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## Fifth Annual Henry Lecture: The Promise and Perils of Hybrid Democracy

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## THE PROMISE AND PERILS OF HYBRID DEMOCRACY

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For most Americans, democracy in the United States is not entirely representative in structure, and none of us lives in a pure direct democracy where laws are made only through popular votes. Instead, for over 70% of Americans, government is a hybrid democracy<sup>1</sup> — a combination of direct democracy and representative institutions at the state and local levels, which in turn influences national politics.<sup>2</sup>

Until recently, scholarship in law and social sciences has been incomplete because analysts have focused mainly on representative institutions or occasionally on the initiative process, but nearly always as separate

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1. See JOHN G. MATSUSAKA, *FOR THE MANY OR THE FEW: THE INITIATIVE, PUBLIC POLICY, AND AMERICAN DEMOCRACY* 8 (2004) (stating that 71% of Americans live in a state or city that allows initiatives). For a brief description of the initiative process in Oklahoma, see M. DANE WATERS, *THE INITIATIVE AND REFERENDUM ALMANAC* 342-57 (2003). Many of Oklahoma's cities and towns, including Oklahoma City, Tulsa, Lawton, Norman, and Bartlesville, have direct democracy on the local level.

2. See Elizabeth Garrett, *Hybrid Democracy*, 73 *GEO. WASH. L. REV.* 1096 (2005) [hereinafter Garrett, *Hybrid Democracy*].

institutions. With political science leading the way, the interactions between the two forms of democratic institutions have moved to center stage. For example, empirical work identifies the ways in which the presence of an initiative process in a state influences the content of laws passed by the legislature,<sup>3</sup> how voter turnout and campaigns in candidate elections are affected by the presence of an initiative on the ballot,<sup>4</sup> and how elected and appointed officials often work to undermine the implementation of initiatives.<sup>5</sup> These studies illustrate that considering hybrid democracy as a whole is more likely to produce a realistic view of democratic institutions and point the way to meaningful reform.

Hybrid democracy is here to stay, so we need to better understand how its components interact. But even if we were writing on a clean slate and had the ability to choose between a purely representative system and one with some elements of direct democracy, I think we would do well to adopt some sort of hybrid. A system that allows the possibility of the initiative and referendum provides a check on elected representatives beyond the accountability of periodic elections. In this Lecture, I will suggest some of the benefits that a hybrid system can provide in three realms. First, hybrid elections allow candidates to make more credible promises by running on platforms that include simultaneous enactment of initiatives. The association of an initiative with a candidate may also provide a richer information environment for voters, although recent scholarship draws into question whether voting cues are invariably enhanced given the strategic use of direct democracy by politicians. Second, the initiative process provides a way to circumvent the self-interest of legislators in designing institutions of government. Third, the possibility of using initiatives to enact policy supplies political actors with a tool that can serve majoritarian interests and can counter special interest influence in legislative bargaining. As Governor Arnold Schwarzenegger has demonstrated in California, governance by initiative profoundly changes the dynamics of interbranch bargaining, although it does not seem to be a sustainable strategy if used frequently. As I discuss these benefits, I will also underscore the dangers of hybrid democracy and discuss reforms that seek to reduce the perils while maximizing the promise of our hybrid system.

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3. *See, e.g.*, ELISABETH R. GERBER, *THE POPULIST PARADOX: INTEREST GROUP INFLUENCE AND THE PROMISE OF DIRECT LEGISLATION* (1999).

4. *See, e.g.*, DANIEL A. SMITH & CAROLINE J. TOLBERT, *EDUCATED BY INITIATIVE: THE EFFECTS OF DIRECT DEMOCRACY ON CITIZENS AND POLITICAL ORGANIZATIONS IN THE AMERICAN STATES* (2004).

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

### *I. Candidates and Initiatives: Making Credible Policy Commitments*

Hybrid democracy entails hybrid elections, which have different dynamics than elections that solely concern selecting representatives. The presence of an initiative on a ballot that also includes candidate elections will affect those races, and vice versa. For example, initiatives increase overall voter turnout.<sup>6</sup> In presidential elections, each ballot measure boosts turnout by half a percentage, and in midterm elections, each ballot measure increases turnout by 1.2%.<sup>7</sup> The additional voters are not random citizens but are people motivated to come to the polls by the subject matter of the initiative, so the increased turnout does not necessarily benefit both candidates equally.

Political actors understand that initiatives on the ballot can have spillover effects on candidate elections. Thus, they often do not wait to take advantage of initiatives that other groups place on the ballot; instead, they play an active role in determining how to benefit from the possibilities presented by hybrid elections. Politicians use ballot measures to shape turnout in a way that aids them while not similarly increasing the number of people voting for their opponents. They also employ ballot measures to frame the issues of the campaign in ways that highlight their message and enhance their images in the minds of likely voters.

#### *A. The Perils of Hybrid Elections: Crypto-Initiatives*

Some scholars have described the use of initiatives by candidates in campaigns as manipulative. Thad Kousser and Mathew McCubbins label such initiatives as “crypto-initiatives” and argue that they are cynically used by candidates and consultants to take advantage of an electorate that does not have enough information to vote competently on the ballot measures.<sup>8</sup> They contend that the policies embodied in crypto-initiatives are unlikely to be welfare-enhancing or effective at achieving their goals.<sup>9</sup> Politicians using crypto-initiatives are mainly attentive to the initiatives’ effect on the dynamics of the campaign, such as voter turnout, not to whether they are well-drafted or represent beneficial reform. Thus, “strategic political actors will pick

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6. See SMITH & TOLBERT, *supra* note 4, at 31-52.

7. *Id.* at 40 (also finding that at a certain point, each additional measure does not further increase turnout).

8. Thad Kousser & Mathew D. McCubbins, *Social Choice, Crypto-Initiatives, and Policymaking by Direct Democracy*, 78 S. CAL. L. REV. 949, 950, 969-74 (2005).

9. *Id.* at 955.

strategies . . . to serve partisan goals even if they lead to the passage of bad policies.”<sup>10</sup>

Kousser and McCubbins describe several recent crypto-initiatives that they believe illustrate the negative effects of hybrid elections.<sup>11</sup> For example, in 2004 voters in eleven states were asked to pass measures defining marriage as a relationship legally available only to heterosexual couples.<sup>12</sup> Some of these initiatives were the result of grassroots efforts touched off by legalization of same-sex marriage in Massachusetts and the attempt to make these relationships official in San Francisco. A few of these measures played a role in close candidate elections, in ways that candidates may not have intended initially, but that they took advantage of as campaigns developed. Thus, in Kentucky the foundering campaign of Republican incumbent Jim Bunning won a narrow victory thanks to rural voters energized by the ballot measure on marriage and convinced by misleading advertisements that Bunning’s opponent did not strongly oppose same-sex unions.<sup>13</sup>

Some of the other marriage initiatives, such as those in Michigan and Ohio, were likely part of a more coordinated strategy to place them on the ballot of battleground states in the presidential election so that they would help reelect President Bush. The initiatives also had grassroots support, but it seems very likely that national strategists encouraged those efforts in states pivotal to the Electoral College vote where the margin of victory was expected to be close. Some strategists have credited the ballot measure for President Bush’s narrow and crucial victory in Ohio,<sup>14</sup> although preliminary results from ongoing empirical studies draw that claim into question.<sup>15</sup> Certainly, however, the numerous ballot measures on this topic, together with the press attention on developments in Massachusetts and San Francisco, framed some of the

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10. *Id.* at 976. Kousser and McCubbins argue that initiatives generally, not just crypto-initiatives, tend to enact policy that does not enhance welfare. *Id.* at 955.

11. *Id.* at 969-74.

12. *Id.* at 971.

13. Kousser & McCubbins, *supra* note 8, at 971; James Dao, *Gay Marriage: Same-Sex Marriage Issue Key to Some G.O.P. Races*, N.Y. TIMES, Nov. 4, 2004, at P4.

14. See Brian Friel, *Both Sides Claim Ballot-Issue Victories*, 45 NAT’LJ. 3415 (2004); Dao, *supra* note 13, at P4.

15. Compare Alan Abramowitz, *Terrorism, Gay Marriage, and Incumbency: Explaining the Republican Victory in the 2004 Presidential Election*, FORUM, Dec. 2004, at 5, <http://www.bepress.com/forum/vol2/iss4/art3/> (finding no effect from anti-same-sex marriage ballot measures), with Todd Donovan, Caroline Tolbert, Daniel A. Smith & Janine Parry, *Did Gay Marriage Elect George W. Bush?* (May 14-15, 2005) (unpublished paper prepared for presentation at the 2005 State Politics Conference held in East Lansing, Mich.), available at [http://polisci.msu.edu/sppc2005/papers/fripm/dtsp\\_sppc05.pdf](http://polisci.msu.edu/sppc2005/papers/fripm/dtsp_sppc05.pdf) (finding that the Ohio measure mobilized turnout of voters more likely to vote for Bush).

“values” discussion in the election that helped President Bush and Republicans.

Although some might argue that these issues allow voters to draw valid conclusions about the presidential candidates’ characters and thus are relevant to voter competence, the measures had generally pernicious effects on the federal elections. The initiatives diverted attention from major issues with greater significance for the future of the country — for example, America’s invasion of and continuing involvement in Iraq, the burgeoning budget deficit, and the related looming crisis in entitlement programs. As such, the initiatives are the sort that Kousser and McCubbins indict, which political operatives use and sometimes generate to enact unwise or unnecessary policies in the absence of robust debate solely to affect outcomes of candidate elections. They were unnecessary in most, if not all, of the states in which they were enacted because there was little threat that courts or legislatures in Utah, Mississippi, Oklahoma, or other similarly red states were likely to endorse same-sex unions. Except in Oregon, there was little opposition to the measures. It seems likely that many voters were not aware that some of the initiatives not only defined marriage to include only traditional marriages, but also ruled out civil unions and eliminated other rights of same-sex committed couples.<sup>16</sup>

### *B. The Promise of Hybrid Elections: Credible Promises and Voting Cues*

Although crypto-initiatives may be a peril of hybrid elections, not all ballot measures used by candidates are crypto-initiatives with largely negative consequences for policies and campaigns. On the contrary, combining a candidate election with a ballot measure or series of initiatives can empower voters in both realms of hybrid democracy in several ways.<sup>17</sup>

First, coordinating a candidate campaign with an initiative can allow politicians to make credible policy commitments to voters. Candidate campaigns consist of a series of promises by people running for elected office. It is difficult for voters to know which promises are credible and which are “cheap talk.”<sup>18</sup> Voters’ only recourse when they discover a candidate has

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16. Eight of the eleven initiatives that passed in November 2004 — including the one in Oklahoma — not only defined marriage in the traditional way, but also banned civil unions or other domestic partnership benefits. See Kavan Peterson, *50-State Rundown on Gay Marriage Laws*, STATELINE.ORG, Nov. 3, 2004, <http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=15576>.

17. Some of this discussion is drawn from Elizabeth Garrett, *Crypto-Initiatives in Hybrid Democracy*, 78 S. CAL. L. REV. 985 (2005) [hereinafter Garrett, *Crypto-Initiatives*].

18. See David Austen-Smith, *Strategic Models of Talk in Political Decision Making*, 13 INT’L POL. SCI. REV. 45 (1992) (discussing “cheap talk” in politics); Garrett, *Crypto-Initiatives*,

failed to follow through on campaign promises is to refuse to reelect her. Candidates are likely to heavily discount this penalty when they are running for office, and they know that reelection is unlikely to hinge on one issue or one broken promise. The problem of making credible campaign promises is particularly acute for challengers who have no record of public service that voters can analyze in order to evaluate the trustworthiness of campaign pledges.

Hybrid democracy provides all candidates — challengers and incumbents — a means to credibly communicate with voters about their policy agendas. If a candidate spends time or money on an initiative, she sends a costly, and therefore more trustworthy, signal about her views on the issue.<sup>19</sup> For example, Jerry Brown did more than just talk about reforming politics and campaigns when he ran for the California governorship in 1974; he also championed the Political Reform Act that was on the same ballot.<sup>20</sup> Voters who supported his reform agenda but worried that he would back away from those promises once he gained office could reduce his ability to renege by simultaneously electing him and enacting comprehensive reform. Speaking to a different audience, Governor Pete Wilson tried to convince conservative Republicans that he would implement policies they valued when he ran together with the country's harshest three-strikes law and an initiative that would have denied public services to undocumented workers.<sup>21</sup> He thus made a costly commitment to key voters that he would not support social policies they found distasteful, both because the initiatives would shape the political environment and because it would be harder for him to reverse course after concretely associating himself with the measures.

Using hybrid democracy in this way — to elect officials and simultaneously enact policies that limit their discretion<sup>22</sup> — reduces the amount of monitoring

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*supra* note 17. See generally GLENN R. PARKER, SELF-POLICING IN POLITICS 59 (2004) (discussing difficulty for voters to obtain trustworthy information about how faithful politicians will be with respect to promises they make).

19. See ARTHUR LUPA & MATHEW D. MCCUBBINS, THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW? 209 (1998).

20. See PETER SCHRAG, PARADISE LOST: CALIFORNIA'S EXPERIENCE, AMERICA'S FUTURE 226 (2004).

21. See STEPHEN P. NICHOLSON, VOTING THE AGENDA: CANDIDATES, ELECTIONS, AND BALLOT PROPOSITIONS 98 (2005). Proposition 187 pertaining to undocumented workers was struck down as unconstitutional. See *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244 (C.D. Cal. 1997); *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995).

22. For a discussion of other ways initiatives can limit executive discretion, see John G. Matsusaka, *Direct Democracy and the Executive Branch* (Jan. 14-15, 2005) (unpublished paper presented at the USC-Caltech Center for the Study of Law and Politics Conference on Direct

required of voters to determine whether politicians keep their campaign promises. It is therefore a way to reduce principal-agent slack between voters and representatives. Of course, enacting the initiative would constrain either candidate's discretion once elected, whether or not she supported the initiative. I am not arguing that the initiative will bind only the candidate supporting it — it will bind whoever is elected — but rather that a candidate's support is a more costly signal than a promise in a platform. Politicians understand this; therefore, associating themselves with an initiative is a more credible signal than using the same themes in their platforms.

Second, candidate involvement in initiative elections may provide voters with better cues about the ballot measures so that they can vote competently with limited information. The vast majority of voters do not go to the polls with comprehensive knowledge of all races, just as they do not go to the store with complete information about all the products they want to buy. In both cases, they rationally rely on shortcuts that they believe will allow them to decide in a way that is consistent with their preferences but which economizes on information costs.<sup>23</sup> In candidate elections, the primary voting cue is party affiliation, which appears on the ballot; in addition, the cue of incumbency can be evident from the ballot in some states. Initiative campaigns are relatively low-information environments because they do not provide these easy shortcuts for voters, who must instead work to determine which groups support or oppose the ballot measure, the intensity of their views, and how the groups' preferences line up with those of voters.<sup>24</sup>

Kousser and McCubbins argue, by contrast, that crypto-initiatives will impair voter competence. In developing such initiatives, they contend, candidates search for issues that will not elicit opposition, because that might turn out people who will vote for their opponents. In the absence of vigorous advocacy on both sides of an issue, voters are less likely to gain sufficient information to make competent choices.<sup>25</sup> Certainly, some crypto-initiatives are constructed to minimize the extent of voting cues because they are designed to avoid strong opposition, but other aspects of hybrid elections suggest that voting cues may be enhanced when politicians are aligned with

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Democracy), available at [http://lawweb.usc.edu/cs/p/conferences/direct\\_democracy\\_05/documents/Matsusaka.pdf](http://lawweb.usc.edu/cs/p/conferences/direct_democracy_05/documents/Matsusaka.pdf).

23. See, e.g., Arthur Lupia & Richard Johnston, *Are Voters to Blame? Voter Competence and Elite Maneuvers in Referendums*, in REFERENDUM DEMOCRACY: CITIZENS, ELITES AND DELIBERATION IN REFERENDUM CAMPAIGNS 191, 194-95 (Matthew Mendelsohn & Andrew Parkin eds., 2001).

24. See Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 ELECTION L.J. 295 (2005) (discussing voting cues in issue campaigns).

25. Kousser & McCubbins, *supra* note 8, at 949.

ballot measures. Close association between an initiative and a candidate allows voters to use the familiar cue of political party in both parts of hybrid democracy. Political parties are already relatively active in many ballot measure campaigns, and they work to publicize their involvement through slate mailings and advertisements.<sup>26</sup> Candidates using ballot measures as part of their campaign strategy will also make their endorsements clear to voters, who can use the affiliation to draw conclusions about the ballot measure, just as they use the policy promoted by the initiative to draw conclusions about the candidates' priorities.

Moreover, it is not necessarily the case that initiatives associated with candidate campaigns will inevitably fail to produce vigorous opposition. If candidate elections are competitive — which, unfortunately, is not the reality in many legislative races, but may be true in other races — then the opponent of the candidate running with a ballot measure has an interest in ensuring that the initiative faces opposition as well. For example, many viewed the California special election in November 2005 as a prelude to the 2006 gubernatorial election.<sup>27</sup> Likely opponents of Governor Schwarzenegger were active in campaigns to defeat his ballot initiatives,<sup>28</sup> in the hope that he would fail at the polls, find himself unable to govern effectively, and enter the race for reelection substantially weakened. Drawing the wisdom of the initiative into question challenges its supporter's judgment and underscores policy differences for the voters. More empirical work on voting cues and how citizens can use them most effectively to cast their ballots competently is necessary, but it seems likely that under some circumstances hybrid elections can improve voter competence rather than undermine it.

### *C. Reforms of Hybrid Campaigns*

Hybrid elections, in which candidates increasingly coordinate their campaigns with initiative campaigns, are a reality in many states and are not necessarily a negative development for politics. The perils posed by such campaigns, however, suggest that we should consider reform of the direct

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26. For a discussion of the involvement of political parties in initiative campaigns, see SMITH & TOLBERT, *supra* note 4, at 116-27, and Richard L. Hasen, *Parties Take the Initiative (and Vice Versa)*, 100 COLUM. L. REV. 731 (2000).

27. See Michael Finnegan, *Special Election Rattles '06 Races*, L.A. TIMES, June 19, 2005, at B1.

28. See, e.g., Press Release, Phil Angelides, Statement from California State Treasurer Phil Angelides Regarding the Governor's Decision to Call a Special Election (June 13, 2005), available at [http://www.angelides.com/media/releases/2005\\_0613\\_special.html](http://www.angelides.com/media/releases/2005_0613_special.html) (Angelidas, the Democratic candidate for governor, attacked the call for a special election and vowed to "fight hard against the Governor's harmful agenda.").

democracy elements of our hybrid system. I will discuss two reforms here: one concerning the durability of initiatives, and the other concerning campaign finance rules. First, to combat the concern that initiatives, particularly crypto-initiatives used by candidates solely for their spillover effects, may enact unwise policies that will lead to lower social welfare,<sup>29</sup> the laws they enact should be less durable. Statutory initiatives should be subject to revision and repeal by the legislature; constitutional initiatives should have sunset provisions so that they expire unless reenacted.

All states except California allow legislatures to modify statutory initiatives.<sup>30</sup> In California, statutory initiatives are insulated from subsequent legislative involvement unless specifically authorized by the initiative itself.<sup>31</sup> A better method is one similar to Oklahoma's approach, which allows repeal and amendment under certain circumstances.<sup>32</sup> Because lawmakers are often hostile to initiatives, which circumvent the traditional process to enact policy, some protection from the legislature is required. Therefore, legislative involvement with statutory initiatives should be limited so that no change can be made until after some experience and only then with a supermajority vote.

Initiatives supported by legislators and political parties may not face the same danger that they will be undermined; indeed, incumbents have an incentive to produce results because voters may evaluate their performance in part on the basis of how well the ballot measures they supported have been implemented. An initiative backed by the governor and supported by the people, however, may be resisted by the legislature — in fact, the governor

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29. See Kousser & McCubbins, *supra* note 8, at 954-55, (making that argument because voters do not consider dead weight losses). *But see* Garrett, *Crypto-Initiatives*, *supra* note 17, at 992 & n.19 (questioning whether this is necessarily true when candidates are associated with ballot measures).

30. See generally Waters, *supra* note 1, at 27 (providing rules in all states with initiatives).

31. CAL. CONST. art. II, § 10(c).

32. OKLA. CONST. art. V, § 7 (“The reservation of the powers of the initiative and referendum in this article shall not deprive the Legislature of the right to repeal any law, propose or pass any measure, which may be consistent with the Constitution of the State and the Constitution of the United States.”) Others have proposed changing the California system to allow more legislative involvement in statutory initiatives. See, e.g., CAL. COMM’N ON CAMPAIGN FIN., DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA’S FOURTH BRANCH OF GOVERNMENT 118-19 (1992); Tracy Westen & Robert M. Stern, *Ending a Love-Hate Relationship*, CAL. B.J., July 2005, at 8 (referring to the 1992 study and continuing to support such changes).

may have turned to direct democracy because of obstruction by lawmakers.<sup>33</sup> That obstruction will presumably continue after the election.

Many initiatives are constitutional amendments and thus cannot be changed solely by the legislature, but only by a subsequent popular vote.<sup>34</sup> These initiatives should expire after a certain period of time, requiring either that the legislature resubmit them to the people or that proponents again gather signatures to place them on the ballot for extension. The analysis of hybrid elections provides guidance about how long the popularly initiated constitutional amendments should remain in effect before they expire. In order to effectively bind politicians to promises made credible by association with a ballot measure, these constitutional provisions should remain in effect at least as long as one term of office, and perhaps longer so that the push for reenactment becomes separated from the candidate's reelection campaign and reflects a strong independent desire to retain the policy. Another factor relevant to the length of time before any initiative would sunset is the need for settled expectations, particularly in some realms.<sup>35</sup> Accordingly, I would propose that constitutional initiatives sunset after ten or twelve years.

No special treatment should be afforded to initiatives on the basis of their popularity on Election Day. Although one could argue that constitutional initiatives passed by a landslide, say by three-fourths of those voting on the measure, should not face a sunset, Kousser and McCubbins's analysis suggests that crypto-initiatives are constructed to face little opposition and thus might be enacted by a substantial margin in an environment that undermines the ability of voters to vote competently.<sup>36</sup>

One subset of initiatives could be made more durable, however. For example, if a commission has been used to consider election reform,<sup>37</sup> then the reasons for sunsetting a constitutional initiative do not apply. There has been an opportunity for deliberation and debate, the proposal has been amended and

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33. There are allegations in California that the Attorney-General, a Democrat, has used his powers in the initiative process to undermine the Governor's proposals by approving unfairly worded titles and descriptions and by applying technical requirements rigorously to keep some of Schwarzenegger's proposals off the ballot. See Robert Salladay, *Lockyer Is Accused of Stacking Deck Against Initiatives*, L.A. TIMES, Aug. 1, 2005, at A1. Whatever the truth of these charges, they demonstrate that even initiatives supported by powerful politicians may still face opposition by those who have responsibility for implementation.

34. WATERS, *supra* note 1, at 27.

35. For example, initiatives that affect redistricting or structures of representation must be in place for at least a decade to avoid some reforms expiring before they can have any significant impact on governance.

36. Kousser and McCubbins, *supra* note 8, at 977.

37. The use of commissions to draft initiatives — particularly dealing with complicated election reform — is discussed in Part II.C. See *infra* text accompanying notes 89-96.

changed throughout the process, and the involvement of a commission operates as a check much as the legislative process does. Just as constitutional measures placed before the people by the legislature would be permanent, the work of commissions should be accorded durability. Applying one default rule for popularly generated initiatives and another for initiatives that are vetted by the legislature or a commission would encourage groups to work through the latter routes.

For popular initiatives that expire and are not placed on the ballot for extension or permanent enactment by the legislature or a commission, fewer signatures would be required to place reenactment on the ballot. Because part of the rationale for a sunset requirement is to allow constitutional initiatives to be modified to reflect the experience with the law, proponents should qualify for the reduced signature thresholds even if the measure is slightly different from the original enactment. This may require some judgment calls by the official certifying the petitions for circulation, but the general rule should be that changes that further the purpose of the measure will be allowed without triggering higher signature thresholds.<sup>38</sup>

Requiring that constitutional initiatives sunset will make them less attractive to those advocating change because the policies they implement will be less durable and will require that time and money be spent to reenact them every decade or so. Thus, fewer initiatives are likely to be proposed if sunsets applied, although the number on the ballot might not decline substantially because of the need to periodically reconsider those that are enacted. The reform might also encourage proponents of initiatives to use the statutory form in states where that option is available — a positive development because it would allow legislatures to be more involved in the development of policy over time. Statutory initiatives are more consistent with a hybrid democracy because they allow a way to spark change from outside the legislature while still relying on the expertise of lawmakers to improve policy, correct mistakes, and take account of changed circumstances. Thus, this reform will calibrate the hybrid system in a way that avoids entrenching policies beyond a relatively short time frame but still allows the initiative process to be used to force consideration of new ideas and provide some experience with new policies.

Second, the close association between candidates and some ballot measures supplies justification for aggressive campaign finance regulation in the direct

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38. This is a standard used by Arizona in determining whether the legislature can amend a statutory initiative, *see* ARIZ. CONST. art. 4, pt. 1, § 1, cl. 6(c), and is used for some initiatives in California that allow subsequent legislative involvement, CAL. COMM'N ON CAMPAIGN FIN., *supra* note 32, at 118-19 (discussing the Political Reform Act, which allowed amendments that further its purpose and that pass by a two-thirds majority).

democracy arena.<sup>39</sup> Because candidates use initiative campaigns to enhance their chances of winning office, the same possibilities for quid pro quo corruption and the appearance of such corruption exist in some issue campaigns.<sup>40</sup> Presumably, whatever favors are likely to flow to big contributors from candidates are also likely to flow to those underwriting ballot measure campaigns in which candidates are involved. Limiting contributions to candidate-controlled issue committees should therefore be found constitutional using the well-established state interest of combating quid pro quo corruption.<sup>41</sup>

Nevertheless, even if constitutional, such limitations may not be sufficient to combat the perception of corruption. When regulations are applied only to committees formally or actually controlled by candidates and officeholders, interests wishing to curry favor with candidates can fund issue committees that remain entirely separate from candidates. If these “uncoordinated” efforts are helpful in publicizing and passing an initiative that a candidate views as important to her campaign, she will certainly know about the support and appreciate it. Such support will either elicit the sort of favorable treatment large contributors seek, such as access to policy makers,<sup>42</sup> or it will lead to the public perception that such favoritism exists.<sup>43</sup> This is the same problem that

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39. See, e.g., Elizabeth Garrett, *Democracy in the Wake of the California Recall*, 153 U. PA. L. REV. 239, 247-53 (2004) [hereinafter Garrett, *Democracy in the Wake*]; Garrett, *Hybrid Democracy*, *supra* note 2, at 1105-10; Richard L. Hasen, *Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns*, 78 S. CAL. L. REV. 885 (2005).

40. For the articulation of the corruption rationale in candidate elections, see *McConnell v. FEC*, 540 U.S. 93, 182-84 (2003), and *Buckley v. Valeo*, 424 U.S. 1, 25-26 (1976) (*per curiam*).

41. Thus, regulations to this effect promulgated by the California Fair Political Practices Commission (FPPC) should not be overturned on constitutional grounds, although there is some question whether the FPPC had the authority to promulgate such regulations in the context of issue committees. See CAL. CODE REGS. tit. 2, §§ 18530.9, 18531.5 (2004). Section 18530.9, applying contributor limitations to issue committees controlled by candidates, is currently being challenged in court and was not applied during the 2005 special election campaign. See *Citizens to Save Cal. v. Cal. Fair Political Practices Comm'n*, No. 05AS00555 (Cal. Super. Ct. Mar. 25, 2005) (order granting preliminary injunction), *reh'g of appeal granted* No. C049642 (Cal. Ct. App. May 31, 2005), available at [http://www.saccourt.com/geninfo/News\\_Media/Citizens\\_vs\\_FPPC.asp](http://www.saccourt.com/geninfo/News_Media/Citizens_vs_FPPC.asp). An initiative on campaign finance reform will appear on the 2006 general election ballot in California to enact similar restrictions on candidate-controlled issue committees. See California Nurses Clean Money and Fair Elections Act of 2006, Cal. Proposition 89, available at [http://www.ss.ca.gov/elections/vig\\_06/general\\_06/pdf/proposition\\_89/entire\\_prop89.pdf](http://www.ss.ca.gov/elections/vig_06/general_06/pdf/proposition_89/entire_prop89.pdf).

42. See John M. de Figueiredo & Elizabeth Garrett, *Paying for Politics*, 78 S. CAL. L. REV. 591, 609-11 (2005).

43. For a discussion of the difficulty of using public perception to justify campaign finance regulation, see Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign*

exists with respect to independent expenditures in candidate elections, and it is clearly an aspect of the current hybrid system with respect to contributions to initiative campaigns.

Subjecting unaffiliated committees to campaign finance limitations is more problematic under current jurisprudence than applying limitations to candidate-controlled committees. The further the distance from the candidate, the more attenuated the relationship to the quid pro quo justification.<sup>44</sup> The difficulty here is the same as that which plagues campaign finance regulations generally: without very comprehensive reform, shutting off the spigot of money in one part of the system merely reroutes it to another part of the system where it can flow unimpeded.<sup>45</sup> This is occurring even in the federal context as representatives and senators use issue committees to raise unlimited amounts of money, unregulated by the federal campaign laws. The Federal Election Commission reversed course in August 2005 in an advisory opinion issued in response to a petition by members of Congress seeking to raise soft money for issue committees formed to defeat the redistricting initiative in California.<sup>46</sup> Although it had ruled two years before that the Bipartisan Campaign Reform Act regulated such activities,<sup>47</sup> it reached the opposite conclusion in the 2005 Advisory Opinion, in part because the initiative appeared on a special election ballot with no federal candidate races. Nevertheless, the appearance of corruption is not necessarily avoided by disaggregating the initiative election from the candidate election; officeholders who value retaining the current system of redistricting were no doubt grateful to those who provided them money to defeat the reform proposal.

The integration of ballot measures with candidate campaigns provides an additional justification for sweeping disclosure regulations in the realm of direct democracy. Disclosure is the primary form of state campaign finance regulation of issue committees, and it is justified on the ground that it provides

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*Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 141-44 (2005).

44. See Hasen, *supra* note 39, at 907-15 (discussing the constitutional issues raised by expanding regulation beyond candidate-controlled issue committees).

45. See Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999).

46. See The Honorable Howard L. Berman and the Honorable John T. Doolittle, FEC Advisory Op. 2005-10 (Aug. 22, 2005), available at <http://www.fec.gov/aos/2005/ao2005-10final.pdf>.

47. See Stop Taxpayer Money for Politicians Committee and United States Representative Jeff Flake, FEC Advisory Op. 2003-12, Fed. Election Camp. Fin. Guide (CCH) ¶6396 (July 29, 2003), available at <http://ao.nictusa.com/ao/no/030012.html>.

information to voters about the forces behind ballot measure campaigns.<sup>48</sup> Citizens can make better judgments about how to vote on ballot measures when they have the information to judge whether their interests are shared by groups supporting or opposing the initiatives and when they can use the amount of money these groups spend as a reliable proxy of the intensity of their views. Although most courts have been willing to uphold disclosure statutes, there are a few cases where courts have determined that the interest in anonymous political speech trumps the informational interests of voters.<sup>49</sup> The state interest in disclosure is surely more weighty when the information not only provides voters cues about the ballot measure itself but also provides insight into the candidate who is actively supporting the initiative. It would undermine electoral integrity if well-to-do interests could hide their support for a candidate by funneling money to a ballot measure she views as a vital part of her campaign. Thus, aggressive campaign disclosure laws designed to pierce through veils that seek to hide the identities of individuals and groups active in issue campaigns will often provide necessary information to voters in both parts of a hybrid election.<sup>50</sup>

## *II. Hybrid Democracy and Designing Electoral Institutions*

The need for some form of hybrid democracy is plainly seen in the context of electoral reform. The U.S. Constitution leaves open many of the questions relevant to the design of democratic institutions; one of its strengths is that it sets forth only minimal requirements and then allows flexibility to develop various kinds of electoral institutions compatible with different visions of democracy. State constitutions contain more details, but they also allow room for change. Moreover, states amend and revise their constitutions more frequently than the federal Constitution is modified.

The key question in light of this flexibility becomes who will design the rules that govern elections, campaigns, and the shape of our democratic

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48. See Elizabeth Garrett, *McConnell v. FEC and Disclosure*, 3 ELECTION L.J. 237, 237 (2004).

49. Compare *ACLU of Nev. v. Heller*, 378 F.3d 979 (9th Cir. 2004) (striking state disclosure down, relying heavily on the Court's protection of anonymous political speech in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995)), with *Majors v. Abell*, 361 F.3d 349 (7th Cir. 2004) (upholding state disclosure statute, relying on *McConnell* and distinguishing *McIntyre*).

50. Under these circumstances, disclosure could also be supported by the anticircumvention rationale articulated in *McConnell* as a justification for regulation of contributions to state and local parties. See *McConnell v. FEC*, 540 U.S. 93, 159-62 (2003); see also Richard Briffault, *McConnell v. FEC and the Transformation of Campaign Finance Law*, 3 ELECTION L.J. 147, 152-53 (2004).

institutions. Often lawmakers themselves determine the rules, in which case the regulated are the regulators. Under such circumstances, there is the worry that self-interest will prevail over the public interest and that rules will be chosen to entrench the already powerful, decrease competition from the outside, and silence new voices.

Given the inherent conflict of interest faced by lawmakers in designing the rules that will shape their careers, involving the people more directly in decision making about democratic institutions is justified.<sup>51</sup> Thus, one advantage of hybrid democracy is that it allows the people a formalized role in institutional design decisions. However, with that role comes peril, namely, the fear that that the voters are likely to adopt initiatives that dangerously weaken the legislature and that the binary format of American initiatives is a poor way to design complex institutions.

*A. The Promise of Hybrid Democracy: Avoiding the Self-Interest of Legislators*

Although direct democracy was primarily a populist reaction against industrial interests like railroads and mining companies,<sup>52</sup> its early supporters also saw it as a way to circumvent self-interested legislators who would block governance reforms supported by Populists and Progressives, such as the direct primary and laws to eliminate corrupt political practices.<sup>53</sup> The initiative continues to be a tool used by reformers to push changes opposed by those with vested interests in current institutional arrangements. Increasingly, it appears that the modern initiative process is being used to modify institutions of representative government in a particular way: to combat increasing polarization and to realign institutions so that they produce outcomes more consistent with the preferences of the median voter. Samuel Issacharoff contends that the success of incumbents in eliminating competition from many federal and state elections has resulted in a “rebellion of the

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51. See DENNIS F. THOMPSON, JUST ELECTIONS: CREATING A FAIR ELECTORAL PROCESS IN THE UNITED STATES 14 (2002) [hereinafter THOMPSON, JUST ELECTIONS]; Dennis F. Thompson, *The Role of Theorists and Citizens in Just Elections: A Response to Professors Cain, Garrett, and Sabl*, 4 ELECTION L.J. 153, 158-60 (2005). Although Thompson sees a role for popular involvement, he has substantial reservations about the initiative process in the United States. See THOMPSON, JUST ELECTIONS, *supra*, at 126-43.

52. See generally STEVEN L. PIOTT, GIVING VOTERS A VOICE: THE ORIGINS OF THE INITIATIVE AND REFERENDUM IN AMERICA (2003). Piott discusses the rise of the initiative process in Oklahoma, which was largely a reaction by farmers and miners to reduce the disproportionate political influence of railroads, banks, and mining companies in the state. See *id.* at 60-82.

53. See, e.g., JAMES W. SULLIVAN, DIRECT LEGISLATION BY THE CITIZENSHIP THROUGH THE INITIATIVE AND REFERENDUM 100 (1893) (taking aim at the “lawmaking monopoly”).

median voter.”<sup>54</sup> Because of its format — asking a question on a single subject that can be answered only with “yes” or “no” — direct democracy tends to favor the median voter, at least as long as turnout in the election is representative of the polity as a whole.<sup>55</sup>

Empowering the median voter was the explicit objective of the initiative passed by Californians in 1996 to replace the parties’ closed primaries with a blanket primary.<sup>56</sup> In a closed primary, only party members can participate in the selection of the nominees for the general election, and those wanting to vote in the primary have to affiliate with the party well before the election. Closed primaries tend to result in the selection of more extreme candidates because only the most motivated partisans will take the time to vote, leaving voters with a choice between two relatively extreme candidates in the general election. In a closed primary, cross-over voting for a particular office is costly; a voter has to register as a member of the party and then forego voting in her regular primary for all other races.<sup>57</sup> A blanket primary, on the other hand, encourages cross-over voting in the primaries because there is little cost to it; the ballot allows a person to vote in the Democratic primary for one office, in the Republican primary for another, and in the Libertarian primary for a third.

Blanket primaries are moderating devices designed to move political parties closer to the center, or, in the words of the California ballot pamphlet, to “weaken” party “hard-liners” and empower “moderate problem-solvers.”<sup>58</sup> Comparing the two primaries illustrates how difficult a concept “meaningful voter choice” really is.<sup>59</sup> There is arguably more of a choice in the general election — and stronger parties — in a world of closed primaries, although the more extreme candidates may not closely reflect the preferences of most

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54. Samuel Issacharoff, *Collateral Damage: The Endangered Center in American Politics*, 46 WM. & MARY L. REV. 415, 416 (2004).

55. See ROBERT D. COOTER, *THE STRATEGIC CONSTITUTION* 145-47 (2000); see also John G. Matsusaka, *Direct Democracy Works*, 19 J. ECON. PERSP. 185, 192 (2005) (describing reasons direct democracy favors median voter and when it may not tend in that policy direction).

56. Open Primary Act, Cal. Proposition 198 (1996) (codified at CAL. ELEC. CODE § 2001 (West repealed 2000)), available at <http://primary96.ss.ca.gov/e/ballot/198txt.html>.

57. Crossover voting is somewhat less costly in the traditional open primary because the voter need not re-register to vote in a different primary. However, she still loses the opportunity to vote in her regular primary for other offices. In an open primary, a voter can choose which party’s primary to participate in on the day of the election, but she is limited to voting only in that primary for all offices.

58. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 570 (2000).

59. For discussions of how the blanket primary in California affected cross-over voting and candidates, see UNIV. OF CAL., BERKELEY, INST. OF GOVERNMENTAL STUDIES, *VOTING AT THE POLITICAL FAULT LINE: CALIFORNIA’S EXPERIMENT WITH THE BLANKET PRIMARY* (Bruce E. Cain & Elisabeth R. Gerber eds., 2002).

voters who tend to be relatively moderate. The nominees that emerge from a blanket primary more closely mirror voter preferences, but there are fewer grounds on which to choose between them because their policy positions will be much closer.

The Supreme Court struck down California's blanket primary, abruptly ending the experiment with reform,<sup>60</sup> but those seeking electoral reform continue to turn to the initiative process as a way to implement change resisted by political parties and office holders. Empirical research on the differences between electoral institutions in states with robust direct democracy and those without it suggests some systematic differences, although fewer than one might expect. Caroline Tolbert has found that "[s]tates with a populist climate and frequent initiative use are more likely to adopt three governance policies: legislative term limits, state [tax and expenditure limitations], and supermajority tax rules."<sup>61</sup> Nathaniel Persily and Melissa Cully Anderson considered the enactment of various electoral reforms, but their findings undermine the "strong claims that are often made about legislative capture inhibiting election reform."<sup>62</sup> Only enactment of legislative term limits is "unimaginable" without hybrid democracy, and the initiative has played an important, although sometimes indirect, role in the adoption of public financing for legislative campaigns and redistricting commissions.<sup>63</sup> Their findings are only preliminary, but even if hybrid democracy does not inevitably lead to different types of governance institutions,<sup>64</sup> it is still the case that it offers the promise of a mechanism for reform that circumvents self-interested legislators. It is that promise that has inspired groups like Common Cause and Public Interest Research Group (PIRG) to use the initiative process

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60. *Cal. Democratic Party*, 530 U.S. 567.

61. Caroline J. Tolbert, *Changing Rules for State Legislatures: Direct Democracy and Governance Policies*, in *CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES* 171, 187 (Shaun Bowler, Todd Donovan & Caroline J. Tolbert eds., 1998).

62. Nathaniel Persily & Melissa Cully Anderson, *Regulating Democracy Through Direct Democracy: The Use of Direct Legislation in Election Law Reform*, 78 S. CAL. L. REV. 997, 1034 (2005).

63. *Id.* at 1033-34; see also John Phippen, Shaun Bowler, & Todd Donovan, *Election Reform and Direct Democracy: Campaign Finance Regulations in the American States*, 30 AM. POL. RES. 559, 573-74 (2002) (finding that initiative states were more likely to restrict campaign contributions and to increase regulation of contributions to candidates from political parties and PACs).

64. Persily & Cully Anderson, *supra* note 62, at 999. A recent study reinforces the conclusion that the presence of the initiative process does not significantly affect the design of democratic institutions. John G. Matsusaka, *Direct Democracy and Electoral Reform*, in *THE MARKETPLACE OF DEMOCRACY: ELECTORAL COMPETITION AND AMERICAN POLITICS* (Michael P. McDonald & John C. Samples eds., forthcoming 2006).

as part of their efforts to establish nonpartisan redistricting commissions and public financing of legislative and other elections.<sup>65</sup>

Hybrid democracy may have propelled efforts to move redistricting from self-interested state legislators to more nonpartisan commissions. Such commissions are more frequently used in states with hybrid democracy, although they are usually established by the legislature as a response to the threat of an initiative.<sup>66</sup> For example, trying to use the indirect influence of direct democracy, Governor Arnold Schwarzenegger of California demanded that the legislature create a nonpartisan commission of retired judges, and when his threat was ignored, he took the issue directly to the voters.<sup>67</sup> The progressive political reform group Common Cause joined with the Governor in supporting the ballot proposition, and it mounted similar efforts using the tool of direct democracy in other states.<sup>68</sup> Although redistricting reform was defeated in both California and Ohio in 2005,<sup>69</sup> it remains an issue on the national agenda in part because of those ballot campaigns. Not only are redistricting commissions under active consideration in other states with the initiative process, but also Representative John Tanner (D-TN) has introduced a bill in Congress that would require all states to use nonpartisan commissions for federal redistricting.<sup>70</sup> If the initiative succeeds in some of the large states,

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65. See Common Cause, Redistricting, <http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=196481> (last visited May 28, 2006); State PIRGs Working Together, <http://www.pirg.org> (last visited May 28, 2006); see also Raphael Lewis, *Groups to Push Redistricting Plan*, BOSTON GLOBE, Aug. 2, 2005, at B4 (discussing the petition drive in Massachusetts led by Common Cause Massachusetts); Thomas E. Mann, *Redistricting Reform*, NAT'L VOTER, June 2005, at 4, 6 (discussing involvement of the League of Women Voters).

66. Persily & Cully Anderson, *supra* note 62, at 1009-10. *But see* Matsusaka, *supra* note 64 (finding that the difference between initiative and noninitiative states in adopting commissions cannot be attributed to availability of initiative).

67. Peter Nicholas, *Gov. to Call for Special Session*, L.A. TIMES, Jan. 1, 2005, at A1; see also Nicholas D. Mosich, Note, *Judging the Three-Judge Panel: An Evaluation of California's Proposed Redistricting Commission*, 79 S. CAL. L. REV. 165 (2005) (evaluating Schwarzenegger's proposal in comparison to those of other commissions).

68. See Press Release, Common Cause, Independent Redistricting Commissions Give Voters the True Power to Choose — California Common Cause Announces Support of Reform Legislation (Feb. 17, 2005), available at <http://www.commoncause.org/site/apps/nl/content2.asp?c=dkLNK1MQIwG&b=194883&ct=429369>.

69. See Sam Hirsch & Thomas E. Mann, Op-Ed., *For Election Reform, a Heartening Defeat*, N.Y. TIMES, Nov. 11, 2005, at A23.

70. Fairness and Independence in Redistricting Act of 2005, H.R. 2642, 109th Cong. (2005); see also Editorial, *Ending the Gerrymander Wars*, N.Y. TIMES, May 30, 2005, at A14. The bill would also restrict states from redistricting for federal legislative office more than once a decade. See H.R. 2642, § 2. Congress has the option to make rules concerning federal elections under the Constitution's elections clause, which leaves the rules up to the states absent congressional mandate. See U.S. CONST. art. I, § 4, cl. 1. If nonpartisan commissions are used

national action becomes more likely. The more representatives who already come from states using independent redistricting commissions, then the fewer the number of members who lose by the conversion to a uniform federal approach.

Although the association of the high-profile former Hollywood star Schwarzenegger played a large role in the increased interest in redistricting commissions, other factors are at play. Also influencing the increased interest in nonpartisan redistricting commissions has been the Supreme Court's decision to take several cases that draw into question the constitutionality of partisan gerrymandering. The Court has avoided directly ruling on the issue twice. In both *Vieth v. Jubelirer*<sup>71</sup> and *League of United Latin American Citizens v. Perry*,<sup>72</sup> the Court refused to intervene in state redistricting plans that were alleged to be unconstitutional partisan gerrymanders. Because it is difficult to imagine a more blatant example of partisan gerrymandering than the plan at issue in *Perry*,<sup>73</sup> the pressure to adopt solutions through the initiative process is likely to grow.<sup>74</sup>

In addition, political commentators have also focused on the lack of competitiveness in most state legislative and House elections.<sup>75</sup> In 2004,

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for federal offices, presumably a state is more likely also to adopt this method of redistricting for state legislative offices. See Michael P. McDonald, *A Comparative Analysis of Redistricting Institutions in the United States, 2001-02*, 4 ST. POL. & POL'Y Q. 371, 380-81 (2004) (showing that Indiana is the only state to use a commission for House seats but not for state legislative offices).

71. 541 U.S. 267 (2004).

72. 126 S. Ct. 2594 (2006).

73. For a description of the politics behind the Texas plan, see *Perry*, 126 S. Ct. at 2628-31 (Stevens, J., concurring in part and dissenting in part). Oklahoma became a player in the Texas saga as Democrats fled across the Red River to deny the state legislature a quorum and delay adopting a redistricting proposal that heavily favored Republicans. Democrats made multiple attempts to deny the legislature a quorum, from fleeing to Ardmore, Oklahoma, to "vacationing" in New Mexico. See Kelley Shannon, *Congressional Redistricting Flap Rages in Texas*, DAILY OKLAHOMAN (Oklahoma City), Oct. 12, 2003, at A17; David Zizzo, *Texas Lawmakers Enjoy Ardmore Hospitality*, DAILY OKLAHOMAN (Oklahoma City), May 14, 2003, at A1.

74. See, e.g., Editorial, *Let Voters Fix a Gerrymander*, CHRISTIAN SCI. MONITOR, Dec. 19, 2005, at 8 (arguing that voters, not the Court, should combat partisan gerrymandering and noting the role of the initiative process).

75. See, e.g., Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 ELECTION L.J. 179, 183 (2003); Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 63-64 (2004); David S. Broder, *No Vote Necessary*, WASH. POST, Nov. 11, 2004, at A37; Nicholas D. Kristof, *No More Sham Elections*, N.Y. TIMES, Nov. 20, 2004, at A19; see also Bruce I. Oppenheimer, *Deep Red and Blue Congressional Districts: The Causes and Consequences of Declining Party Competitiveness*, in CONGRESS RECONSIDERED 135, 143 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 8th ed. 2004) (making a similar point with

fewer than thirty-six races for the House of Representatives were real contests.<sup>76</sup> In California in 2004, not a single seat in the Assembly or Senate changed parties,<sup>77</sup> and one strongly suspects that nearly all of the same 153 state lawmakers would have returned to Sacramento but for term limits. The experience with redistricting commissions in the handful of states that uses them does not suggest that commissions usher in radical alterations of elections or single-handedly bring back vibrant competition.<sup>78</sup> But it is a reform that promises some change in political dynamics, and it seems less likely to be considered absent hybrid democracy. A hybrid system allows the reform to be adopted by some states, through the initiative process or threat of initiative, and the resulting attention then can place the topic on the national agenda to cause change in states without the initiative process.

It is important not to overstate the value of hybrid democracy in allowing consideration and adoption of electoral reforms. After all, nonpartisan redistricting and election commissions are common in Europe, which does not have a robust hybrid system.<sup>79</sup> The Persily and Cully Anderson study suggests that differences in state electoral systems may be more a product of political culture than of the initiative process,<sup>80</sup> although surely those two things — political culture and hybrid democracy — are inherently related and their effects are hard to separate. It is equally important to understand the

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respect to the 2000 elections).

76. See Bruce E. Cain, Karin MacDonald & Michael McDonald, *From Equality to Fairness: The Path of Political Reform Since Baker v. Carr*, in *PARTY LINES: COMPETITION, PARTISANSHIP, AND CONGRESSIONAL REDISTRICTING* 6, 19 (Thomas E. Mann & Bruce E. Cain eds., 2005) (stating that 10% or less of the 2002 and 2004 elections for House seats were competitive); Mann, *supra* note 65, at 4.

77. See Editorial, *Serving the Pols, Not the People*, L.A. TIMES, Nov. 10, 2004, at B10.

78. See Thomas E. Mann, *Redistricting Reform: What is Desirable? Possible?*, in *PARTY LINES: COMPETITION, PARTISANSHIP, AND CONGRESSIONAL REDISTRICTING*, *supra* note 75, at 92, 107-09; McDonald, *supra* note 70, at 371; Jamie Carson & Michael H. Crespín, *Comparing the Effects of Legislative, Commission, and Judicial Redistricting Plans on U.S. House Elections, 1972-2002*, (Mar. 11-13, 2004) (unpublished paper presented at the Western Political Science Association Annual Meeting); see also Gene R. Nichol, Jr., *The Practice of Redistricting*, 72 U. COLO. L. REV. 1029, 1030 (2001) (observing “intensely political” process with respect to appointment of politicians, but less for appointments of judges).

79. See Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1694 (1992); Pildes, *supra* note 74, at 78-80; see also Christopher S. Elmendorf, *Representation Reinforcement Through Advisory Commissions: The Case of Election Law*, 80 N.Y.U. L. REV. 1366 (2005) (drawing on European and other international experience to advocate consideration of a permanent advisory commission on electoral reform).

80. See Persily & Cully Anderson, *supra* note 62, at 1001, 1033.

limitations of hybrid democracy as a method to improve electoral institutions and to circumvent legislator self-interest.

*B. The Peril of Hybrid Democracy: Critically Weakening Representative Institutions*

Any policy-making process that applies generally and is formulated well in advance of particular decisions can usually be used to adopt reforms that one believes are good for democracy and reforms that one believes harm democratic institutions. The initiative process has been used by groups to enact changes in democratic institutions that I believe have been unwise, such as term limits and limitations on the ability of legislatures to raise taxes, as well as reforms I view as positive, such as redistricting commissions and ethics reform. In some cases, the experiments adopted by initiative have worked well, and in other cases, they have failed. Often it is not entirely clear when a reform is adopted whether its consequences will be a net improvement; however, one of the strengths of a federal system is the ability of states to try new approaches and to learn from their experiences and those of other states. The costs of reforms that prove unwise can be reduced through the proposals described above to allow legislative modification of statutory initiatives and to sunset constitutional initiatives. Of course, sunset provisions also reduce the possible advantages of beneficial initiatives because they limit their durability, but presumably reforms that are widely perceived to be successful will be easier to reenact.

The real concern with hybrid democracy is not that it allows people to make unwise decisions as well as good ones, but that laws adopted through the initiative process *more often than not* will weaken representative institutions rather than strengthen them. In fact, some would argue that direct democracy *necessarily* undermines representative institutions. This is a serious charge because, even in states with active direct democracy, most governance decisions will continue to be made by elected and appointed officials. If their ability to govern effectively is systematically and substantially damaged by initiatives, popular referendums and recalls, then the value of hybrid democracy is called into question.

The reasoning of these critics is that people turn to initiatives because they are frustrated with their representatives; thus, they will mostly enact legislation that reduces the power of elected officials. Even initiatives that are heralded by the reform community as beneficial changes to democratic structures — such as redistricting reform and campaign finance reform — operate to limit the discretion of legislators to act in self-interested ways. The argument made by opponents of direct democracy cannot simply be that initiatives limit legislative discretion; often they do. The argument must be

that initiatives more often limit discretion needed for effective representative government than they limit discretion to act in the interests of legislators themselves or special interests to the detriment of the public interest. In short, the case must be made that the costs of initiatives to the vitality and strength of representative democracy outweigh the benefits.

For example, critics of direct democracy claim that policies enacted by initiative have exacerbated the budget difficulties of states like California. The concern is that initiatives will tend to reduce the flexibility of lawmakers to modify budgets in response to economic changes and to reorder government priorities. When lawmakers begin to work on the state's annual budget, they find that a substantial amount of revenue has already been committed to particular projects by initiatives. Laura Tyson has stated, without any empirical support, that 70% of California's budget has been earmarked by initiatives,<sup>81</sup> and lawmakers in other states say they are worried about a similar "Californi-fication" of their budgets.<sup>82</sup> Other critics point to term limits, which are almost entirely a product of initiative, as responsible for a substantial reduction in the ability of legislators to reach compromises and govern competently.<sup>83</sup>

Certainly, there is reason to be concerned that one inevitable effect of hybrid democracy is a significant weakening of the representative component. However, elected officials bear some responsibility for this feature of modern hybrid democracy: the resurgence of direct democracy in the 1970s partially resulted from public disgust with and distrust of representative institutions because of the perceived — and actual — failure of elected officials to respond to voter preferences. Voter frustration with representative institutions continues to drive election reform by initiative. For example, recent efforts to change the primary system in California, including the adoption of the short-lived blanket primary, are reactions to the unwillingness of the two major parties to adopt internal reforms that would present voters with different choices in the general election.

A recent election concretely demonstrated the effect of the major parties' failure to nominate candidates that can energize voters. The prospect of

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81. Laura D'Andrea Tyson, *A New Governor Won't Fix What Ails California*, BUS. WK., Sept. 22, 2003, at 24.

82. See, e.g., Bill Cotterell, *Panel Seeks to Make It Harder to Change Florida Constitution by Petition*, TALLAHASSEE DEMOCRAT, Dec. 9, 2003 (quoting Florida lawmakers in hearings to consider changes in initiative process that would make initiatives more difficult to qualify for the ballot and to pass).

83. For an exhaustive examination of the effect of term limits in California, see BRUCE E. CAIN & THAD KOUSSER, *ADAPTING TO TERM LIMITS: RECENT EXPERIENCES AND NEW DIRECTIONS* (2004).

choosing between Gray Davis and Bill Simon in the 2002 gubernatorial election in California led to voter alienation and very low turnout.<sup>84</sup> Ironically, this low turnout made it easier for those supporting a recall of Davis to collect enough signatures to place the question of retaining him before the voters less than a year after his reelection because the number of signatures required is a percentage of the total voting in the last gubernatorial election.<sup>85</sup> Opponents of the recall attacked it as undermining representative institutions;<sup>86</sup> blame should have been shared by the entrenched political players who refused to adopt reforms that responded to voters' legitimate concerns about the quality of candidates. The two parts of hybrid democracy are related; each reacts to the other. When the behavior of elected officials leads to disengagement from representative institutions, the public may be more likely to support initiatives aimed at elected officials.

Moreover, criticism of the effect of initiatives on the performance of representative institutions is typically overstated. For example, Tyson's claim that 70% of the California budget is earmarked by initiatives is certainly exaggerated.<sup>87</sup> The most comprehensive study of the California budget puts the figure well below this level, revealing that only 32% of the state's 2003-04 Budget was constrained by popular initiatives.<sup>88</sup> Furthermore, the mandated spending is largely the product of one initiative, Proposition 98, that requires the money be spent for grades K-12 and community college education.<sup>89</sup> To be sure, even this amount of earmarking can be problematic in difficult

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84. See Carla Marinucci, *The White House Question; Davis Is Only Large-State Democrat Governor, but His Stock Has Slipped*, S.F. CHRON., Nov. 7, 2002, at A3 ("Turnout for Tuesday's election was an estimated 44.8 percent, which would be the worst general election turnout in California history . . . .")

85. See Garrett, *Democracy in the Wake*, *supra* note 39, at 242. See generally CAL. CONST. art. II, § 14(b).

86. Lisa Petrillo, *Jesse Jackson Decries Recall Election; Democracy Being Undercut, He Says*, SAN DIEGO UNION-TRIB., Oct. 6, 2003, at B3; John Wildermuth, *Dean, Davis Say Recall Undermines Democracy*, S.F. CHRON., Sept. 7, 2003, at A21.

87. Others have used similar figures but with regard to the amount of the budget determined by initiatives and federal mandates. See, e.g., John W. Ellwood & Mary Sprague, *Options for Reforming the California State Budget Process*, in CONSTITUTIONAL REFORM IN CALIFORNIA: MAKING STATE GOVERNMENT MORE EFFECTIVE AND RESPONSIVE 329, 337, 348 (Bruce E. Cain & Roger G. Noll eds., 1995) (stating that 88% of the state's budget is earmarked by some source, including federal mandates and initiatives, and that 60% of the General Fund expenditures are earmarked by Proposition 98 and the three-strikes initiative).

88. John G. Matsusaka, *Direct Democracy and Fiscal Gridlock: Have Voter Initiatives Paralyzed the California Budget?*, 5 ST. POL. & POL'Y Q. 248, 248 (2005).

89. *Id.* at 252; see also Classroom Instructional Improvement and Accountability Act, Cal. Proposition 98 (1988), amended by Traffic Congestion Relief and Spending Limit Act of 1990, Cal. Proposition 111.

budgetary times and deny lawmakers necessary flexibility. Indeed, one of the initiatives that Governor Schwarzenegger placed on the ballot in 2005 was a budget reform proposal that would have weakened the requirements of Proposition 98.<sup>90</sup> Of course, looking only at the amount of earmarked money does not provide the full story of the effect of initiatives on the legislature's ability to budget. Other initiatives limit the ability of the legislature to raise money to fund new programs, and term-limited legislators are less able to reach the compromises to enact a budget in a timely fashion than legislators with more experience. In short, the effect of initiatives on budgeting is complicated — and the experience of the federal government suggests that budget policy can become inflexible and poorly run without the influence of initiatives.

No easy solution exists to reduce the threat that direct democracy poses to the health of representative institutions. If one thought the costs to representative government substantially outweighed the benefits of hybrid democracy, eliminating direct elements of our system might be justified. It does not seem, however, that the case has been made; critics do not pay sufficient attention to the power of initiatives to reform representative institutions in ways that improve their performance and responsiveness. Moreover, even if critics persuade scholars and policy elites that direct democracy is reducing welfare overall, eliminating the initiative process is very unlikely to be accepted by the people. Polls consistently demonstrate that citizens like the initiative process and trust its outcomes more than they trust legislation enacted by their representatives.<sup>91</sup> Moreover, in the United States and around the world, the trend is toward increasing the influence on governance exerted by the initiative and referendum. The vast majority of new constitutions in Europe have some element of direct democracy,<sup>92</sup> and efforts to substantially erode the process in U.S. states and cities that allow popular involvement in lawmaking rarely succeed. Throwing out all direct elements of our hybrid system is an extreme reaction that denies voters an ability to play a role in shaping institutions of governance within our

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90. California Live Within Our Means Act, Cal. Proposition 76 (2005), available at [http://www.ss.ca.gov/elections/bp\\_nov05/voter\\_info\\_pdf/text76.pdf](http://www.ss.ca.gov/elections/bp_nov05/voter_info_pdf/text76.pdf).

91. See, e.g., MARK BALDASSARE, CALIFORNIANS AND THEIR GOVERNMENT: PPIC STATEWIDE SURVEY 17 (2004) (stating that 74% of California voters think the initiative process is a “good thing” and that 59% of them think that policy made through initiatives is better than policy made by elected officials); Jack Citrin & Jonathan Cohen, *Viewing the Recall from Above and Below*, in *ESSAYS ON THE CALIFORNIA RECALL* 68, 74-82 (Shaun Bowler & Bruce E. Cain eds., 2006).

92. Bruno Kaufmann, *A Comparative Evaluation of Initiative & Referendum in 32 European States*, in *DIRECT DEMOCRACY IN EUROPE* 3 (Bruno Kaufmann & M. Dane Waters eds., 2004).

democratic framework. The better response is to work toward thoughtful reform, and to understand that any process of government can be used to enact legislation that we like and legislation that we dislike.

*C. Avoiding the Peril of Binary Decision Making: Using Commissions to Augment the Initiative Process*

Decisions about the design of democratic institutions can be complex. Not only is each particular reform proposal complicated and likely to interact in multifaceted and sometimes unexpected ways with other parts of the political system, but design decisions may also require that one choose among several options simultaneously. The format of decision making in the initiative process in the United States is not conducive to this type of multi-factored analysis. The first limitation of the initiative is the binary nature of the process. Voters are asked to vote “yes” or “no” on one option that is compared, in most cases, to the status quo. Only in a few instances will there be more than one question on the ballot relating to the same issue. Even in those cases, the choice must be made in a binary way on each proposal, compared only to the status quo, without any way for voters to signal how they might make trade-offs among the alternatives.<sup>93</sup> Rather than empowering voters, the presence of multiple questions on the same ballot about the same topic often means that the status quo is retained because confused voters vote “no” on all the questions. Indeed, opponents of reforms proposed through direct democracy sometimes qualify competing initiatives merely to ensure the defeat of the first reform; they are largely indifferent about whether their proposal passes because they are relatively happy with the status quo.<sup>94</sup>

Furthermore, single subject rules usually apply to initiatives. These rules are intended to reduce voter confusion and to avoid forcing voters to accept a policy they oppose in order to get a change that they strongly favor.<sup>95</sup> But single-subject requirements also limit the scope of any particular reform proposed by initiative even if it is more sensible to consider it as part of a comprehensive reform.

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93. Others have indicted direct democracy because it forces voters to make difficult decisions in this binary fashion without considering the trade-offs inherent in governance. See THOMPSON, JUST ELECTIONS, *supra* note 51, at 139; Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434 (1998).

94. See Elizabeth Garrett, *Who Chooses the Rules?*, 4 ELECTION L.J. 139, 144 (2005) [hereinafter Garrett, *Who Chooses?*].

95. See Daniel H. Lowenstein, *Initiatives and the New Single Subject Rule*, 1 ELECTION L.J. 35 (2002) (discussing courts’ greater use of single subject rules to invalidate laws enacted by initiative).

The current design of hybrid democracy is not inevitable, however; it could be changed to allow more complex decision making. Careful thought is required before adopting any design change; most voters will never spend the time required to become experts on policy choices, and the political environment must be shaped so that it allows them to decide competently on the basis of a few voting cues. Reform is nonetheless still possible, for example, by combining an independent commission with an initiative, much as New Zealand did when it adopted a proportional election system for its Parliament.<sup>96</sup> In 1986, the Royal Commission on the Electoral System analyzed the existing first-past-the-post (FPTP) system and alternatives, and it recommended changing to a mixed-member proportional (MMP) system based on the German approach.<sup>97</sup> It was not clear at this point whether the Commission's recommendations were necessarily the prelude to a popular referendum, or whether any such referendum would be binding.<sup>98</sup> The report, however, served as a focal point for reform and placed the issue of electoral reform on the policy agenda, making it impossible for politicians to avoid a popular vote on reform. Thus, in 1992, voters were asked in a non-binding referendum whether they wanted to keep the status quo, and then which of four other electoral systems they would prefer instead. In this advisory vote, the voters clearly signaled a desire to get rid of FPTP and to adopt MMP. After a year of further discussion and campaigning, voters were presented the binding binary choice between FPTP and MMP, and 54% of them chose MMP in an election in which 85% of eligible voters participated.<sup>99</sup>

A different sort of entity has been combined with direct democracy in British Columbia to consider sweeping electoral reform of its FPTP system. In April 2003, the government created a Citizens' Assembly on Electoral Reform, consisting of 160 members — one man and one woman from each electoral district and two aboriginal members.<sup>100</sup> The Assembly, which was

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96. See Garrett, *Who Chooses?*, *supra* note 94, at 145.

97. GEOFFREY PALMER & MATTHEW PALMER, *BRIDLED POWER: NEW ZEALAND'S CONSTITUTION AND GOVERNMENT* 13 (4th ed. 2004).

98. See WILLIAM KEITH JACKSON & ALAN MCROBIE, *NEW ZEALAND ADOPTS PROPORTIONAL REPRESENTATION: ACCIDENT? DESIGN? EVOLUTION?* 46-49 (1998) (describing how the issue of popular referendum was raised, perhaps mistakenly, by the Prime Minister in a debate); *id.* at 125-34 (describing the political process that resulted in the two-referendum format).

99. PALMER & PALMER, *supra* note 97, at 13. Findings from the California recall, with its two-part, relatively complicated ballot, suggest that voters can handle more complexity than the current binary format for initiatives in the states. See R. Michael Alvarez, D. Roderick Kiewiet & Betsy Sinclair, *Rational Voters and the Recall Election*, in *ESSAYS ON THE CALIFORNIA RECALL*, *supra* note 91, at 87.

100. See Keith Archer, *Redefining Electoral Democracy in Canada*, 3 *ELECTION L.J.* 545

provided a staff and budget and held public hearings, assessed the electoral system and compared it to approaches in other countries.<sup>101</sup> In December 2004, the Assembly adopted a proposal to change British Columbia's system to a single transferable vote system that would allow voters to rank candidates and would move any vote not necessary to elect a candidate to the voter's next preferred candidate.<sup>102</sup> The question of whether to adopt the Citizens' Assembly's recommendation was submitted to the voters in a referendum in May 2005.<sup>103</sup> To pass, the referendum had to receive both a supermajority of 60% of all those voting and a simple majority in 60% of the seventy-nine electoral districts.<sup>104</sup> The referendum failed, but it only barely missed the threshold when it received over 57% support and achieved a simple majority in all but two districts.<sup>105</sup> As often occurs when a referendum receives majority support but fails because of supermajority requirements,<sup>106</sup> the discussion about reforming the FPTP system in British Columbia is continuing.<sup>107</sup>

I do not want to suggest that this combination of commission or citizens' assembly and popular votes, perhaps on questions phrased in non-binary ways, is required for every decision presented to the people. For example, when the legislature puts a proposal on the ballot, lawmakers have engaged in the

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(2004). The website of the Citizens' Assembly is <http://www.citizensassembly.bc.ca/public>. A similar assembly is under consideration in Ontario. See Press Release, Office of the Premier of Ont., Ontarians To Have a Say on Electoral Reform: Citizens' Assembly Will Re-examine How We Elect MMPs (Nov. 18, 2004), available at <http://www.premier.gov.on.ca/news/Product.asp?ProductID=251>; see also ETHAN LIEB, DELIBERATIVE DEMOCRACY IN AMERICA: A PROPOSAL FOR A POPULAR BRANCH OF GOVERNMENT (2004) (proposing an institution like a citizens' assembly in a creative proposal to make direct democracy more deliberative).

101. See B.C. CITIZENS' ASSEMBLY ON ELECTORAL REFORM, MAKING EVERY VOTE COUNT: THE CASE FOR ELECTORAL REFORM IN BRITISH COLUMBIA 11 (2004), available at [http://www.citizensassembly.bc.ca/resources/final\\_report.pdf](http://www.citizensassembly.bc.ca/resources/final_report.pdf).

102. *Id.* at 6.

103. See British Columbia Referendum Information Office, Election Reform, [http://www.gov.bc.ca/referendum\\_info/](http://www.gov.bc.ca/referendum_info/) (last visited May 28, 2006).

104. See Elections BC, Final Referendum Results: Referendum on Electoral Reform, <http://www.elections.bc.ca/elections/ge2005/finalrefresults.htm> (last visited May 28, 2006).

105. See *id.*

106. See Elizabeth Garrett, *Issues in Implementing Referendums in Israel: A Comparative Study in Direct Democracy*, 2 CHI. J. INT'L L. 159, 165 (2001) (discussing the situation with regard to Scottish devolution, which passed in a second referendum).

107. See Andru McCracken, *Premier Addresses Electoral Reform*, ROBSON VALLEY TIMES, Sept. 21, 2005, [http://www.robsonvalleytimes.com/index.php?option=com\\_content&task=view&id=197&Itemid=0](http://www.robsonvalleytimes.com/index.php?option=com_content&task=view&id=197&Itemid=0); Gordon Campbell, Premier of B.C., Speech from the Throne on the Opening of the First Session of the Thirty-Eighth Parliament 24-29 (September 12, 2005) (promising another referendum regarding electoral reform by November 2008), available at [http://www.legis.gov.bc.ca/38th1st/Throne\\_Speech\\_2005\\_1st\\_38th.pdf](http://www.legis.gov.bc.ca/38th1st/Throne_Speech_2005_1st_38th.pdf).

process of deliberation, and they have winnowed down the alternatives and thought about the relevant trade-offs. In the area of electoral reform, however, use of commissions seems particularly appropriate.<sup>108</sup> Lawmakers have a conflict of interest when it comes to designing the institutions through which they seek and retain office, so they should not be the primary decision makers about larger structural issues. Leaving such decisions entirely to the people without some guidance from experts, however, is problematic because comprehensive electoral and governance reforms can be too complex for the traditional initiative process in the United States. An awareness that we operate in a hybrid democracy — with representative institutions, direct elements, and the potential for special commissions and assemblies — should allow more creative solutions to the perils of the initiative process, while retaining its promise as a means to consider and enact reforms opposed by entrenched political players with a stake in the status quo.

### *III. Governing in a Hybrid Democracy: Empowering the Majority?*

As the preceding discussion of electoral reform through initiatives suggests, the presence of a robust initiative process can influence the traditional legislative process so that more legislation reflects the preferences of the median voter, rather than interest groups with intense and often outlying preferences.<sup>109</sup> This has been called the indirect effect of direct democracy.<sup>110</sup> Accordingly, groups advocating a position that is likely to gain majority support if presented to the people on the ballot, but who are stymied in the legislature, can threaten to qualify an initiative. This threat can change the bargaining dynamics in the legislature and allow a compromise to be enacted through the representative branches. For example, in 1996, Reed Hastings, a wealthy Silicon Valley entrepreneur, led a group in an effort to establish charter schools and found they were blocked by powerful teacher unions in the California legislature.<sup>111</sup> So they spent \$3.5 million to fill petitions with 1.2 million signatures and raised an additional \$12 million for a campaign war chest.<sup>112</sup> Their success in signature gathering and fundraising provided them

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108. See generally Elmendorf, *supra* note 79.

109. See Elisabeth R. Gerber, *Legislative Response to the Threat of Popular Initiatives*, 40 AM. J. POL. SCI. 99 (1996); Matsusaka, *supra* note 55, at 192-93.

110. See GERBER, *supra* note 3, at 121-36.

111. Daniel M. Weintraub, *Charter-School Deal Reached: Backers Agree to Keep Measure off the Ballot if Ok'd by Legislature*, *Wilson*, ORANGE COUNTY REG., Apr. 29, 1998, at A1.

112. See Zachary Coile, *Fear of Initiative Spurs Charter School Bill in Legislature: Lawmakers Respond Overwhelmingly to Millionaire's Clout*, S.F. EXAMINER, May 1, 1998, at A1; Peter Schrag, *Technetters: The Silicon Valley Mystique*, SACRAMENTO BEE, May 20, 1998, at B7.

credibility when they began to bargain again with lawmakers.<sup>113</sup> Because legislators understood that the initiative would likely pass if presented to the people, they were willing to work with Hastings's group to reach a compromise.<sup>114</sup> A charter schools bill was enacted, an indirect consequence of the initiative process.<sup>115</sup>

This ability to threaten to qualify a ballot measure depends on two conditions: the resources to gain ballot access and an issue that is likely to receive majority support at the polls. The latter condition means that the initiative threat tends to push legislative outcomes toward majoritarian preferences and could be a healthy counterweight to the tendency of the traditional legislative process to favor relatively small groups with intense preferences. Hybrid democracy might therefore represent a balance between a process that gives significant voice to intensity of preferences (representative democracy) and one that favors majoritarian outcomes (direct democracy).

There are two problems with this rosy view, however. The first one I will mention but not deal with thoroughly in this Lecture. It is not clear that hybrid democracy is sufficiently balanced to appropriately protect the rights of all minority groups in a democracy. The majoritarian aspect of direct democracy was seen as a serious weakness by Madison, for example, who argued for purely representative institutions to guard against the passions of majoritarian factions.<sup>116</sup> Well-organized and well-funded minorities probably can use their funds to defeat initiatives that threaten their interests;<sup>117</sup> the real worry is that minorities that lack money and power may be systematically harmed by the initiative process. In recent years, initiatives that target immigrants, felons, and gays and lesbians have been passed by substantial margins because they appeal to the prejudices of the majority and are enacted in a process with little protection for those who lack power and resources.<sup>118</sup> Of course, these groups do not necessarily fare much better in the representative process, which has

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113. See Weintraub, *supra* note 111, at A1.

114. See Coile, *supra* note 112, at A1.

115. See Elizabeth Garrett, *Money, Agenda Setting, and Direct Democracy*, 77 TEX. L. REV. 1845, 1860 (1999) (detailing this story).

116. THE FEDERALIST No. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961).

117. See Elizabeth Garrett & Elisabeth R. Gerber, *Money in the Initiative and Referendum Process: Evidence of Its Effects and Prospects for Reform*, in THE BATTLE OVER CITIZEN LAWSMAKING 73, 79-80 (2001) (surveying literature demonstrating that heavy one-sided spending to defeat an initiative is disproportionately successful).

118. See *supra* text accompanying notes 11-16 (discussing initiatives targeted at gays and lesbians); see also, e.g., "Three Strikes Initiative," Cal. Proposition 184 (1994); Cal. Proposition 187 (1994) (denying public services to undocumented workers), available at <http://www.americanpatrol.com/REFERENCE/prop187text.html>.

also passed laws hostile to them and others without significant electoral clout. However, the representative process has safeguards that slow enactment of policies and that empower representatives of a determined minority, especially in blocking legislation. These safeguards, such as the vetogates of committees, requirements of bicameralism and presentment, and supermajority voting requirements in some circumstances, are unavailable in direct democracy. The safeguard for minority interests burdened by oppressive initiatives is the courts, which have been willing to strike down some of the ballot measures, such as those denying undocumented workers access to government services or some aimed at restricting the rights of gays and lesbians.<sup>119</sup> It is not clear, however, that the representative process combined with judicial protection is substantial enough to balance the majoritarian aspects of the initiative process, particularly when harnessed by populist demagogues who appeal to the worst instincts in voters.

There is another, related way to look at the “cost” of majoritarianism that results from direct democracy. Direct democracy generally empowers the median voter, while representative democracy allows groups with intense preferences a larger role in policy making.<sup>120</sup> Depending on the intensity of the preferences held by the minority and majority, privileging the median voter may reduce overall welfare. Hybrid democracy, and the bargaining in the legislative process that occurs in the shadow of the initiative process, however, might allow a healthy balance between the preferences of the median voter and strongly held preferences of a minority. More theoretical and empirical work is needed to determine whether the balance is indeed healthy — that is, whether hybrid systems allow minorities to prevail when such a result maximizes overall welfare but blocks their success when the policy they seek results in larger societal costs than the benefits they obtain. The concern with respect to unorganized minorities or groups lacking both the resources to meaningfully influence the representative process and the numbers to prevail in initiatives is that their preferences will be systematically ignored and undervalued. Thus, the majority will always prevail even when

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119. See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996) (holding that a constitutional amendment passed by referendum in Colorado, which prohibited state action that was protective of homosexuals, violated the Equal Protection Clause); *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244 (C.D. Cal. 1997) (finding that most of California’s Proposition 187, which denied public services to undocumented workers, was in conflict with federal law).

120. Arthur Lupia & John G. Matsusaka, *Direct Democracy: New Approaches to Old Questions*, 7 ANN. REV. POL. SCI. 463, 476-77 (2004); see also Thomas Stratmann, *Logrolling*, in PERSPECTIVES ON PUBLIC CHOICE 322, 325 (D.C. Mueller ed., 1997) (describing how logrolling in legislatures allows those with intense preferences to obtain policy outcomes).

society on the whole is better off with the policy favored strongly by the minority.

The second flaw in the ideal version of a balanced hybrid democracy lies in the realities of the first condition: the process of qualifying measures for the ballot. Although grassroots groups may be able to qualify initiatives with armies of volunteers, the sure route to ballot access is money. A group that can pay between fifty cents and ten dollars per signature is guaranteed access to the ballot.<sup>121</sup> The reality that money is a sufficient condition for ballot access means that the agenda of the initiative process is set by wealthy groups and individuals. Although Reed Hastings could not have successfully threatened lawmakers unless charter schools was an issue with majority support, we cannot be certain that a majority of Californians would have agreed with him that his charter-schools proposal was the most pressing educational reform. If the people had been allowed more say in setting the agenda, one suspects that issues like class size, the condition of facilities, per-pupil spending, and teacher accountability would have ranked ahead of charter schools.<sup>122</sup> In other words, the initiative process may favor majoritarian outcomes but only on the questions that well-funded interests want to ask the public.

This dynamic may be different, however, when elected officials are wielding the initiative threat. Unlike a wealthy entrepreneur or a leader of a well-funded group, an elected official is accountable to the voters and thus may be more likely to elevate issues to the policy agenda that concern most of her constituents. A politician who uses the threat of initiative to change bargaining dynamics among the branches of government not only deploys a tool that favors majoritarian outcomes but she may also use it on issues that matter to her constituents. Of course, governors and other elected officials can also be susceptible to the entreaties of well-funded and well-organized groups when choosing which issues to champion. Arnold Schwarzenegger has raised most of his campaign money from business interests such as financial institutions, information technology firms, real estate developers, oil and gas companies, health care and drug companies, auto dealers, and retailers;<sup>123</sup> presumably, they exercise some influence over his decisions about agenda-

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121. See generally ANDREW M. GLOGER, INITIATIVE & REFERENDUM INST., IRI REP. 2006-1, PAID PETITIONERS AFTER *PRETE* (2006), available at <http://www.iandrinstitute.org/REPORT%202006-1%20Paid%20Petitioners.pdf>.

122. A study by the Public Policy Institute of California in 2005, for example, found that class size, curriculum, and teacher quality were the most important issues to adults in the state. See MARK BALDASSARE, PPIC STATEWIDE SURVEY APRIL 2005: SPECIAL SURVEY ON EDUCATION 10 (2005), available at [http://www.ppic.org/content/pubs/S\\_405MBS.pdf](http://www.ppic.org/content/pubs/S_405MBS.pdf).

123. See Garrett, *Hybrid Democracy*, *supra* note 2, at 1106; Hasen, *supra* note 39, at 901.

setting. However, the Governor's statewide constituency and political ambition may lead him to be more concerned with majoritarian preferences than legislators who represent smaller geographic areas, and certainly he is more accountable than policy entrepreneurs like Reed Hastings. At the least, the dynamics of initiative threats used to govern are significantly different when the person making the threat faces reelection, rather than when the tool is used by the leader of an interest group or a rich person whose hobby is politics.

*A. Arnold Schwarzenegger and Hybrid Democracy: A Promising Start?*<sup>124</sup>

Politicians have used the threat of initiative, as well as the initiative process itself, to enact policies in the past,<sup>125</sup> but never to the extent that it has been used recently in California. The modern politician who embodies hybrid democracy — with its promise and its perils — is Arnold Schwarzenegger. His systematic use of direct democracy to govern is qualitatively different from anything seen before in California or elsewhere. After a brief review of Schwarzenegger's use of hybrid democracy since he took office, I will turn to the perils of this approach. As we have learned in California, even a politician with all the advantages of Schwarzenegger cannot use this tactic over the long term to enact major and controversial policies. It is simply not a sustainable method of governing. When the threat fails and the executive must turn to the people, he faces the risk of loss at the polls, thereby decreasing the credibility of future threats. Even when he succeeds, the policy enacted suffers from the problems of initiatives generally. That is, it is enacted in an extremely durable form that cannot easily be changed over time to deal with unforeseen consequences or to correct mistakes in the original drafting. Moreover, if the strategy is used as a primary method of governing, politicians find themselves in a perpetual campaign, diverting their energy from the task of day-to-day governance.

Schwarzenegger's first foray into the political realm, largely to test the waters for a gubernatorial candidacy, was his support in 2002 of Proposition

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124. Much of this discussion is drawn from a longer analysis in Garrett, *Hybrid Democracy*, *supra* note 2.

125. *See, e.g.*, Senator Bob Graham, Keynote Address at USC-Caltech for the Study of Law and Politics Conference: The 2004 Election: What Does It Mean for Campaigns and Governance? (Oct. 8, 2004), available at <http://lawweb.usc.edu/cslp/pages/conference.html> (follow video hyperlink "Keynote Address by Senator Bob Graham (D-FL)") (discussing how Graham and others enacted higher education reform through the initiative even though the sitting Governor and Republicans opposed it). Of course, executives have long used populist rhetoric and threats to go over the heads of the legislators to the people to increase their bargaining position. The initiative makes the threat more potent because if the tool is used successfully, the governor can actually enact the law he supports.

49, requiring funds be spent on after-school programs.<sup>126</sup> Not only did he lend his name to the campaign, but he also spent \$1.1 million of his own money to pass the measure.<sup>127</sup> This initiative, which passed easily, is the kind of crypto-initiative Kousser and McCubbins indict: it was designed primarily for Schwarzenegger's political gain rather than to effect policy change. The initiative provided no funding to after-school programs unless there was a surplus available after other education funds had been disbursed; indeed, experts believe that funds will not be available for these programs until 2007.<sup>128</sup> There was virtually no opposition to this proposal, which was structured both to resonate positively with voters and to demonstrate to an important interest group — the educational community — that Schwarzenegger would support their interests.

After his first success in hybrid democracy, Schwarzenegger began to watch for an opportunity to run for governor, a tricky proposition despite his popularity because his relatively liberal social views would hurt him in a closed Republican primary. The right wing of his Party distrusted him on several grounds: his support of gay rights, women's reproductive freedom, and environmental issues; his marriage to a member of the Kennedy family; and his inability to prove that he was a fiscal conservative who would oppose all tax increases. The recall was a tailor-made opportunity for Schwarzenegger to run for office.<sup>129</sup> He was able to bypass the primary system and go straight to a general election. He could run against an extremely unpopular and uncharismatic governor who had barely managed to defeat an even more uncharismatic Republican opponent in the 2002 election.

Schwarzenegger's celebrity status and personal wealth gave him substantial advantages in the truncated recall campaign and allowed him to rise to the top of a crowded field of 135 candidates. Schwarzenegger spent about \$10.5 million of his own money,<sup>130</sup> a figure that his closest competitor, Cruz Bustamante, had to try to match by rapidly raising money from individuals through contributions limited to \$21,200 each.<sup>131</sup> Although Bustamante

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126. See After School Education and Safety Act, Cal. Proposition 49 (1992); David L. Schechter, Rights of Removal: Recall Politics in the Modern Era 22 (Sept. 5, 2004) (unpublished paper presented at the 2004 American Political Science Association Annual Meeting held in Chicago, Ill.), available at <http://convention2.allacademic.com/index.php?cmd=apsa04> (use "Quick Search" feature to search for "Right of Removal"; then click on the hyperlink for the article).

127. Schechter, *supra* note 126, at 22.

128. Carla Rivera, *Schwarzenegger's Initiative Unfunded*, L.A. TIMES, Aug. 28, 2003, at B1.

129. For a discussion of the recall and its advantages for Schwarzenegger, see Garrett, *Democracy in the Wake*, *supra* note 39, at 254-65.

130. See *id.* at 247.

131. See Dan Morain, *Recall Campaigners Spend \$88 Million, Despite Limits*, L.A. TIMES,

attempted to evade contribution limitations through his own use of hybrid democracy — raising money to defeat an initiative on the recall ballot and spending it on advertisements featuring Bustamante — he was never able to generate the kind of money that Schwarzenegger had in his personal bank account.<sup>132</sup> Thus, hybrid democracy — the California statewide recall system — propelled Schwarzenegger into the governor's office and allowed him to avoid many of the pitfalls of a traditional campaign and election.<sup>133</sup>

Schwarzenegger has continued to use hybrid democracy as the linchpin of his approach to governing. His celebrity status ensures that he receives intense media attention; he is the most successful fundraiser in California's history and, until 2005, he was tremendously popular with voters, including Democrats and independents. Because of these qualities, his threats to circumvent the legislature and take his proposals directly to the people were credible and, for the first year or so of his governorship, forced lawmakers to bargain with him and enact legislation he could support. Few other politicians would be able to consistently and credibly make such threats.

In Schwarzenegger's first State of the State Address, he warned legislators that he would take workers' compensation reform to the voters unless he received a bill that he could accept by March 1,<sup>134</sup> a deadline that was subsequently relaxed. His victory in the recall election gave the threat some credibility, and his position was substantially strengthened after a March special election in which voters passed a \$15 billion bond that the Governor needed to survive an immediate budget crisis.<sup>135</sup> This victory was impressive because the bond proposal, which was linked to a second proposal requiring a balanced budget, had initially received support from only about one-third of the voters.<sup>136</sup> After an aggressive campaign led by the Governor, the bond was

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Feb. 4, 2004, at B6.

132. Garrett, *Democracy in the Wake*, *supra* note 39, at 248-49.

133. For example, the brief campaign period made it less likely that allegations of past inappropriate behavior toward women would affect the viability of Schwarzenegger's campaign. See Gary Cohn, Carla Hall & Robert W. Welkos, *Women Say Schwarzenegger Groped, Humiliated Them*, L.A. TIMES, Oct. 2, 2003, at A1 (presenting a story that broke only days before Election Day and after many absentee ballots had been cast).

134. Arnold Schwarzenegger, Governor of Cal., State of the State Address (Jan. 6, 2004), available at [http://www.governor.ca.gov/state/govsite/gov\\_homepage.jsp](http://www.governor.ca.gov/state/govsite/gov_homepage.jsp) (follow "Speeches" hyperlink; then follow "2004" hyperlink; then follow "Governor Schwarzenegger's State of the State Address 01/06/2004" hyperlink).

135. See Rene Sanchez, *Political Muscle: Schwarzenegger Demonstrates Strength with Ballot Triumph*, WASH. POST, Mar. 4, 2004, at A01. See generally Economic Recovery Bond Act, Cal. Proposition 57 (2004), available at <http://primary2004.ss.ca.gov>Returns/prop/00.htm> (follow "57" hyperlink; then follow "Text of Proposed Law" hyperlink).

136. Sanchez, *supra* note 135, at A01.

passed by a decisive margin; 63% of those voting supported it.<sup>137</sup> Although this reversal in public opinion is noteworthy, victory was always likely because Schwarzenegger faced no real opposition. Instead, he had the support of virtually all political leaders in the state including Democratic Senator Dianne Feinstein.<sup>138</sup> Soon after the victory, the California legislature sent workers' compensation reform to the Governor's desk for his signature.<sup>139</sup> The threat of initiative backed up by success at the polls had succeeded in breaking the legislative logjam that previously had blocked reform.

Schwarzenegger continued to govern during his first year by threat of initiative. During budget negotiations in spring 2004, he had convinced Indian tribes to contribute more money to the state in part because he threatened to support initiatives circulated by gambling interests to take away the tribes' monopoly.<sup>140</sup> Part of the agreement with the tribes was that Schwarzenegger would oppose the initiatives; he was so successful that the supporters of Proposition 68, which would have eliminated the monopoly unless tribes agreed to pay 25% of their revenues to the state, pulled out of the campaign several weeks before the election after having spent \$25 million.<sup>141</sup>

Schwarzenegger was active not only in the campaigns concerning the gambling initiatives; he also took positions on twelve of the sixteen ballot measures on the November 2004 ballot.<sup>142</sup> His position prevailed in all but two of the races, and those losses should not have significantly hurt his reputation because he did not take a particularly public position on either.<sup>143</sup> He supported the nonpartisan primary proposal late in the campaign and did not include it in the slate mailer that the Republican Party mailed out listing his positions; this ballot measure lost.<sup>144</sup> Voters enacted Proposition 63,<sup>145</sup>

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137. Cal. Sec'y of State, California Primary Election, Mar. 2, 2004: State Ballot Measures, Statewide Returns, <http://primary2004.ss.ca.gov>Returns/prop/00.htm> (last visited July 9, 2006) (showing Proposition 57 (Economic Recovery Bond) winning with over 63% support and Proposition 58 (Balanced Budget) winning with 71% support).

138. See Sanchez, *supra* note 135, at A01.

139. See Act of Apr. 19, 2004, ch. 34, 2004 Cal. Stat. 94 (codified in scattered sections of CAL. LAB. CODE).

140. See Garrett, *Hybrid Democracy*, *supra* note 2, at 1123.

141. See Robert Salladay & Dan Morain, *Prop. 68 Backers Fold 'Em*, L.A. TIMES, Oct. 7, 2004, at B1; see also Cal. Sec'y of State, Cal-Access Campaign Finance: Yes on 68 Committee, <http://cal-access.ss.ca.gov/Campaign/Committees/Detail.aspx?id=1260733&session=2003> (showing a record of fundraising for the committee).

142. See GOVERNOR ARNOLD SCHWARZENEGGER'S BALLOT PROPOSITION VOTER GUIDE (2004) (on file with author). In addition to the positions listed there, he also took positions on Proposition 71, supporting a bond for stem cell research, and Proposition 62, supporting a nonpartisan primary to replace the closed primaries.

143. See Garrett, *Hybrid Democracy*, *supra* note 2, at 1124.

144. Cal. Sec'y of State, California General Election: November 2, 2004, State Ballot

which he had opposed on his slate mailer; this initiative funded mental health services with the proceeds from a tax on millionaires.<sup>146</sup> Schwarzenegger was not very visible in the campaign opposing this initiative, perhaps sensing that voters were likely to support both the program and the source of funding. His opposition was mostly intended to signal to fiscal conservatives in his Party that he would remain true to his “no taxes” pledge. He was less successful in the state legislative races he chose to become involved in, a development that led to his enthusiastic embrace of a nonpartisan redistricting commission a few weeks later. His failure to translate his personal popularity into influential endorsements of candidates was a chink in his armor, but he seemed nearly invincible when he took an issue directly to the people. Presumably, the results of the 2004 general election made his strategy of governing through the threat of initiative more likely to change bargaining dynamics in Sacramento.

After his victories in November, the Governor was emboldened to make four specific threats in his State of the State Address in 2005. He demanded that the legislature establish a nonpartisan redistricting commission of retired judges; that it enact budget reform designed to reduce the amount of the budget earmarked by initiatives, particularly Proposition 98, and to enforce a hard cap on spending; that it change the public employees’ pension system from a defined benefit to a defined contribution plan; and that it use a merit pay system for public school teachers and change their tenure system so that they could be more easily fired if their performance was unsatisfactory.<sup>147</sup> His campaign organization began raising record amounts of campaign funds and circulating petitions to put the policies on the ballot in a special election in the fall, but it was clear that he hoped to use the threats to force legislative action. Although in some cases the reforms required constitutional change, and thus a popular vote, victory would be more certain if the voters were asked by both the Governor and the legislature to support any proposal. Schwarzenegger preferred compromise, on terms acceptable to him, to continued interbranch disagreement and a contested and lengthy initiative campaign. Even after he called in June for a special election on his reform proposals, his staff

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Measures, <http://vote2004.ss.ca.gov>Returns/prop/00.htm> (last visited May 31, 2006)

145. *Id.*

146. *See* Cal. Sec’y of State, Official Voter Information Guide, California General Election: November 2004, Proposition 63, <http://vote2004.ss.ca.gov/voterguide/propositions/prop63-title.htm> (last visited May 31, 2006).

147. Arnold Schwarzenegger, Governor of Cal., State of the State Address (Jan. 5, 2005), available at [http://www.governor.ca.gov/state/govsite/gov\\_homepage.jsp](http://www.governor.ca.gov/state/govsite/gov_homepage.jsp) (follow “Speeches” hyperlink; then follow “2005” hyperlink; then follow “Governor Schwarzenegger’s State of the State Address 01/05/2005” hyperlink).

continued to try to work out a deal with Democratic legislators so that they could put consensus measures on the ballot.<sup>148</sup>

Schwarzenegger seemed surprised when the legislature called his bluff and refused to negotiate seriously. Moreover, the Governor had to quickly back down from one proposal that he touted in his State of the State; he took to the people only three measures that were first mentioned in his address.<sup>149</sup> Organized and effective opposition by teachers, nurses, and law enforcement officers to the pension proposal resulted in the Governor's decision not to put this question on the ballot.<sup>150</sup> Instead, he had to be content with a vague promise — or mild threat — to pursue pension reform in the future. Moreover, his sweeping public school reform was less ambitious when it was presented to the people: the merit pay provisions were not part of the initiative.<sup>151</sup>

In the end, the Governor lost on all his initiatives — those that related to his policy agenda described in his State of the State and those that he endorsed during the campaign.<sup>152</sup> After the voters' resounding rejection of his proposals in November 2005, the Governor no longer looked invincible at the polls, a development which drew into question his continuing ability to use the threat of the initiative to govern. The larger issue this story raises is whether governing by threat of initiative is ever a sustainable strategy in the long run, even for a politician who looks as strong as Schwarzenegger did following the November 2004 victories.

### *B. Governance by Threat of Initiative Is Unsustainable*

For more than a year, it appeared that Schwarzenegger would succeed in creating an entirely new method of governing. He could threaten to take policies to the people, negotiate a compromise with intimidated legislators,

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148. See Gary Delsohn, *Democrats, Governor's Staff Say They're Trying to Work Out Compromises on Initiatives*, SACRAMENTO BEE, June 17, 2005, at A1; Robert Salladay & Evan Halper, *As Popularity Ebbs, Governor Reaches Out*, L.A. TIMES, June 22, 2005, at A1.

149. See Lynda Gledhill & John Wildermuth, *Governor Defends About-Face, Foes Gleeful That He Dropped Measure on Public Pensions*, S.F. CHRON., Apr. 9, 2005, at B7 (describing how Schwarzenegger had to abandon his pension proposal).

150. Jordan Rau, *Governor Puts Agenda on the Ballot*, L.A. TIMES, June 14, 2005, at A1; Jill Stewart, *Rise of the Political Machines*, N.Y. TIMES, June 20, 2005, at A15 ("Night after night the local news featured state workers clasping hands to chests in grief, claiming their pensions were going to be privatized.").

151. See Bill Ainsworth, *Flaws Dooming Initiative Plans, Critics Contend*, SAN DIEGO UNION-TRIB., July 21, 2005, at A1.

152. See BRAD MCPHERSON, CAL. SEC'Y OF STATE, STATEMENT OF VOTE: SPECIAL STATEWIDE ELECTION — NOVEMBER 8, 2005, at xiv (2005), available at [http://ss.ca.gov/elections/sov/2005\\_special/sov\\_entire.pdf](http://ss.ca.gov/elections/sov/2005_special/sov_entire.pdf) (showing the defeat of the relevant propositions — Proposition 74, Proposition 76, and Proposition 77).

and then avoid actually going to the voters in many cases. At first, his threat was credible and appeared to change bargaining dynamics sufficiently to suggest that politics-as-usual in Sacramento would be disrupted. In 2005, however, the limitations of governance that frequently uses hybrid democracy have become apparent. Even a wealthy celebrity with access to unprecedented amounts of campaign money like Arnold Schwarzenegger cannot effectively govern entirely — or even largely — using this strategy. There are several reasons why this is a perilous path.

First, initiatives necessary to govern, as opposed to those used purely for political advantage, are very likely to be initiatives that are difficult to pass. Unlike crypto-initiatives, ballot measures proposed as a way to implement real change in policy and governance are quite likely to engender effective opposition; after all, the reason the governor would resort to the threat was his inability to pass his reforms through the legislature. To enact meaningful, long-term budget reform, the Governor had to propose change that elicited strong negative reaction from well-funded and organized interest groups. Moreover, the Governor had to propose several relatively complicated measures that expanded the number of opposing groups and diluted his focus.

For example, the effective opposition to his pension reform proposal not only caused the governor to back away from this proposal, but it also hurt him in all his other battles.<sup>153</sup> In part because of his opponents' attacks in rallies and broadcast advertisements, the Governor's popularity took a precipitous drop in spring and summer of 2005, falling to under 40% in some polls.<sup>154</sup> In the first year of his term, his popularity was consistently in the 60% range, and polls showed that he had support from Democrats and independents as well as Republicans.<sup>155</sup> Thus, the damage inflicted by the pension reform battle was more serious than just losing on one item in his policy agenda; the Governor went into the battle on his remaining policies in a weakened position. Moreover, many of these same groups opposed his budget reform, which included changing the preferential funding formula for education mandated by Proposition 98, and his education reform, which involved

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153. See David S. Broder, *Has the Terminator Lost Touch?*, WASH. POST, Oct. 2, 2005, at B07 (noting that public service unions spent \$25 million on ads attacking Schwarzenegger before his committee broadcast its first advertisement in late September).

154. See Salladay & Halper, *supra* note 148, at A1.

155. See *id.* (approval rating dropped in six months from 60% to 40%); see also MARK BALDASSARE, PPIC STATEWIDE SURVEY OCTOBER 2004: CALIFORNIANS AND THEIR GOVERNMENT 13 (2004), available at [http://www.ppic.org/content/pubs/S\\_1004MBS.pdf](http://www.ppic.org/content/pubs/S_1004MBS.pdf) (finding that Schwarzenegger had an approval rating around 60% among all adults for all of 2004, with 51% approval from Democrats and 62% approval from Independents in October).

modifying tenure rules for public school teachers. They were energized because of their victory on pension reform.

Second, threatening to use the initiative process exposes the politician to attacks different from those emerging during the traditional legislative interplay. For example, once a proposal has been submitted to the secretary of state in order to get permission to circulate petitions, the text of the proposed law or constitutional amendment cannot be changed.<sup>156</sup> The initiative process is thus much less flexible than policy making through the legislature, where lawmakers can amend and modify text as drafters gather more information and discover errors. Not only does the rigidity of the process of legislating through direct democracy eliminate the possibility of improving the proposal on the basis of new information and deliberation, but it also opens the initiative to attack because of mistakes or sloppy drafting that cannot be corrected. This weakness is exacerbated in California by the virtual impossibility of modifying the initiative after it passes.

Schwarzenegger learned of this kind of peril several times during the course of the 2005 election campaign. First, he had to withdraw his pension reform initiative because the Attorney General interpreted his proposal not only as changing the structure of state pensions but also as abolishing death benefits for survivors of police officers and firefighters killed in the line of duty.<sup>157</sup> Although the Governor contested this interpretation as one adopted by a Democratic official seeking to undermine his agenda,<sup>158</sup> the structure of direct democracy denied him the easy response of just changing the language to clarify that death benefits were protected. The airwaves soon were full of testimonials of widows of police and firefighters that their families could not have survived without the benefits, and this campaign forced the Governor to postpone pension reform.<sup>159</sup> The effort was not entirely in vain because of a spillover effect: the Governor's championing of pension reform has made it salient and there are now several pension overhaul bills pending in the state legislature.<sup>160</sup>

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156. See Glen Staszewski, *The Bait-and-Switch in Direct Democracy*, 2006 WISC. L. REV. 17, 32-33.

157. See John Hill, *Governor Retreats on Pensions: He Drops the Ballot Plan, a Key Part of His Effort to Overhaul Government*, SACRAMENTO BEE, Apr. 8, 2005, at A1. See generally Proposed Initiative: California Public Employee Pension Reform Act, AG File No. SA2005RF0070 (Feb. 10, 2005), available at <http://ag.ca.gov/initiatives/pdf/SA2005RF0070.pdf> (giving the proposed provisions of the withdrawn initiative).

158. Lockyer has been criticized on this ground. See Salladay, *supra* note 33, at A1.

159. See Gledhill & Wildermuth, *supra* note 149, at B7.

160. See Mark Martin, *Results Can Pale Next to Splashy Pledges, but Governor's Bold Pronouncements Have Had Influence*, S.F. CHRON., June 27, 2005, at A1.

A similar drafting error forced the Governor to back away from broad educational reform that would have included a merit pay provision. According to the Attorney General's analysis of the initiative that Schwarzenegger supported at the outset of the bargaining game, it would also have repealed the portion of the education code that allows school districts to fire teachers for alcoholism, immorality, or unprofessional conduct.<sup>161</sup> The measure on the ballot in November 2005 was a less ambitious reform aimed only at teacher tenure rules.<sup>162</sup>

Perhaps the sloppiest error, however, occurred with respect to Schwarzenegger's redistricting proposal. California law requires that the same version of an initiative that is submitted to the secretary of state be circulated by signature gatherers.<sup>163</sup> The group in charge of the petition process — Peoples' Advocate, led by a initiative-process veteran Ted Costa — circulated a slightly different version from the one submitted to the state.<sup>164</sup> Although supporters argued that the differences were minor and technical, Attorney General Lockyer went to court to remove the measure from the special election ballot. He succeeded in the lower courts; the superior court judge declined to determine whether the alternative versions were close enough to accurately inform voters asked to sign the petition.<sup>165</sup> Instead, she wrote, "[t]here is no good reason to put the courts in the position of having to decide what is good enough for qualifying an initiative measure for the ballot when actual compliance is easily attainable."<sup>166</sup> Ultimately, the California Supreme Court allowed the initiative to remain on the ballot, ruling tersely that there had been no showing that the people who signed the initiative had been misled.<sup>167</sup> In its final opinion on the issue, after the ballot measure had been defeated, the Supreme Court held that the proposition was

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161. See Ainsworth, *supra* note 151, at A1.

162. See John Marelius, *No Offseason for Political Ads; Schwarzenegger's Agenda, National Issues Induce Onslaught*, SAN DIEGO UNION-TRIB., May 22, 2005, at A1; see also Put the Kids First Act, Cal. Proposition 74 (2005), available at [http://www.ss.ca.gov/elections/bp\\_nov05/voter\\_info\\_pdf/entire74.pdf](http://www.ss.ca.gov/elections/bp_nov05/voter_info_pdf/entire74.pdf).

163. See CAL. CONST. art. II, § 10(d) (requiring a copy of the proposed initiative to be submitted to the attorney general prior to circulation); CAL. ELEC. CODE § 9004 (West 2006) (requiring the attorney general to prepare a title and summary of the proposed initiative based upon a review of "the final version of a proposed initiative measure").

164. See *Lockyer v. McPherson*, No. 05CS00998, 2005 WL 1719252, at \*1, \*1 (Cal. Super. Ct. July 21, 2005), *mandamus denied sub nom.*, *Costa v. Superior Court*, 32 Cal. Rptr. 3d 562 (Cal. Ct. App. 2005).

165. *Id.*

166. *Id.*

167. *Costa v. Superior Court*, 128 P.3d 149, 149 (Cal. 2005), *granting review to* 32 Cal. Rptr. 3d 562.

properly presented for a vote, notwithstanding the inadvertent and minor discrepancies between the two versions, because the differences would not have “affected the decision of *any* person to sign or not to sign the petition or to take any other action related to the petition.”<sup>168</sup> Even though the measure remained on the ballot, the episode drew the competence of the Governor and his initiative team into question.

Such sloppiness in drafting occurs in the legislative process, too, of course. But if the errors are caught early in the process, they can be corrected and clarified through amendment and redrafting. The initiative process lacks such flexibility. Even in the case where initiative backers ultimately prevailed — the redistricting initiative — the errors required judicial intervention for resolution and caused substantial uncertainty during the campaign. The traditional legislative process is considerably more flexible.

Third, the politician seeking to govern by initiative has only limited control over the process once it is triggered. Of course, the legislative process is also susceptible to unanticipated events, but the majority party has a great deal of control over the legislative agenda, including the order in which topics will be considered. In the initiative process, for example, other measures that qualify for the ballot in an election being used by a governor to implement his agenda can have spillover effects for his initiatives. Again, consider the 2005 special election in California. A group apparently unrelated to the Governor or his opponents qualified a constitutional initiative to require parental notification before a minor can receive an abortion.<sup>169</sup> The presence of this measure on the ballot brought to the polls voters who might not have been interested enough in the other initiatives to turn out. Because this was a special election, turnout was particularly important. People do not have the lure of candidate elections to get them to take the time to vote, so they have to feel strongly about one or more of the ballot measures. An issue like abortion motivates an element of the religious right, and it may energize voters on the left as well, particularly in California. The initiative was a wild card in the election, complicating strategies for the Governor and his opponents.

Other initiatives did not lead to the same type of uncertainty because they were strategically placed on the ballot for the purpose of producing spillover effects related to the Governor’s reform package. The so-called “paycheck protection” measure in the November 2005 election, which would have prohibited union dues from being used for political purposes without annual written consent from union members,<sup>170</sup> was supported by business interests.

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168. *Costa v. Superior Court*, 128 P.3d 675, 699 (Cal. 2006), *rev’g* 32 Cal. Rptr. 3d 562.

169. Parent’s Right to Know and Child Protection Initiative, Cal. Proposition 73 (2005), available at [http://www.ss.ca.gov/election/bp\\_nov05/voter\\_info\\_pdf/text73.pdf](http://www.ss.ca.gov/election/bp_nov05/voter_info_pdf/text73.pdf).

170. See *The Public Employees’ Right to Approve Use of Union Dues for Political*

In part, this measure was used to turn out anti-union groups and voters who would also presumably support the Governor's position on budget and education reform. It was also a hot-button issue for unions, who spent more than \$56 million to kill the measure in the 2005 special election campaign.<sup>171</sup>

Fourth, governance by initiative, as it has been used by Schwarzenegger, has resulted in a continuous campaign in California since the recall election in fall 2003. The 2005 special election was merely the prelude to the 2006 gubernatorial election.<sup>172</sup> A virtually perpetual campaign, with frequent elections, is not a sign of a healthy democracy.<sup>173</sup> It does not lead to a well-run government; instead, it diverts the attention of elected officials from the day-to-day operations of government to winning in a campaign.<sup>174</sup>

Furthermore, campaigns and elections are expensive. More than \$662 million was raised to fund campaigns related to the initiatives on the 2005 special election ballot.<sup>175</sup> The election itself cost around \$50 million,<sup>176</sup> and it increased the financial pressures on local governments already strapped for cash. The strategy of governing by threat of initiative, which means that the state is in the midst of a perpetual campaign and voters are frequently asked to cast ballots, may cause people to feel more alienated from government and more frustrated with politicians. Frequency of elections may be one reason for the relatively low turnout in the United States,<sup>177</sup> so the special election could negatively affect turnout in other elections. An occasional threat to go around legislators to the people may inject a healthy dose of majoritarian

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Campaign Purposes Act, Cal. Proposition 75 (2005), available at [http://www.ss.ca.gov/elections/bp\\_nov05/voter\\_info\\_pdf/text75.pdf](http://www.ss.ca.gov/elections/bp_nov05/voter_info_pdf/text75.pdf).

171. California Secretary of State, Cal-Access, Campaign Finance: No on 75, <http://cal-access.ss.ca.gov/Campaign/Committees/Detail.aspx?id=1277769&session=2005&view=general> (last visited July 10, 2006).

172. See Robert Salladay, *Initiative Drive Puts '06 Governor's Race in Gear*, L.A. TIMES, Sept. 22, 2005, at B1.

173. For a more optimistic view of governance by initiative, see John G. Matsusaka, *A Rolling Snowball of Direct Democracy*, L.A. TIMES, June 15, 2005, at B13.

174. See Stewart, *supra* note 150, at A15 (arguing that Schwarzenegger "should be spending his time fixing nuts-and-bolts problems, not gearing up a messy political campaign").

175. Cal. Sec'y of State, Cal-Access Ballot Measure Summary Data Report for All Propositions in the 2005 Special Election, <http://dbsearch.ss.ca.gov/BallotSearch.aspx> (Search "Ballot Measure Summary Data Search" for "Special Election 08 November 2005") (last visited July 10, 2006).

176. See Rau, *supra* note 150, at A1.

177. See, e.g., RUY A. TEIXEIRA, *THE DISAPPEARING AMERICAN VOTER* 54-57 (1992); Richard W. Boyd, *Decline of U.S. Voter Turnout: Structural Explanations*, 9 AM. POL. Q. 133, 140-46 (1981). But see MARK N. FRANKLIN, *VOTER TURNOUT AND THE DYNAMICS OF ELECTORAL COMPETITION IN ESTABLISHED DEMOCRACIES SINCE 1945*, at 98-99 (2004) (disagreeing with the theory that frequency of elections causes low turnout).

influence into policy making; constant threats which result in frequent votes lead to a dismaying disarray in governance institutions.

This pessimistic portrayal of Schwarzenegger's strategy should not be understood as an argument to rule out any use of the initiative threat by elected officials. The tactic injects into legislative bargaining a mechanism that favors the preferences of the median voter and thus provides a counterweight to powerful minorities with intense preferences. Used sparingly, it changes policymaking in a normatively attractive way because it is ultimately tied to the ability of the proposer — here the Governor — to convince a majority of people to support him. The traditional legislative process is disproportionately influenced by well-organized and well-funded interests with intense preferences, with a majoritarian influence injected through the electoral tie. Hybrid democracy adds more weapons to the arsenal of those advocating reforms that resonate with the median voter. Moreover, even though the legislature called Schwarzenegger's bluff in 2005, his threats still shaped the legislative agenda. For example, pension reform bills are receiving more serious consideration in the legislature than they have before, even though the Governor did not get that issue to the ballot.<sup>178</sup> His budget initiative was part of a larger national strategy by anti-tax groups and fiscal conservatives to use the initiative process to impose hard spending caps on state legislatures.<sup>179</sup>

Perhaps the concerns about initiative threats as a governance strategy are not, in the long run, especially significant. Schwarzenegger has been a unique politician, combining celebrity status, the ability to raise substantial money, and, at least for a time, tremendous popularity. After the 2005 special election, he found that his threat to resort to direct democracy was no longer credible, and he faced the prospect of governing through traditional methods in an environment of divided government. But now that he has made the possibility of governance by initiative salient, we may see more elected officials resorting to initiative to overcome legislative gridlock, a bargaining strategy available only through hybrid democracy. Schwarzenegger's experience may convince politicians to use the threat carefully, although the story of hybrid democracy and California's governor is far from over. No reform of the initiative process aimed at this peril is required; in the end, the political system will reach an equilibrium as ordinary politicians and others occasionally threaten the legislature with a ballot measure that is likely to resonate with voters, while most bargaining still takes place within the traditional legislative arena.

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178. See Martin, *supra* note 160, at A1.

179. See Evan Halper, *Spending Cap Called Key to National Plan*, L.A. TIMES, July 25, 2005, at A1; Daniel B. Wood, *Cap State Spending: The Next New Wave?*, CHRISTIAN SCI. MONITOR, Aug. 2, 2005, at 1.

#### *IV. Conclusion*

Reformers, politicians, and other political actors are increasingly recognizing the opportunities provided by hybrid democracy. Like many other aspects of our political system, the interactions between initiatives and representative institutions have both positive and negative consequences. The key is to harness the promise of hybrid democracy while minimizing its perils. Both parts of a hybrid system can be shaped in different ways, and rules can be changed over time to reflect experience. Because the players in the political game adapt to new rules over time, scholars and others must work to understand and describe new dynamics, and institutional reform must be reconsidered to respond to these changes. In the end, the challenge — as well as the ultimate strength — of democratic institutions is their flexibility and endogeneity; the use of hybrid democracy is merely a variation on this larger theme.