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## COMMENTARY

# COMMENTARY ON “REGULATING DEMOCRACY THROUGH DEMOCRACY: THE USE OF DIRECT LEGISLATION IN ELECTION LAW REFORM”

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At no time since the Populist and Progressive Eras has the confidence in America’s electoral process been so low. Just as those movements agitated in favor of an expanded franchise, nonpartisan elections, and the direct election of senators, current reformers have set their sights on term limits, the campaign finance system, and the mechanics of voting. Thus, it seems apropos to explore the link between one of the achievements of the earlier era, the voter initiative, and the uneven adoption of contemporary reform.

This Comment attempts to explore whether the institutions of direct democracy contributed to the success of electoral reform movements.<sup>1</sup> The primary hypothesis rests on a compelling foundation: direct democracy is necessary to circumvent legislatures whose members are naturally hostile to certain electoral reforms.<sup>2</sup> The main empirical strategy is simply to compare differential rates of adoption of various electoral reforms across initiative and noninitiative states.<sup>3</sup> Nathaniel Persily and Melissa Cully Anderson find significant variation across reform domains in terms of the differences in adoption rates.<sup>4</sup> On some issues, like legislative term limits, the differences

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1. See generally Nathaniel Persily & Melissa Cully Anderson, *Regulating Democracy Through Democracy: The Use of Direct Legislation in Election Law Reform*, 78 S. CAL. L. REV. 997 (2005).

2. See *id.* at 997.

3. See *id.* at 1002–05.

4. See *id.* at 1004–05.

are quite striking, while for others the differences are barely noticeable, as is the case with most provisions of the campaign finance system. The authors then examine within initiative states whether electoral reforms were carried out through the legislative process or the ballot box.<sup>5</sup> As I explain below, I think the inferences drawn from this second exercise are more questionable on theoretical grounds.

For the most part, Persily and Anderson explain the variation in the effect of the initiative in terms of how much the reform encroaches on legislators' careers.<sup>6</sup> There can be little doubt that this is a key factor, but even in the case of term limits, it does not explain why nine initiative states have not adopted the reform. Therefore, I think it both possible and desirable to go much further in deducing the conditions under which an initiative state would adopt a reform that an otherwise identical initiative state would not.

In a recent paper, John Matsusaka and I developed a game-theoretic model that can be used to study the policy effects of voter initiatives.<sup>7</sup> We explicitly compare the equilibrium policies in systems with and without direct voter initiatives. To keep the model simple, we assume that the policy in systems without the initiative is that preferred by the median legislator. To model policymaking under the threat of initiative, we assume that the legislature moves first and sets a policy. After observing the legislature's policy, an interest group may move to qualify its own proposal for a voter initiative. If the interest group decides to challenge the policy through the initiative, the electorate chooses between the group's proposal and the legislature's policy. A key assumption of our model is that both the legislature and the interest group are uncertain about the voters' preferences over the policy issue in question.<sup>8</sup> At the time that an initiative proposal is made, neither the group nor the legislature knows whether it will pass. Thus, there are three possible paths of play for the game. First, the legislature might try to *deter* the group from proposing an initiative by passing an accommodating policy. Thus, it passes a bill sufficiently favorable to the group; the group prefers that policy and its certainty over the electoral lottery facing the group's preferred policy. In the second path of play, the legislature decides not to accommodate the group and passes its preferred policy; the group then

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5. *See id.*

6. *See id.* at 1005–08.

7. *See* John Matsusaka & Nolan McCarty, *Political Resource Allocation: The Benefits and Costs of Voter Initiatives*, 17 J.L. ECON. & ORG. 413, 413–48 (2001).

8. We also discuss the extent to which the divergence of preferences between the voters and the legislature affects policy in the presence of an initiative. In the context of electoral reform, my discussion will concentrate on the case where there are substantial agency problems between voters and politicians.

proposes an initiative which is successfully adopted. The final path is identical to the second except that the initiative fails. Thus, the first two outcomes lead to an observable policy effect—the outcome is distinct from the legislature's preferred policy. The third does not.

From these outcomes, an important caveat for empirical work emerges. The first path emerges exactly where one might expect the initiative to be the most effective. It occurs when the voters' preferences are sufficiently well known and the costs of mounting an initiative campaign are low. Conversely, paths two and three occur exactly in the same context, where initiative pressures are low. In other words, there is uncertainty about what the voters want, initiatives are costly, or both. The only difference between the two outcomes is the random realization of the voters' preferences. The take-home point is that whether an electoral reform in an initiative state is legislatively adopted gives us a misleading impression about the policy pressures of the initiative. When the initiative is most effective, we should not observe policy change at the ballot box. At many points in the article, Persily and Anderson are dismissive of the effects of the initiative because the legislature adopted the statute in question. I do not think this inference has solid theoretical grounding.

My and Matsusaka's model also helps to explain why there might be so much variation in the effects of the initiative across types of electoral reform. The first point is that there must be an interest group (or coalition of such groups) who sufficiently gain from electoral reform to be willing to mount an initiative contest. "Good government" groups clearly perceive large benefits, but rarely have the resources to go it alone. Thus they will need to form alliances with organizations with ulterior motives. The opportunities for interest groups to pursue their own agendas through electoral reform clearly vary. Some issues will generate very little interest, such as upgrading election machinery or same-day registration. Others may work to the detriment of strong groups such as campaign finance reform. Some issues, however, may generate a lot of group support. One argument about legislative term limits is that they strengthened certain lobbies as novice legislators became more reliant on the lobbies for advice and expertise.

A second factor that the model stresses is uncertainty about voter preferences. In the scenario most closely mirroring electoral reform (a legislature with extreme preferences), we show that the moderating effect of the initiative declines as electoral uncertainty rises. This is the result of interest groups not wanting to make risky investments in the initiative process. It seems to me that electoral reform issues are exactly those for

which uncertainty is high. Even the most ardent advocates of reform know how complex the issues are and are uncertain as to whether voters will ultimately find it in their interests to support reform. Take public financing of campaigns, for example. To simplify, suppose there are three considerations a voter must entertain. First, the public financing of campaigns *might* reduce corruption and the undue influence of contributors. Second, public financing *might* increase electoral competition and enhance representativeness and accountability. Third, public financing *will* divert public monies into electoral campaigns. There is little guarantee, no matter how well executed the media campaign, that the expected value of the two speculative benefits will outweigh the tangible and measurable costs of the third consideration. To compound this problem, the voters may respond to their own uncertainty by reflexively voting “no” for reform.<sup>9</sup> All of these factors work against an effect of initiatives on electoral reform.

Finally, and most importantly, voters have to actually want the reform more than the legislatures do. It is not hard to come up with examples of legislative reform that are more popular in the state capitol than with the voters; felon and noncitizen disenfranchisement come immediately to mind. Recognizing this obvious point may explain why several initiative states did not adopt female suffrage before the Nineteenth Amendment. It also creates problems for the hypothesis that initiative states are generically more reformist.

There are also a number of factors outside the model that may further complicate the relationship between direct democracy and modern electoral reform. The first is the nature of partisan conflict within the state. Few states truly reflect the implicit assumption of the political class as a unified cartel seeking to limit the control of the electorate. In most cases, reform has large partisan consequences that divide both politicians and partisan voters into competing camps. Well-known are the partisan differences about the ease of turnout and voter registration,<sup>10</sup> but many other reforms are also believed to have strong partisan implications. Voters may even be strongly motivated to oppose reforms that per se weaken party organization. When Mayor Michael Bloomberg’s charter commission placed nonpartisan primaries on the New

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9. And this may well be the rational response, given that the law of unintended consequences seems to exercise more authority in the arena of electoral reform than in many of its other jurisdictions. See also Arthur Lupia, *Busy Voters, Agenda Control, and the Power of Information*, 86 AM. POL. SCI. REV. 390, 390–410 (1991).

10. Ironically, the experience of most reforms easing voting and registration have had partisan implications far smaller or even contrary to expectations. See Adam J. Berinsky, *The Perverse Consequences of Electoral Reform in the United States*, 33 AM. POL. RES. (forthcoming 2005).

York City ballot, it was the Democratic Party itself that mobilized the opposition. A large part of its successful appeal was that the nonpartisan primary would hurt the Democratic Party as an organization. In a heavily Democratic polity, a large number of voters thought it worthwhile to protect the party. However, voters in states with weaker partisan organizations and traditions, such as Washington and California, were not moved by such appeals when they adopted similar reforms at the ballot box.

The legal environment of the state may also support or hinder the initiative as a device for reform. The courts of some states are clearly more deferential to voter initiatives than others. State courts are also likely to differ in terms of whether the restrictions on campaign activities and spending are consistent with free speech and the extent of the freedom of association in protecting political parties from regulation. Bureaucratic implementation and enforcement may also be an issue.<sup>11</sup>

Political culture plays an important role as well, in at least two respects. First, it complicates any inference about a correlation between direct democracy and electoral reform. It is possible that states with more democratic or reformist cultures were the most likely to adopt direct democracy at the turn of the century and the most likely to adopt modern electoral reforms. I do not think this creates large problems for the analysis of recent reforms; many of them are at least a half-century removed from the adoption of the initiative. It does complicate considerably, however, the analysis of reforms that came earlier, such as female suffrage, malapportionment before *Baker v. Carr*, and gubernatorial term limits. To their credit, Persily and Anderson acknowledge this problem, but use it to suggest that the correlations between the initiative and female suffrage and equal apportionment may also be due to a state's culture.<sup>12</sup> Neither causal inference is valid.

The second way in which culture comes into the argument is as the fall-back explanation when other explanations fail. Unfortunately, much of the political science literature has been stunted by this sort of reasoning; if there is some policy that institutional or behavioral variables cannot explain, then it must be the distinctive culture of the state that produced it. Unexplained variation can emerge from many sources and there is little justification in relegating it all to culture.

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11. See ELISABETH R. GERBER, ARTHUR LUPIA, MATHEW D. MCCUBBINS & D. RODERICK KIEWIET, *STEALING THE INITIATIVE: HOW STATE GOVERNMENT RESPONDS TO DIRECT DEMOCRACY* 4–5 (2001).

12. See Persily & Anderson, *supra* note 1, at 1028–30, 1033.

The conclusion that political culture is more important than the institutions of direct democracy is unsupported as a social scientific proposition. No theory of political culture is put forward to have its explanatory power tested. Few would dispute that the electorate's preferences for reform should correlate in some way with the adoption of reform. The real question is how particular policymaking institutions mediate this link. Without controlling for voter preferences and the other contextual factors that I have outlined in this Comment, I think it a bit premature to say what role direct democracy plays in state electoral reform.