraints on representative government, she notes, are not intrinsically unhealthy, especially if one believes that legislators are not constrained enough. Moreover, the initiative process is not by itself the cause of anti-minority laws; direct legislation hostile to minorities also requires a statewide majority with anti-minority preferences.

With the imagined problems of the initiative process exposed for what they are and the real problems of the initiative process identified, the message to reformers is clear: focus on crafting solutions to the real problems. To counter the advantages enjoyed by economic interest groups during the ballot qualifying process, it might be useful for states to increase the length of the petition circulation period, thereby reducing the expenses associated with collecting an enormous number of signatures in a short period of time. Moreover, problems with direct legislation hostile to minorities, as well as problems with poorly written laws, might be ameliorated by greater pre-election legislative and judicial involvement, though public support for such reforms is by no means guaranteed. Pre-election public hearings on ballot initiatives can also be a means

of educating citizens on the policy perspectives of racial, ethnic, and social minorities. To ensure sufficiently informed voters, states should continue to improve voter ballot guides and, more generally, ensure that voters have information about group support for ballot initiatives – information that serves as a crucial voting cue. Since voters are more likely to acquire information on group support when ballot initiative campaigns are competitive and vigorous, there is little to be gained by *limiting* group campaign activity in the initiative process.

As a final – and wise – point, Gerber admonishes that any reforms to specific parts of the initiative process must be considered in light of their effect on the overall process. As with any complex political structure, reforms in one area of the initiative process are likely to have consequences for other parts of the process. For example, whereas increasing the petition circulation time period may help to empower citizen groups, it will also likely lead to a greater number of initiatives on the ballot – which in turn will create greater informational demands on voters. The point here is that reformers need to think broadly about the effects of any reform and be willing to weigh the benefits of reform in one area against its potential costs in another area. Finally, Gerber also makes the point that reformers will continue to be highly constrained by both state and federal courts, which have viewed with intense scrutiny state regulations that limit groups' first amendment protections. With courts committed to shielding group activity in the initiative process, reforms to put economic and citizen groups on more equal footing must do so by increasing the influence of citizen interests rather than limiting the activities of economic interests.

With a more or less sanguine view of the initiative process – and confidence that a

few well-placed reforms could help remedy some the problems associated with the process – Gerber fits squarely in the camp occupied by Ernst and Donovan et al. Yet readers comforted by the unabashedly strong defense of the ballot initiative process in Chapters 1 through 3 will be greatly disturbed by Chapters 4 and 5 – each of which offers searing criticisms of direct democracy in the states.

In Chapter 4, Daniel Smith argues that the so-called “citizen” initiative is – and for the most part, always has been – polluted by the influence of big (mostly corporate) money. Smith’s analysis focuses primarily on the impact of interest group money on ballot initiative outcomes. Here, Smith notes that a plethora of studies on the impact of interest group campaign spending has yielded inconsistent findings. Yet at the same time, observes Smith, most of these studies find evidence to support one important conclusion: while big spending by initiative proponents generally doesn’t increase the likelihood of success, big spending by opponents significantly increases the likelihood that the measure will be defeated. Although this conclusion has been used to illustrate the *limits* of money in the initiative process, it might just as easily be used to illustrate the *power* of group money. As Smith points out, a group’s interests are often just as well served by preserving the policy status quo as by changing it. Finally, Smith argues that the influence of big money in ballot initiative campaigns is by no means a new development. Indeed, well-heeled corporate interests have been spending big dollars to influence ballot initiative campaigns virtually since the dawn of direct democracy in America.

While big money’s influence on ballot initiatives highlights the need for reform, the federal courts have placed what Smith sees as an unjustifiable roadblock in the way. In a comprehensive discussion of ballot initiative campaign finance law, Smith makes the

important point that the Supreme Court has applied different standards in reviewing state regulation of corporate campaign expenditures, depending on whether the regulations apply to candidate or ballot campaigns. In *First National Bank of Boston v Bellotti* (1978), the Court struck down a Massachusetts law prohibiting corporate expenditures in ballot initiative campaigns. In its opinion, the Court relied on its ruling in *Buckley v Valeo* (1976), where it held that campaign contributions and expenditures are a form of speech that can be limited only if such limits serve the government's interest in reducing corruption associated with *quid pro quos*.<sup>6</sup> Since no possibility of *quid pro quos* exists in ballot campaigns, the Court reasoned, Massachusetts had no legitimate justification for prohibiting corporate expenditures in such campaigns. Yet twelve years later, in *Austin v Michigan State Chamber of Commerce* (1990), the Court upheld a Michigan law that set strict regulations on corporate contributions and expenditures in candidate campaigns for state office. Underpinning the Court's decision in *Austin* was a substantially broadened definition of corruption. As the Court in *Austin* put it, Michigan had a compelling interest in preventing "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporations political ideas." Smith argues that the Court's rationale for upholding regulations on corporate financial activity in candidate campaigns should also serve to justify regulations on corporate financial activity in ballot campaigns. After all, unregulated corporate expenditures in ballot campaigns could lead

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<sup>6</sup> In *Buckley*, which considered the constitutionality of contribution and expenditure limits in the 1974 Amendments to the Federal Election and Campaign Act (FECA), the Court's reasoning led it to uphold the law's limits on campaign contributions to federal candidates and invalidate limits on campaign expenditures by federal candidates. Consistent with the Court's logic in *Buckley*, the Court in *Citizens Against Rent Control v City of Berkeley*, 454 U.S. 290 (1981), also struck down a city ordinance limiting campaign *contributions* to ballot campaigns.

to the same “corrosive and distorting effects” of corporate wealth in candidate contests that so worried the Court in *Austin*. Nevertheless, federal courts continue to rely on *Bellotti*’s narrower definition of corruption in reviewing the constitutionality of government regulations on corporate financial activity in ballot campaigns.<sup>7</sup> Meanwhile, the Supreme Court has shown no inclination to reconcile its rulings in *Bellotti* and *Austin*.

Finally, Smith’s chapter highlights an interesting new development in the ballot initiative process: the involvement of political parties. Although political parties have historically remained on the sidelines during initiative campaigns, state and national parties now endorse ballot initiatives and contribute significant sums of money and in-kind support to select ballot campaigns. Three related factors evidently motivate party involvement in ballot campaigns. First, support for select ballot initiatives can help parties mobilize their bases of support on election day. Second, ballot initiatives can serve as useful wedge issues against the opposition party. Third, party support for ballot initiatives may increase the party’s success in soliciting campaign contributions. Since the architects of American direct democracy sought to reduce the power of parties no less than that of moneyed interest groups, the active involvement of political parties in ballot campaigns might be viewed as yet another subversion of a process originally intended to turn power back to the grassroots.

While Smith’s criticisms of the initiative process are centered largely in the area of campaign finance, in Chapter 5 Bruce Cain and Kenneth Miller wage a broad assault on the entire direct democracy edifice. Cain and Miller begin by making an important

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<sup>7</sup> Indeed, in *Montana Chamber of Commerce v Argenbright* (1998), a federal district invalidated a 1996 Montana law prohibiting corporations from spending corporate treasury monies in connection with a ballot issue.

distinction between populist and progressive conceptions of direct democracy. Although both Populists and Progressives were responsible for introducing mechanisms of direct democracy in the states, these two movements, the authors argue, had very different conceptions about the role that such mechanisms should play in policy making. Populists, motivated large by issues such as of banking reform and railroad regulation, were committed to the belief that “the people,” and not moneyed interests, should control the government. As such, Populists wanted direct democracy mechanisms to *replace* representative government. In contrast to Populists, Progressives wanted direct democracy to *supplement*, rather than supplant, representative government. Motivated by a broad array of reform issues ranging from campaign finance to antitrust, Progressives fought to make government more responsive to the public’s interests. Unlike Populists, however, Progressives were wary of unmediated public opinion – a wariness evident in their call for greater administrative expertise in government. Never, the authors argue, did Progressives seek to replace representative government with direct democracy.

Although populism and progressivism describe specific movements in American history, the authors argue that these competing impulses continue to inform the debate over direct democracy in the U.S. today. In terms of legal structures, for example, the populist and progressive conceptions of direct democracy place emphasis on very different procedural mechanisms. The progressive conception of direct democracy favors the use of recall elections, referendums, and legislative constitutional amendments (LCAs). Consistent with the progressive view that direct democracy should supplement rather than supplant representative government, these mechanisms strengthen (rather than sidestep) the checks and balances of traditional representative government by adding

important checks. Referendum and LCAs supplement representative government by providing one more point at which legislation and constitutional changes may be vetoed, and recall elections increase government responsiveness by providing a constant threat of electoral defeat for unresponsive legislators. The populist conception of direct democracy, in contrast, favors the use of citizen initiatives. Unlike the mechanisms favored by the progressive conception of direct democracy, citizen initiatives replace rather than supplement representative government. In sidestepping the traditional legislative process, ballot initiatives discard the checks and balances provided for by separate executive and legislative branches and leave the courts as the sole institutional filters of raw majority opinion. Although the populist and progressive conceptions of direct democracy have competed over the course of the twentieth century, the increase in populist-inspired citizen initiatives suggests that the populist conception has won out.

Cain and Miller are troubled by these developments. In their view, the initiative process undermines the checks and balances associated with separation of powers because the governor and legislature play no formal role. With only the courts left to check laws passed via the initiative process, the likelihood of the process producing unsound and/or unconstitutional policy increases. The initiative process also relinquishes the lawmaking benefits of the legislative process, particularly in the area of crafting legislation, where the fine tuning that results from compromise and hours of committee work by expert staff is nowhere to be found. Perhaps most importantly, Cain and Miller make a strong case that the initiative process violates democratic norms. Legislatures in the United States are characterized by openness, with laws that require the “front end” of policymaking to be public. Ballot campaigns, in contrast, are marked by an absence of

such openness. Moreover, whereas conflict of interest laws prohibit legislators from crafting legislation from which they would benefit personally, no such laws exist in the initiative process – an absence that, in the view of the authors, violates the democratic norm of accountability. Finally, the fairness norm that pervades legislatures – motivated by the legislators’ need to work with each other over the long term – is largely absent from the initiative process, where the actors, with little likelihood of ever having to work with their opponents, have less incentive to cooperate. Ironically, the initiative process, viewed by some as the purest form of democracy, may well undermine democratic norms.

Although election day lawmaking bypasses many of the traditional checks and balances of representative government, it has not been able to sidestep the courts. Indeed, Cain and Miller show that federal and state courts have been more than willing to strike down laws passed via the initiative process, especially those that trample on individual rights. Although people concerned about individual rights should be thankful for the courts’ involvement, the authors stress that court invalidation of direct legislation is not without costs. First, the counter-majoritarian nature of the courts is especially problematic in the initiative process, since courts that strike down laws passed through the ballot box invalidate what some see as the “pure” will of the majority. Second, since the initiative process bypasses all of the traditional checks and balances of representative government except for the courts, the courts are isolated as the lone institutional filters of the majority’s will. Thus, ballot initiatives have put courts in a perilous position, since courts seen as too willing to halt the majority’s will are in danger of losing credibility with the public. In concrete terms, this danger has been all too apparent for state court



judges who have been defeated in retention elections for striking down laws passed through the initiative process. In sum, then, not only has the initiative process sidestepped the checks and balances of traditional representative government provided by the legislative and executive branches; it risks undermining the judicial branch as well.

Consistent with their argument, Cain and Miller end with some ideas for reform which might help push direct democracy back from its populist conception (manifested in citizen initiatives) towards a more progressive conception (manifested in referendum, recall elections, and LCAs) – and also how politically feasible any such reforms are... [Cain and Miller are completing this section].

As the chapter summaries make clear, the book includes a broad array of opinion on the health of the ballot initiative process in the American states. Whereas Donovan, Bowler, McCuan, and Gerber challenge many of the popular criticisms of direct democracy, Smith, Cain, and Miller see fundamental problems with the ballot initiative process. In the conclusion chapter, we assess the arguments and evidence marshaled by the authors, identify the components of the ballot initiative process we believe to be most in need of repair, and put forth some reform ideas that would considerably improve direct legislation institutions.