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Evaluating Direct Democracy: A Response²

MATTHEW L. SPITZER[†]

Professors Marci Hamilton and Elizabeth Garrett address different questions about how to deal with direct democracy.¹ Professor Hamilton asks whether direct democracy is a good idea, and concludes that “the tide of direct democracy should be stemmed.” Professor Garrett focusses a bit more narrowly, arguing that direct democracy is influenced and shaped by the same interest groups that shape legislation. She also considers how a court should approach interpreting directly enacted legislation.

Although Professor Hamilton’s result—direct democracy “should be stemmed”—may be correct, her methodology is not. Professor Hamilton argues that the framers of the U.S. Constitution set up a system designed to avoid tyranny by decentralizing power. The framers spread power between Congress, President, and Courts; between state and federal governments; between church and state; and between authors and publishers. The framers believed that spreading power among various social organs would naturally check power, and mob rule—otherwise known as the “tyranny of the majority”—would be defeated. Professor Hamilton invokes the images of a clock and of a solar system to animate these ideas, but I think they are not much different from the conceptions usually referred to as “checks and balances.” The net result of all of these checks and balances should include, at least, a slow, deliberate, *status quo*-oriented government. Within this framework, legislators become trustees, charged with weighing and balancing various aspects of the public good when deciding how to vote on legislation and do other legislative tasks. In contrast, according to Professor Hamilton, a voter in a booth need merely ask “what’s in it for me?” Because direct democracy thus represents such a wide departure from the framers’ plan for our federal and state governments, it should be abandoned.

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1. See Marci A. Hamilton, *The People: The Least Accountable Branch*, 4 U Chi L Sch Roundtable 1 (1997); and Elizabeth Garrett, *Who Directs Direct Democracy?*, 4 U Chi L Sch Roundtable 17 (1997).

Professor Hamilton's methodology fails because she compares two different things. She contrasts the aspirational vision of democratic government as framed by our Constitution with the real politics of voters in booths. If one were to invoke the aspirational vision of direct democracy, it would include actively interested citizen voters, informing themselves of the arguments about ballot propositions, engaging in spirited debates, and coming to well-reasoned decisions about how to vote prior to entering the voting booth. The long period of time between qualifying an initiative for the ballot would allow for a full reflective equilibrium, both on the level of the individual voter and within interest groups. The result of the vote should thus define the public's vision on the subject of the initiative.

Although comparing the aspirational ideal of representative government with the analogous ideal for direct democracy might illuminate the relative merits of the ideal conceptions, and might also represent a starting point for evaluating direct democracy, it does little to help us choose whether to value existing forms of direct democracy.

I contend that evaluating direct democracy requires *at least* comparing the available theory and evidence on the actual operation of representative legislation with the theory and evidence on the actual operation of direct democracy. Such theory and evidence will naturally bear on both the process and outcomes of legislation and direct democracy.

In short, I agree with Professor Garrett when she writes:

[M]erely analyzing the shortcomings of direct democracy does not answer the question of whether this form of lawmaking is desirable. To fully evaluate popular lawmaking, we must compare it with the alternative—governance by elected representatives. Moreover, our comparison must focus on the reality of the state and federal legislative processes, rather than on some idealized conception of representative democracy in which the legislature comprised men and women replete with wisdom and civic virtue who rise above current passions to pursue the public interest.²

The purpose of my small contribution is to emphasize the nature of some of the comparisons that must be made, and to introduce a bit of the learning from political science into the evaluation. I will start by giving a thumbnail sketch of what is known about representative legislation, and then do the same for direct democracy.

2. Elizabeth Garrett, 4 U Chi L Sch Roundtable at 24 (1997) (cited in note 1).

I. Legislation

A. PROCESS

The process of organizing and running a modern legislature is far from the ideal that the framers might have embraced. Modern legislatures organize themselves into committees that exercise effective veto power over legislation in their area. Because the committees are stacked with members whose districts have special interests in the committee's subject matter, the committee will often preserve a status quo that deviates substantially from the preferences of a substantial majority of the legislators. Thus, agriculture committees may protect subsidies to inefficient farms, a commerce committee may protect airlines from competition, and a committee on taxation may protect special tax breaks for particular industries.

When bills are allowed through the relevant committees and onto the floor for a vote, the legislators seldom read the bill before voting on it. Instead, if the legislators read anything, it is the summary of the bill prepared by the relevant committee. More often, however, the legislators do not even read the summary. Instead, the summary is read and digested by one of the legislator's staff, who tells the legislator what to do. Further, the advice is not what a naive observer might expect. If the bill is on a subject that the legislator's constituents care about, or can be made to care about at the next election by a hostile challenger, then the legislator must "vote his district." If the bill is on a subject that the legislator's constituents do not care about, then the legislator will look for another legislator with whom to trade the vote so as to gain a favorable outcome on another bill that the constituents care about. If no trade can be worked out, the legislator has nothing left to do but vote his vision of the public interest.

There are good theoretical reasons for expecting reelection-minded legislators to act in this fashion. If legislators want to get reelected they must budget their time and resources carefully. Funds must be raised, constituents must be helped individually (by doing "casework"), and legislative business must be conducted. Reading complex bills before voting costs a lot; reading would take a great deal of time from other tasks, particularly raising funds for reelection campaigns. On the other hand, staffers can be trusted to give accurate summaries of the bills, or at least of the committee summary of the bill. Hence, the legislator's marginal benefit from reading the bill is small. In sum, a rational legislator would not be expected to read most of the bills on which she votes.

Even if a legislator were inclined to read the text of a bill, often she would be unable to do so. In many cases the text of a bill or an amendment is not available early enough to allow a careful read. Relying on committee or party summaries is thus the only course of action, given time constraints.

Rational legislators should organize themselves into committees. The rational legislator gains a reelection advantage by trading a small amount of influence over all policy areas for a larger amount of influence over a policy area about which the legislator's constituents care deeply. Because voters in different districts

care deeply about different things, legislators can organize themselves into subject-based committees and make (almost) all legislators better off. Committees have another advantage. Committee members can learn a lot about some complex issues and be much better able to control the specialized bureaucracies that provide services to the public.

Rational, reelection-minded legislators should be expected to vote in much the same way that they seem to vote. If such a legislator were to vote against her district, she would be subject to a challenge at the next election that focussed on the vote. If no such challenge can be mounted, a rational legislator would look for a way to “spend” the vote on something she cares about—either reelection (by trading the vote) or true beliefs about the public interest (by casting the vote honestly).³

B. SUBSTANCE

Characterizing legislative output is, in some ways, more controversial than describing legislative process. Much legislation is obviously the result of bargains and logrolls, and hence represents the interests of diverse groups. Some of the legislation, often called pork barrel, seems to serve the interests of a very narrow, geographically concentrated group. And some of it seems to approximate a more or less defensible vision of the public interest.

There are reasons to believe that legislative output should deviate from the preferences of the polity’s median voter. First, the organization of the legislature described above should affect outcomes. The committee system, when run by legislators whose preferences differ from those of the median voter, should bias outcomes.⁴ In addition, the voting institutions, including the informal institution of vote trading, as well as the formal institutions of agenda control, either by a speaker or a rules committee or something similar, should also bias outcomes away from the median.⁵ Last, constituents and representatives have incomplete information about each other’s preferences. This may give rise to “shirking” behavior on the part of legislators (because of voters’ incomplete information)⁶

3. See Joseph P. Kalt and Mark A. Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 *American Economic Review* 279 (1984); Joseph P. Kalt and Mark A. Zupan, *The Apparent Ideological Behavior of Legislators: Testing for Principal-Agent Slack in Political Institutions*, 33 *Journal of Law and Economics* 103 (1990).

4. See Barry R. Weingast and William J. Marshall, *The Industrial Organization of Congress: or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 *Journal of Political Economy* 132, 148-49 (1988); Barry R. Weingast, Kenneth A. Shepsle, and Christopher Johnson, *The Political Economy of Benefits and Costs: A Neoclassical Approach to Distributive Politics*, 89 *Journal of Political Economy* 642, 644-45 (1981). See generally Thomas Gilligan and Keith Krehbiel, *Collective Decision-Making and Standing Committees: An Informational Rationale for Restrictive Amendment Procedures*, 3 *Journal of Law, Economics, & Organization* 287 (1987).

5. See, for example, Thomas Romer and Howard Rosenthal, *Political Resource Allocation, Controlled Agendas, and the Status Quo*, 33 *Public Choice* 27, 40 (1978).

6. Kalt and Zupan, 74 *American Economic Review* at 297 (cited in note 3); Kalt and Zupan, 33 *Journal of Law and Economics* at 105 (cited in note 3).

and mistakes and biased decisions by legislators (because of legislators' incomplete information).⁷

II. Direct Democracy

A. PROCESS

As Professor Garrett details so well, the process of direct democracy falls well short of any ideal method of social choice. The initiatives are often long, complex, and written in dense language. Then, there is a long and expensive process of qualifying the initiative for the ballot. Professional consultants often direct the signature drive, and signature gatherers are directed (or incentivized) to avoid deep deliberative conversations with potential petition signers. Once an initiative has qualified for the ballot, an expensive campaign will likely be needed to convince voters to approve the initiative. An expensive campaign against the initiative may also be waged, and "killer" alternative initiatives may also be proposed.⁸ At election time many voters seem to have little information about the initiative proposals on which they are voting.

I wish to make only two points. First, when we speak of a system of "direct democracy," we are actually talking about a *mixed* system of representation and direct democracy.⁹ The process of direct democracy that we have just described focusses only on the initiative portion. The description of the legislative process that I provided above was taken primarily from studies of the United States Congress, along with a few studies of state legislatures. No one, to my knowledge, has checked to see if state legislative processes change in some important way when the initiative process is introduced into a state. If the legislative process were to change in response to direct democracy, this might well be important to the evaluation of direct democracy.

Second, political scientists are making some headway in understanding the circumstances in which voters can acquire sufficient information to make informed political choices. "Informed," in this context, does not mean that the voter can describe in detail the social costs and benefits associated with particular choices. Instead, the question is whether voters can learn enough to cast votes that are the same ones they would have cast had they had significant cost/benefit knowledge.¹⁰ As Professor Garrett points out, citizens often try to deal with

7. John G. Matsusaka, *Economics of Direct Legislation*, 107 *Quarterly Journal of Economics* 541, 542-49 (1992).

8. On the difficulty of studying the role of interest groups in this process, see Elisabeth R. Gerber, *The Populist Paradox: Interest Group Influence and the Promise of Direct Legislation*, University of California, San Diego, Department of Political Science Working Paper (Feb 1997) (unpublished manuscript on file with the *Roundtable*).

9. There are at least two senses in which we have mixed systems of direct democracy and legislative democracy. Sometimes the mix is formally explicit, as when referenda put statutes up for popular vote or initiatives place items on the legislative agenda. Sometimes the mix is implicit; there are alternative routes—through the legislature or through direct democracy—to pass a statute. The text discusses the latter sense of mixed systems.

10. The most thorough exploration of this topic to date appears to be Arthur Lupia

their lack of cost/benefit knowledge by searching for cues about how to vote. And the two cheapest cues in legislative elections, party identification and incumbency, are lacking in initiative contests. Perhaps one should conclude that the voters cannot learn enough to vote as if they had cost/benefit information.

This pessimism may be premature. In *Shortcuts Versus Encyclopedias*,¹¹ Arthur Lupia showed that voters in a California election choosing between alternative insurance “reform” initiatives could be grouped into three sets: voters with cost/benefit information, voters lacking costs/benefit information but who had figured out what the insurance industry’s positions were; and those who lacked cost/benefit and insurance industry position information. Voters who had learned cost/benefit information and those who lacked cost/benefit information but who knew of the insurance industry’s position voted almost identically. Voters who lacked both sorts of information, however, voted very differently. Thus, Lupia concluded, it was possible for some voters to find a cue that worked as well (in terms of voting) as acquiring cost/benefit knowledge.

Other work by Arthur Lupia,¹² as well as work by Elisabeth Gerber,¹³ tells a similar story—rationally ignorant voters are pretty good at finding cues to help them vote their interests. In fact, if we compare voters’ ability to choose policies by voting for legislators, as opposed to the voters’ ability to choose policies directly, direct democracy has some advantages. When voting for a candidate a voter must often guess at the candidate’s position on issues, must take the risk that the candidate will change his mind on an issue, must hope that the voter’s own preference does not change by the time the issue is to be decided, must deal with the candidate’s positions on a bundle of issues, and so forth.¹⁴ In contrast,

and Mathew D. McCubbins, *The Democratic Dilemma: Can Citizens Learn What They Need to Know?* (Cambridge University Press) (forthcoming). Lupia and McCubbins argue that citizens can learn from others when the others are both knowledgeable and have incentives to tell the truth. Lupia and McCubbins also argue that political institutions can be designed to foster these conditions. Professor Garrett argues that we should prefer direct democracy or pure representation on the basis of “how to structure each to allow space for reasoned decisionmaking,” and that “[d]irect democracy can also be structured in a variety of ways to facilitate public discussion.” See Garrett, 4 U Chi L Sch Roundtable at 26-27 (cited in note 1). This seems quite consistent with Lupia and McCubbins’ agenda.

11. Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 *American Political Science Review* 63, 72 (March 1994).

12. See Arthur Lupia, *Who Can Persuade Whom?: How Simple Cues Affect Political Attitudes*, University of California, San Diego, Working Paper (May 1997) (unpublished manuscript on file with the *Roundtable*).

13. See Elisabeth R. Gerber and Arthur Lupia, *Voter Competence in Direct Legislation Elections*, in Steven L. Elkin and Carol E. Soltar, eds, *Democracy and Citizen Competence* (Penn State) (forthcoming); and Elisabeth R. Gerber, *The Populist Paradox: Interest Group Influence and the Promise of Direct Legislation*, University of California, San Diego, Department of Political Science Working Paper (Feb 1997) (unpublished manuscript on file with the *Roundtable*).

14. Gerber and Lupia, *Voter Competence* at 15-17 (cited in note 13).

when voting on an initiative, a voter faces a quite different and possibly less severe set of problems.

B. SUBSTANCE

There are theoretical reasons to believe that adding direct democracy to a representative system of government may change the laws. Recall that there are both theoretical reasons and empirical evidence supporting the belief that a purely representative government will adopt laws that deviate significantly from the preferences of the median voter. A just-emerging set of work in political science suggests that adding an initiative process will pull laws back toward the preferences of the median voter.¹⁵ And in states with initiatives, the legislature will tend to revert to passing uncontroversial "good government" laws, leaving the controversial laws with substantial distributive effects to the initiative process.¹⁶

The basic idea is as follows. Consider the problem of a legislator trying to choose a policy when an interest group can, at some cost, propose an initiative after the legislator has chosen a policy. If the legislator chooses a policy too far away from the preferences of the median voter, an interest group will intervene and propose an initiative closer to the preferences of the median voter, and the initiative will defeat the legislator's policy at the polls. To forestall such an outcome, the legislator proposes a policy closer to the median voter's preferences. The interest group is deterred from proposing the initiative. Where the legislator makes an error, the interest group is not deterred, proposes an initiative, and the law moves closer to the median voter.¹⁷

Note that there are two results here. First, the behavior of the legislature changes in response to the threat of the initiative. The legislature, working in the shadow of the initiative process, chooses outcomes that are closer to the median voter and refuses to vote on really controversial distributive issues. Second, the initiative is used to bring some laws into line with the preferences of the median voter.

Existing theory has a lot of room for improvement. First, the models assume the existence of an interest group with a preference. Although this may be fine for some issues and groups, such as gun control and the NRA, for other issues the interest group will form in response to voters' perceptions that state law is far from the median. Thus, the interest group and its preferred policies should be

15. See Matsusaka, 107 *Quarterly Journal of Economics* 541 (cited in note 7); Elisabeth R. Gerber, *Legislative Response to the Threat of Popular Initiatives*, 40 *American Journal of Political Science* 99 (1996); and John G. Matsusaka and Nolan M. McCarty, *Political Resource Allocation: The Benefits and Costs of Voter Initiatives*, Working Paper 4 (May 19, 1997) (unpublished manuscript on file with the Roundtable).

16. Matsusaka and McCarty, *Political Resource Allocation* at 21 (cited in note 15).

17. *Id.* at 16, suggesting that if there is only one interest group and it has extreme views, and if the legislators are uncertain about voters' preferences, the law may be more extreme with an initiative than without. It is unclear to me that this result survives if there is more than one interest group.

made endogenous. Second, existing models assume that voters can observe the policy content of an initiative. This runs counter both to survey results, as well as to the existence of the third group of voters—those with neither cost/benefit information nor interest group information—in Lupia’s study.¹⁸ New models should incorporate some voter uncertainty.

The evidence, though generally suggesting that the theory is right, is not unanimous. John Matsusaka, in two important papers, has presented strong evidence that legislatures in states with initiatives tend to leave the controversial distributive issues to the initiative process,¹⁹ and that state budgets are lower and closer to the preferences of the median voter in states with the initiative.²⁰ Elisabeth Gerber, in a very clever study of state abortion laws, has shown that parental consent laws *passed by legislatures* in states with the initiative were closer to the preferences of the median voter than were parental consent laws in other states.²¹ Other articles fail to find an effect, though there is reason to believe that some of them have serious methodological problems.²²

Professor Garrett spends the second half of her paper worrying about judicial interpretation of initiatives, and she is right to do so for at least two reasons. First, the question of how to interpret these things is interesting, challenging, and important in its own right. Initiatives are often lengthy, poorly drafted, and contain seemingly quixotic portions that may represent errors of drafting or of logic. Judges have developed a set of guides for legislative statutory interpretation that do not fit initiatives. New guidelines must be developed. Second, we must know how interest groups, legislators, and voters expect initiatives to be interpreted by the courts before we can analyze the strategic

18. See Lupia, 88 *American Political Science Review* 63 (cited in note 11).

19. Matsusaka, 107 *Quarterly Journal of Economics* at 569 (cited in note 7).

20. John G. Matsusaka, *Fiscal Effects of the Voter Initiative: Evidence from the Last 30 Years*, 103 *Journal of Political Economy* 587, 590 (1995) (“[S]tates with the initiative have significantly lower spending per capita. For a typical initiative state with relatively easy ballot access, expenditure is about 4 percent less than in a similar state with a pure representation form of government.”).

21. Elisabeth R. Gerber, *Legislative Response to the Threat of Popular Initiatives*, 40 *American Journal of Political Science* 99, 124 (Feb 1996). Also see Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 *American Journal of Political Science* 245 (1997), which finds that the initiative process tends to produce more rights-restrictive laws than does a purely representative system. Because representative democracies are constructed to bias outcomes in favor of individual rights, Gamble’s results support the theory about the effect of the initiative. Unfortunately, her paper is written in such tones of moral outrage that it is possible to miss the important intellectual result.

22. See Edward L. Lasher, Jr., Michael G. Hagen, and Steven A. Rochlin, *Gun Behind the Door? Ballot Initiatives, State Policies and Public Opinion*, 58 *Journal of Politics* 760 (1996) (finding no evidence that initiatives make a “more responsive” policy, but using a very indirect measure of voter preferences by building on past work aggregating surveys of public opinion over several years); Paul G. Farnham, *The Impact of Citizen Influence on Local Government Expenditure*, 64 *Public Choice* 201, 211 (1991) (same); Jeffrey S. Zax, *Initiatives and Government Expenditures*, 63 *Public Choice* 267 (1989) (finding that state expenditures are greater in initiative states).

behavior surrounding initiatives and legislation. After all, if interest groups cannot predict how judges will interpret an initiative, the groups will have trouble taking a position, and voters will be unable to vote appropriately. In short, if judges and interest groups are clueless, voters may be clueless.

C. INTERACTIONS BETWEEN SUBSTANCE AND PROCESS IN DIRECT DEMOCRACY.

There may well be interactions between the findings about process and the findings about substance. Consider how the existence of direct democracy in a state may affect the incentives for voters to gather information. If Gerber, Lupia, and Matsusaka are correct in asserting that a state with direct democracy is more likely to have laws that are close to the preferences of the median voter than is a state without direct democracy, and if voters know that this is true, then rational voters in direct democracy states will behave differently than voters in states without direct democracy. Consider a voter in a direct democracy state who is considering spending time and money to acquire information about candidates for state office. Such a voter knows that the legislature's actions will be pushed toward the preferences of the median voter by the threat of an initiative, and that in case the legislature strays "too far," an initiative will be proposed. Hence, a rational voter might spend little time and money at the time of voting for state legislators investigating the candidate's politics on particular issues. In contrast, a voter in a state without direct democracy knows that there will be no initiative to change the legislature's choices. Hence, information about the candidate at the time of election is likely to be worth more to the voter in a state without direct democracy; the election is the last time that the voter gets to choose legal output.

Several hypotheses might well flow from this observation.

(1) Inexpensive sources of information about candidates—incumbency, party endorsement, and notoriety from previous media employment (such as talk show host or news commentator) will be comparatively more important in states with direct democracy. Voters can use these cues at virtually no cost, and will resist spending large amounts of time and effort to learn details that compete with cheap cues. In particular, this should lead to a stronger incumbency effect in states with direct democracy.

(2) Abstentions on state legislative races should be higher in states with direct democracy. Once a voter has stepped into the booth to vote, the marginal cost of abstaining on a state assemblyman or state senator is lower, for the voter can count on direct democracy to discipline the process, regardless of who is elected.

(3) The average distance in policy space between the ideal points of legislators and those of voters should be larger in direct democracy states than in states without direct democracy.

(4) If hypothesis (1) is correct, and direct democracy exacerbates the incumbency effect, and if the demand for term limits is directly related to the strength of incumbency in a given state, then the demand for term limits should be higher in a state with direct democracy.

III. Pulling It All Together

How should we compare pure representation with direct democracy? This depends not only upon some of the positive issues that have yet to be resolved—the role of multiple interest groups, the role of some voters' failure to gain appropriate voting cues, the change in legislative process from initiatives, and so forth—but also upon the normative evaluation of these phenomena. An example shows the importance of normative analysis. Suppose that after further work we conclude that the initiative pulls legislative outcomes toward the preferences of the median voter. Is this good? It depends, I claim, on which issue we are examining. If we are talking about the general level of state spending or of state indebtedness, this may well be a good thing. But if we are talking about fundamental civil rights, such as freedom of speech, religion, or association, catering to the median voter may not be such a good idea. In the area of civil rights many people (including me) think that the appropriate outcome is to allow *more* individual freedom than the median voter might like to allow his fellow citizens. Hence, pulling outcomes toward the preferences of the median voter is morally ambiguous, and may depend on the type of policy that is being dragged toward the center.

* * * *

Academic scholarship usually follows empirical events. The increasing importance of direct democracy in California and some other states suggests that a wave of work should soon be coming our way. I hope that my comment on Professors Hamilton and Garrett provides some help to those who will be studying direct democracy.