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California's Hybrid Democracy

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Legal scholars are beginning to engage in sustained study of direct democracy: initiatives, referendums and recalls. More than merely assessing constitutional issues implicated by the initiative process, we are studying the legal structure that shapes direct democracy. Our analysis remains incomplete for two reasons, however. First, we tend to think of direct democracy as exceptional – an exotic way to make laws and a process affecting only California and a few other Western states outside the mainstream of America. This vision is inaccurate. Although far fewer laws are enacted by the people than by state legislatures or city councils,¹ direct democracy is part of government that affects the majority of Americans. Seventy-one percent of Americans live in a state or city or both that allow the popular initiative.² Although California has a relatively high number of initiatives at the state level, Oregon has had the largest number of initiatives proposed and adopted, and California's passage rate of 35% is substantially less than Florida's passage rate of nearly 70%.³ Initiatives are not a purely Western phenomenon, although they are prevalent in Western states because of their popularity at the time these states entered the Union. Massachusetts, Maine, and Florida have relatively robust systems of direct democracy, as do New York City, Houston, and Columbus. Substantial sums of money are spent in issue

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¹ Since the first statewide initiative in 1904 until 2000, only 840 initiatives were adopted by popular vote in the 24 states that allow initiatives. M. Dane Waters, *Initiative and Referendum Almanac* 7 (2003).

² See John G. Matsusaka, *For the Many of the Few: The Initiative, Public Policy, and American Democracy* 8 (2004).

³ Waters, *supra* note 1, at 8, 174 (figures from beginning of process in those states until 2000).

campaigns. In California alone, between the 2000 primary and the 2004 primary, nearly \$500 million was spent on ballot measure campaigns.⁴

Second, legal scholarship still tends to analyze direct democracy on its own, just as the study of representative institutions by legal scholars tends to focus on them in isolation. Yet, for most Americans, policy is determined at the local or state level by a combination of direct and representative institutions. Moreover, although the United States is one of only a five established democracies not to have held a national referendum,⁵ state and local initiatives can shape the national policy agenda and political discourse. In last November's election, initiatives defining marriage may have affected the outcome of the presidential election and certainly played a role in some federal races, and ballot measures on clean energy in Colorado and stem cell research in California are affecting national policy by influencing other states. Some of the solutions to problems discussed in the other articles in this symposium – from campaign finance to redistricting at the state and federal levels to voting technology – are more likely to be adopted either through the initiative process or because of pressure on state legislators brought about by the threat of direct democracy.⁶ Thus, a complete analysis of any democratic institution necessarily involves understanding that it operates in a Hybrid Democracy – neither wholly representative nor wholly direct, but a complex combination of both at the local and state levels, which in turn influences national politics.

My objective in this Article is to underscore the dynamic nature of our Hybrid Democracy to establish the proposition that any complete assessment of democracy must

⁴ See Thomas Stratmann, *The Effectiveness of Money in Politics: Ballot Measures, Candidate Elections, and Roll Call Votes*, 78 S. Cal. L. Rev. __, [5-6] (forthcoming 2005) (providing other figures).

⁵ Referendums around the World: The Growing Use of Direct Democracy (David Butler & Austin Ranney eds., 1994) (listing India, Israel, Japan, the Netherlands, and the U.S.). Israel may leave that group if it negotiates a peace settlement with Syria or the Palestinians because its government has long promised to submit those agreements to the people in a referendum. See Elizabeth Garrett, *Issues in Implementing Referendums in Israel: A Comparative Study in Direct Democracy*, 2 Chi. J. of Internat'l Law 159 (2001).

⁶ See Caroline J. Tolbert, *Changing Rules for State Legislatures: Direct Democracy and Governance Policies*, in Citizens as Legislators 171, 187-88 (S. Bowler, T. Donovan & C.J. Tolbert eds., 1998); Melissa Cully Anderson & Nathaniel Persily, *Regulating Democracy Through Democracy: The Use of Direct Legislation in Election Law Reform*, 78 S. Cal. L. Rev. __ (forthcoming 2005).

take these interactions into account.⁷ Those who wish to understand the law of democracy and the institutions it puts into place and who wish to propose and implement reforms must accept the fact of Hybrid Democracy and work within it. Some reforms are more likely to be adopted because of the flexibility of Hybrid Democracy. On the other hand, legislatively-enacted reforms can be threatened by the possibility of initiative, recall or referendum. Political scientists have found that legislators in states with the initiative process pass different legislation than legislators in states without the possibility of direct democracy.⁸ They are also studying how representative institutions resist implementing enacted initiatives or otherwise try to undermine popularly-determined policies.⁹ It is time for the legal academy to follow the lead of the social scientists and study the interactions and complexities of Hybrid Democracy in the United States.

I will describe interactions that occur in three ways in Hybrid Democracy. These interactions are dramatically seen in California politics, but they are present in other areas of the country with hybrid systems. First, candidate elections can be influenced by the presence of initiatives on the ballot. Hybrid Democracy can affect turnout in candidate elections, issues discussed in candidate campaigns, and the effectiveness of campaign finance laws. Second, democratic structures and the laws regulating elections are likely to be different in a Hybrid Democracy than in a wholly representative democracy. This occurs because initiatives offer a way around legislators when their self-interest clashes with reforms favored by a majority of voters. Third, the fact of Hybrid Democracy affects the policies that lawmakers adopt because they are aware that the political game includes the possibility of initiative and referendum. Strategic politicians, notably Arnold Schwarzenegger, take

⁷ This point was made in an essay by my colleague Matt Spitzer, who referred to the system as one of “mixed” democracy. See Matthew L. Spitzer, *Evaluating Direct Democracy: A Response*, 4 U. Chi. Roundtable 37, 41 (1997). I have chosen the term Hybrid to capture both Spitzer’s idea of a mixture and the notion of cross-fertilization.

⁸ See, e.g., Elisabeth R. Gerber, *Legislative Response to the Threat of Popular Initiatives*, 40 Am. J. Pol. Sci. 99 (1996), Matsusaka, *supra* note 2; Elisabeth R. Gerber, *Pressuring Legislatures through the Use of Initiatives: Two Forms of Indirect Influence*, in *Citizens as Legislators: Direct Democracy in the United States* 191 (S. Bowler, T. Donovan & C.J. Tolbert eds., 1998).

⁹ 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).

advantage of Hybrid Democracy as they negotiate using the threat of initiative as a bargaining tool.

The next major project for scholars working in law and social sciences is to determine the appropriate mix of direct and representative elements in Hybrid Democracy, a project that will require a normative vision of the objectives sought through democratic institutions and an accurate understanding of the dynamics of the Hybrid system based on empirical work. That larger project lies ahead; for the present, it is my goal to establish the framework in which that discussion must take place, a framework that accepts and understands the reality of Hybrid Democracy.

I. Hybrid Democracy and the Dynamics of Candidate Elections

Candidate elections and issue elections often occur simultaneously. Hybrid elections inevitably produce interactions among the various campaigns, and candidates and other political actors understand the possibility of spillover effects. There are at least three such effects that can be seen more clearly through a lens focused on Hybrid Democracy. First, candidates use initiatives to frame their campaigns and highlight issues that they believe will help them win, and they use ballot measures to affect turnout in the election. Second, candidates and interest groups use ballot measures to increase their membership rolls and financial coffers – and to drain the treasuries of their opponents. McCubbins and Kousser call initiatives designed to serve these two political objectives, instead of primarily intended to enact policy change, “crypto-initiatives” and claim that their use is likely to increase.¹⁰ Third, the bifurcated nature of campaign finance rules in hybrid elections – where contribution limits apply to candidate elections but usually not to issue elections – provides an opportunity for candidates to circumvent campaign finance restrictions. Realizing this, the California agency that oversees campaign finance laws has just applied contribution limitations to some issue committees. Even if the new regulation survives judicial challenge, it merely changes the way campaign finance rules are bifurcated; the reform does not

¹⁰ Thad Kousser & Mathew D. McCubbins, *Social Choice, Crypto-Initiatives and Policy Making by Direct Democracy*, 78 S. Cal. L. Rev. __ (forthcoming 2005).

eliminate all differences between the two sets of rules and thus may not entirely plug the gaps in coverage.

Initiatives are tools that candidates can use to shape campaigns in ways that make favorable issues salient and that they hope will alter turnout to their benefit. Recent empirical work by Smith and Tolbert reveals that initiatives increase overall voter turnout in states with robust direct democracy. In presidential elections, each ballot measure boosts turnout by half a percentage, and in midterm elections each ballot measure increases turnout by 1.2 percent.¹¹ Thus, the effect of initiatives on the size of turnout is most pronounced in less competitive or lower-information elections, which may not be where the most notable use of hybrid elections by candidates occurs. This finding of increased turnout does not precisely reveal the influence of Hybrid Democracy that is most important to politicians. Candidates are more interested in changing the composition of the voter turnout than they are in increasing the sheer number of people going to the polls; they use ballot measures to motivate people who are likely to vote for *them* to take the time to cast a ballot.¹²

Thus, candidates coordinate their campaigns with ballot measure campaigns to encourage turnout favorable to them, and also to highlight issues that they believe will enhance their image, or tarnish their opponents', in the minds of potential voters. Supporting an initiative which can allow a platform to be enacted into durable policy is a credible way to signal ideological commitments. In 1974, Jerry Brown ran on a platform of government reform, and he provided concrete evidence of his reform agenda by sponsoring the initiative to enact

¹¹ See Daniel A. Smith & Caroline J. Tolbert, *Educated by Initiative: The Effects of Direct Democracy on Citizens and Political Organizations in the American States* 39-42 (2004) (also finding that at a certain point, each additional measure does not further increase turnout).

¹² See Caroline Tolbert, John A. Grummel & Daniel A. Smith, *The Effects of Ballot Initiatives on Voter Turnout in the American States*, 29 *Am. Pol. Res.* 625, 643 (2001) (noting that “[b]allot initiatives dominate media headlines, shape candidate elections and even national party politics” but studying only the effect on the size of turnout not its composition); Kousser & McCubbins, *supra* note 10, at [31] (“Smart political actors do not spend millions to turn out a random selection of nonvoters. Their efforts are targeted in two ways: they want to get voters who support their candidates to the polls, and they aim their message at those who are likely to be most receptive.”).

the Fair Political Practices Act.¹³ More notoriously, Pete Wilson, who had a reputation as a relatively moderate Republican, demonstrated his bona fides to conservatives in his party by campaigning for reelection through his support of two initiatives on the 1994 ballot. He supported an initiative that would become the country's harshest three-strikes law, and he was the point man on Proposition 187, an initiative denying services to undocumented workers that was later ruled unconstitutional.¹⁴

The strategy of using initiatives as a trustworthy signal of policy preferences does not invariably succeed. In 1990, then-Attorney General John Van De Kamp ran for governor, using three initiatives on the general election ballot to prove that he was not just taking positions on issues – he was committed to real change. The Democrat sponsored Proposition 131, which imposed relatively generous term limits on legislators and enacted campaign finance reform; Proposition 128, an environmental measure called “Big Green”; and Proposition 129, a moderate anti-crime law that also provided funding for drug abuse and treatment.¹⁵ None of the initiatives passed, although for candidates who use ballot measures as a strategy to win office, passage of the measures is a secondary goal. Van de Kamp's use of this strategy backfired, because those who supported his policy agenda contributed money to the issue committees supporting them and not to his election committee, starving his campaign for money.¹⁶ Although the strategy of using initiatives is designed to allow a candidate to boost name recognition and gain attention without spending his own funds, he must also have access to sufficient funds to run a healthy election campaign. In this case, Van de Kamp did not survive the primary. The hybrid strategy can also fail when it provokes

¹³ See Elizabeth Garrett, *Money, Agenda Setting, and Direct Democracy*, 77 *Tex. L. Rev.* 1845, 1859 (1999); David B. Magleby & Kelly D. Patterson, *Consultants and Direct Democracy*, 31 *PS* 160, 167 (1998).

¹⁴ Smith & Tolbert, *supra* note 11, at 118. For cases striking down most of Proposition 187, see *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995) and *League of United Latin American Citizens v. Wilson*, 997 F. Supp. 1244 (C.D. Cal. 1997).

¹⁵ See Peter Schrag, *Paradise Lost: California's Experience, America's Future* 226 (updated ed. 2004).

¹⁶ See Comments of Garry South, Panel on the Initiative and Referendum Process, Conference on the 2004 Election: What Does it Mean for Campaigns and Governance?, USC Law School, Oct. 8, 2004, *available at* http://lawweb.usc.edu/cslp/conferences/Election_04/documents/panel1notes.pdf (notes taken by Anna Chu, Joel Farar & Daniela Stolman).

substantial turnout in opposition to a controversial and salient ballot measure, and those voters also vote against the candidate closely associated with the ballot measure. For example, although Wilson's use of Proposition 187 did not hurt him in that election, the Republican Party has been dealing with the aftermath of his high-profile support for a decade as it has tried to convince Hispanic voters that it is not anti-immigrant.¹⁷

Politicians can use hybrid elections not just to assist their own campaigns but also to increase the chances that co-partisans will be elected. Denied by term limits a third term in 1998, Wilson sponsored and provided \$1 million in campaign funds to Proposition 226, the "paycheck protection" initiative opposed by labor unions. He hoped the initiative would make issues salient in the election that would benefit Republican candidates.¹⁸ Not only was Wilson interested in a legislature that was likely to continue his policies, but he wanted to solidify his support in the party so that he could run for higher office in the future and play a pivotal role in Republican politics. Smith and Tolbert also describe similar tactics used by Colorado Governor Roy Romer, later the head of the Democratic National Committee, to turn out the Democratic vote in that state. Romer supported ballot measures dealing with education, a perennial favorite with voters and a traditionally Democratic issue, and opposed antiabortion and tax limitation measures.¹⁹ Wilson and Romer are thus both examples of progressively ambitious politicians,²⁰ using Hybrid Democracy to increase their stature in their parties and to help elect people who shared their policy platform.

The 2004 election vividly demonstrated the use of the initiative process to affect the presidential election and other nationally-significant races. Voters in eleven states were asked to pass ballot measures defining marriage as a relationship legally available only to heterosexual couples. In some brightly red states, particularly in the South, these measures resulted from grassroots reactions to developments in Massachusetts and California that apparently threatened the worldview of some evangelical Christians and conservative Catholics. In at least one of these states, Kentucky, the initiative may have played a role in

¹⁷ See Elizabeth A. Capell, *Schwarzenegger in Transition: Time to Govern*, The Forum, Vol. 1, No. 4, Art. 7, at 8 (2003), available at <http://www.bepress.com/forum/vol1/iss4/art7>.

¹⁸ Smith & Tolbert, *supra* note 11, at 118-19.

¹⁹ *Id.* at 119.

²⁰ See Joseph A. Schlesinger, *Ambition and Politics: Political Careers in the United States* 14 (1966) (explaining idea of progressive ambition).

the reelection of Jim Bunning to the Senate. Bunning's campaign had been beset by difficulties in the last weeks of the campaign, including questions about his mental competence, and he had become a vulnerable target for Democrats. However, the rural voters who turned out to vote in favor of traditional marriage also voted for Bunning, whose campaign ads had accused his opponent of weak support for the measure.²¹

In battleground states, political strategists concerned about the presidential race encouraged the grassroots movements in favor of the marriage initiatives. These savvy political players saw the ballot measures as a way to ensure Bush the margin of victory in these crucial states. It was seen both as a wedge issue – an issue that would divide the opposing party and attract more conservative Democrats – and a jack issue – an issue that would increase turnout of socially conservative Republicans likely also to vote for Bush and other Republican candidates.²² The head of the Ohio Republican Party credits the initiative for increasing the President's support in what he calls the "Bible Belt" of Ohio, the rural areas in the southern part of the state.²³ More work must be done to gauge the effect of these

²¹ See James Dao, *Gay Marriage: Same-Sex Marriage Issue Key to Some G.O.P. Races*, N.Y. Times, Nov. 4, 2004. For a discussion of the influence of this crypto-initiative on Bunning's race, see Kousser & McCubbins, *supra* note 10, at [3-4]. It is not clear to me that this Kentucky initiative is properly considered a "crypto-initiative" as Kousser and McCubbins use that term because when it was placed on the ballot, Bunning was seen as a strong incumbent who was not in need of assistance through Hybrid Democracy. As his campaign unraveled, his backers used the initiative and the issue to keep his candidacy viable, but when it was placed on the ballot, the Kentucky ban on same-sex marriages was more likely a grassroots response to developments in Massachusetts and California.

²² See Kousser & McCubbins, *supra* note 10, at [33-35] & [35-36] (describing and comparing wedge and jack initiatives). It is unclear how large a role national and party strategists played in the effort to qualify these initiatives in Ohio; it may have been a grassroots movement that strategists took advantage of in the campaign and get-out-the-vote effort. See Daniel Smith, *Was Rove Right? The Partisan Wedge and Turnout Effects of Issue I, Ohio's 2004 Ballot Initiative to Ban Gay Marriage* [11-12] (paper presented at Conference on the Impact of Direct Democracy, January 14, 2005). For a general discussion of the use of wedge issues, particularly those related to religion, as a political strategy, see Edward L. Glaeser, Giacomo A.M. Ponzetto & Jesse M. Shapiro, *Strategic Extremism: Why Republicans and Democrats Divide on Religious Values*, Harvard Institute of Economic Research Discussion Paper No. 2044 (Oct. 2004).

²³ *Ibid.* See also Brian Friel, *Election 2004 – Both Sides Claim Ballot-Issue Victories* Nat'l J., Nov. 6, 2004 (quoting the president of the Family Research Council, one of the backers of the marriage measures, that the issue was "probably the deciding factor in the presidential

ballot questions on the presidential election and the congressional races,²⁴ but it was no accident that these measures appeared on the ballot in Michigan, Missouri, Ohio, and Oregon. The measures' effects went beyond turnout, however; they also were part of the "values" frame that Republicans sought for this election because they believed it emphasized aspects of their candidates' characters and agendas that would appeal to many voters – and allow them to label Democratic opponents (even those who opposed allowing same sex-couples to marry) as "liberal."

Second, Hybrid Democracy allows groups to use initiative campaigns to change the relative balance of power between them and opposing groups, and these changes can affect the political environment beyond the particular initiative race. Political operatives and interest groups can use the dynamic environment of hybrid elections to weaken their opponents, perhaps even in races in states different from the ones voting on the ballot measures. Smith and Tolbert describe how Grover Norquist, the head of Americans for Tax Reform (ATR) and a leading light in the national Republican Party, spent millions of dollars to qualify antitax and paycheck protection initiatives in California, Colorado and Oregon over the past few years. Although Norquist and the ATR membership believed in these policies, they also hoped to force labor unions and the Democratic Party to divert funds that otherwise would be used nationally to support Democratic candidates.²⁵ Given the expense of initiative campaigns in those states, particularly California, forcing groups to fight an initiative battle drained substantial resources from their political war chests. With respect to the paycheck protection initiative in California, Americans for Tax Reform provided \$441,000 and expertise, while state labor unions, supported by national unions, spent \$23 million.²⁶ If the issue is important enough to a group and seems likely to resonate with many voters, groups with much to lose will spend substantial sums of money to oppose the initiative, even in the face of relatively insignificant expenditures by supporters. It is clear

race"). See also Kousser & McCubbins, *supra* note 10, at [2-3] (discussing strategy and effect of initiative in Ohio on the presidential race).

²⁴ Preliminary work by Daniel Smith suggests that it did not serve as a successful wedge issue in Ohio. See Smith, *supra* note 22.

²⁵ Smith & Tolbert, *supra* note 11, at 107-09.

²⁶ *Id.* at 108.

that one-sided spending to oppose a ballot measure is very likely to ensure defeat,²⁷ and this may convince risk-averse groups to devote resources to killing a ballot measure, particularly in a key state like California or in a campaign that threatens to spread to other states.

Interest groups not only use initiative battles to divert the resources and attention of their opponents, but they can also raise their own profiles with people sympathetic to their goals. A well-publicized issue campaign can increase a group's membership base and ability to raise money, allowing it to be a more influential player in future candidate and initiative campaigns. FreedomWorks, a coalition of Citizens for a Sound Economy, an antitax group associated with Rep. Dick Armey (R-TX), and Empower America, a think tank founded by former Sen. Jack Kemp (R-NY), has used a series of initiatives limiting taxes and spending to build its membership base and raise money. Although the group was not especially successful in its support of such measures in 2004, it did play a role in the defeat of an initiative in Washington that would have raised sales taxes to fund education.²⁸ More importantly, Armey and other leaders saw the 2004 election as a way to build so that FreedomWorks will be more influential in the future.²⁹ Again, it is always possible that such strategies will backfire – just as a salient and tough initiative campaign can build up those supporting a particular cause, it may also strengthen groups that oppose the new policies. The key for groups hoping to use these tactics is to gauge the political environment correctly and to weigh the costs and benefits of using wedge issues and other aspects of hybrid democracy. Even the most sophisticated groups can miscalculate, but it is increasingly evident that many political actors are willing to take the risk when they believe the payoff will be substantial.

²⁷ 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 Lawmaking* 73, 79-80 (M.D. Waters ed., 2001) (discussing studies).

²⁸ Proposition 884, available at <http://www.secstate.wa.gov/elections/initiatives/text/i884.pdf>. The initiative failed to pass, with only 40% of voters voting in favor. See Washington Secretary of State, Washington State 2004 General Elections Measures Results, available at <http://vote.wa.gov/general/measures.aspx>.

²⁹ See Peter Schmidt, *Dick Armey's Forces Win Again*, *Chron. of Higher Ed.*, Nov. 12, 2004 (also quoting M. Dane Waters of the Initiative and Referendum Institute as noting “that the popular referendum process was a great tool for them to use to gin up support and membership at the local level”).

Although many of the preceding examples involve relatively conservative groups using initiatives to affect voter turnout, outcomes in candidate elections, and their own membership and fundraising, liberal groups also use this strategy. In 2004, the Association of Community Organization for Reform Now (ACORN) supported a minimum wage initiative in Florida, a key presidential battleground, because it was seen as an issue that would increase turnout among those who would also vote for Democratic candidates without sparking substantial opposition.³⁰ Many business already paid their employees wages at or above the new minimum wage, so they would not actively oppose the ballot measure (and might even see it as eliminating a competitive disadvantage by requiring all businesses to pay the higher wage). To help ensure turnout among the targeted voters, an affiliated group, Florida Family for All, helped to register as voters the 200,000 people who signed the initiative petition. ACORN also hoped that the initiative would help build “permanent political capacity for future gains,”³¹ increasing its political clout and membership rolls. In Colorado, the Democratic Party used focus groups and polling to determine which issues were important to people likely to vote for their candidates; activists then sponsored an initiative on mass transportation and one requiring utilities to generate some electricity from renewable sources. Perhaps in part because of this use of Hybrid Democracy, Democrats did surprisingly well in federal and state races in Colorado.³²

Finally, hybrid elections forcefully demonstrate the effects of the bifurcation of campaign finance regulations. There are virtually no contribution limits in issue campaigns, with the primary and essentially sole regulatory regime that of disclosure. In contrast, federal laws and many state laws restrict contributions to candidates, as well as regulate through disclosure and sometimes provide public financing. This bifurcation has been discussed before, as has the consequence that candidates use issue committees to raise unlimited

³⁰ See Jerry Seper, *Liberals Target Bush with Florida Wage Initiative*, Wash. Times, Oct. 25, 2004. For more discussion of this effort, see Kousser & McCubbins, *supra* note 10, at [5-6].

³¹ Seper, *supra* note 30 (quoting ACORN internal document).

³² See Kousser & McCubbins, *supra* note 10, at [6-7]. Kousser and McCubbins also believe that well-funded 527 organizations may turn to the initiative process to continue to influence candidate elections and to implement their policy agenda. See *id.* at [7] and [40] (calling the groups “crypto-PACs”). See also Katharine Q. Seelye, *Money-Rich Advocacy Groups Look Far Beyond Election Day*, N.Y. Times, Oct. 17, 2004 (stating that some 527s will not disband after the 2004 election but will seek out other ways to continue to influence politics and policy).

amounts of money from supporters and to spend that money in ways that benefit them, circumventing campaign finance regulations that apply in candidate elections.³³ No one has more aggressively used the ability to raise unlimited funds for issue committees to further his political agenda and electoral future than Arnold Schwarzenegger. His “Total Recall” committee, the committee that he headed to support the recall of Gray Davis and that was separate from his election committee, raised \$4.5 million³⁴ mainly to finance ads that featured Schwarzenegger and that were virtually indistinguishable from advertisements advocating his election. He continues to raise substantial sums to spend in direct democracy, primarily through “Governor Schwarzenegger’s California Recovery Team,” a committee that bankrolls his activities in ballot measure campaigns vital to his agenda.

Considering all his fundraising, both for his own career and, more significantly, for ballot measures, Schwarzenegger is the most aggressive and successful political fundraiser in California’s history.³⁵ From January 1 through October 16, 2004, the California Recovery Team raised nearly \$14.3 million, much of that money through contributions over the \$21,200 contribution limit that applied to Schwarzenegger’s gubernatorial reelection committee.³⁶ More than three dozen individuals and companies have made six-figure contributions to the Recovery Team, including financial institutions, information technology firms, real estate developers, oil and gas companies, health care and drug companies, auto dealers, and retailers.³⁷ Many of these firms are members of the California Chamber of Commerce, an

³³ See, e.g., Elizabeth Garrett, *Democracy in the Wake of the California Recall*, 153 U. Pa. L. Rev. 239, 250-53 (2004); Richard L. Hasen, *Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns*, 78 S. Cal. L. Rev. ___ (forthcoming 2005).

³⁴ See California Secretary of State, Campaign Finance Activity: Arnold Schwarzenegger’s Total Recall Committee, Vote Yes to Recall Gray Davis, *available at* <http://cal-access.ss.ca.gov/Campaign/Committees?Detail.aspx?id=1257330&session=2003> (listing contributions to, and expenditures of, the “Total Recall” committee).

³⁵ See Peter Nicholas, *Gov. Sets Restrictions on His Fundraising Sources*, L.A. Times, September 10, 2004, at B1, B6 (noting that Governor’s target for the weeks of the fall 2004 campaign was to raise an average of \$818,000 a week).

³⁶ See California Secretary of State, Campaign Finance Activity, Governor Schwarzenegger’s California Recovery Team, *available at* <http://cal-access.ss.ca.gov/Campaign/Committees/Detail.aspx?id=1261406&session=2003>.

³⁷ See Hasen, *supra* note 33, at [21-22]; see also *Reclusive Millionaire Tops Schwarzenegger Donors*, CNN.com, Dec. 3, 2004 (describing donations totaling \$650,000 given by William

ally of the Governor on several November 2004 ballot measures; some have interests in policies he has pushed using the threat of initiative, like his workers' compensation reform; and some are involved in other matters before the governor, like the repeal of the vehicle license tax or laws affecting drug prices.³⁸ The Governor also controls committees focused on passing particular initiatives and transfers money from the Recovery Team to these specific efforts. For example, the Recovery Team transferred \$5.3 million to a committee controlled by Schwarzenegger to help in the effort to pass the \$15 billion bond and the associated spending limit proposal in March 2004. That committee itself accepted a number of substantial contributions, including six-figure donations from Toyota, Kaiser Foundation Health Plan, and Anheuser-Busch.³⁹

Even if contributions in the hundreds of thousands of dollars are not actually influencing the Governor or his policies, they surely provide a basis for the perception of *quid pro quo* corruption in much the same way as would similarly large donations to a candidate committee.⁴⁰ Only an extraordinarily naïve person would believe that Schwarzenegger is less grateful to interests that fund ballot question campaigns vital to his agenda than to those who contribute directly to his campaign committee. Despite the representations by the Governor's aides that "this is a governor who can't be bought and money does not influence

Robinson, founder of DHL courier service); Christian Berthelsen, *Governor Sets Money-Raising Record: \$26.6 Million in His First Year – Most of It From Special Interests*, S.F. Chron., Nov. 17, 2004 (noting a \$500,000 contribution from the real estate developer who owns the San Diego Chargers and providing figures for particular industries).

³⁸ See Berthelsen, *supra* note 37 (noting also that the \$26.6 million figure is double the amount raised by Gray Davis in his first year in office). See also Peter Nicholas, *Business Sees an Ally in Governor*, L.A. Times, Oct. 18, 2004, at B1 (noting Governor received large contributions from Chamber board members Hewlett-Packard, Anheuser-Busch, and PG&E); Peter Nicholas & Joe Mathews, *Schwarzenegger Sworn In, Rescinds Car Tax Increase*, L.A. Times, Nov. 18, 2003, at A1 (describing speech to Chamber of Commerce where Governor told members he would rely on their financial and other support). After some criticism of the role of "special interests" in the Governor's fundraising efforts, he announced that his committees would no longer accept contributions from insurers who underwrite workers' compensation policies. See Nicholas, *supra* note 35, at B1.

³⁹ See Hasen, *supra* note 33, at [22].

⁴⁰ See Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 152 U. Pa. L. Rev. 119 (2004) (discussing perceptions of corruption, how to measure them, and whether campaign finance reform can effectively address them).

governmental decisions,”⁴¹ Schwarzenegger’s aggressive and unprecedented use of the bifurcated campaign finance laws prompted the California Fair Political Practices Commission (FPPC) to adopt innovative reform.⁴² Essentially, the new regulations apply the contribution limits applicable to the office held by the politician or for which he is running to any issue committees controlled by that politician.

Although the Governor brought the issue to a head, he is not the only candidate to take advantage of the campaign finance bifurcation. During the public debate before the FPPC, other examples like issue committees controlled by Attorney General Bill Lockyer (who supported Proposition 69, the DNA database measure), Controller Steve Westly (who supported Proposition 62, the “open” primary initiative), and Senator John Burton (who supported Proposition 72, the referendum on a bill extending mandatory health care coverage offered by businesses to employees) were mentioned.⁴³ Lieutenant Governor Cruz Bustamante’s use of an issue committee related to an initiative that appeared on the recall ballot also made the consequences of a bifurcated system salient. To evade contribution limits on his election committee, Bustamante transferred money contained in an old campaign account, which had accepted contributions over the then-applicable \$21,200 limit, to a committee he organized to oppose Proposition 54, the “Racial Privacy Initiative.”⁴⁴ To take advantage of the window between the FPPC’s adoption of the new rule and its effective date after the November election, Treasurer Phil Angelides created an issue committee called Standing Up for California, which accepted six-figure donations.⁴⁵

⁴¹ Peter Nicholas, *Fundraiser “Unfortunate,” Governor’s Aides Concede*, L.A. Times, Feb. 18, 2004 (quoting Rob Stutzman, the Governor’s communications director).

⁴² See Cal. Admin. Code, tit. 2, §§ 18530.9, 18530.10 & 18531.5 (2004). The Bipartisan Campaign Reform Act has been interpreted by the FEC to extend soft money prohibitions on federal candidates to their fundraising for state issue committees. See FEC Advisory Opinion 2003-12, available at <http://ao.nictusa.com/ao/no/030012.html>. BCRA’s fundraising provisions apply only to federal officeholders or candidates for federal office; they would not affect Governor Schwarzenegger or any of the state officials discussed during the FPPC’s deliberations.

⁴³ See Cal. Fair Political Practices Comm’n, Minutes of June 25, 2004 Meeting, Public Session, at 17 (remarks of attorney Chuck Bell, representing Governor Schwarzenegger).

⁴⁴ See Garrett, supra note 33, at 250.

⁴⁵ Margaret Talev, *FPPC Curbs Gifts to Issues Panels*, Sac. Bee, Nov. 16, 2004.

A sophisticated awareness of the interactions within a Hybrid Democracy makes it more likely that regulation along the lines proposed by the FPPC will be found constitutional.⁴⁶ The traditional justifications of combating *quid pro quo* corruption and the appearance of such corruption are directly implicated with respect to candidate-controlled issue committees, much as they are with candidate committees. Politicians work diligently to connect themselves in the minds of voters to the issues and themes pushed by their issue committees. Thus, it is not surprising if the same voters view large contributions to a controlled committee as capable of corrupting the candidate. Moreover, the concern about preferential access to officeholders given to contributor, an element of corruption described by the Court in *McConnell v. FEC*,⁴⁷ also fits the circumstances of fundraising for some issue committees. For example, Schwarzenegger has held a series of fundraisers for his Recovery Team that provide access to the governor, including one in New York City, also featuring New York Governor Pataki, during the March 2004 campaign for the \$15 billion bond.⁴⁸

But awareness of the hybrid nature of elections also suggests that the FPPC's fix or others like it that target some issue committees and not others may not fully solve the problem. The FPPC regulates not only candidate-controlled committees, but also issue committees that spend at least \$50,000 on advertisements run within 45 days of an election, clearly identifying a candidate for state office, and made at the candidate's "behest."⁴⁹ This regulation is aimed at those who would try to evade the other regulations on candidate-controlled committees by eschewing formal control but associating themselves closely and visibly with the issue campaign. Even if this anti-circumvention rule survives judicial challenge, other gaps in coverage remain. For example, candidates often control several committees which can be active in direct democracy. The FPPC's contribution limits apply to each committee, they do not apply to aggregated contributions. Or candidates seeking to use initiatives to frame campaigns and make certain issues salient could allow supporters to

⁴⁶ For the first academic analysis of the constitutionality of the FPPC's regulations, as well as other variations, see Hasen, *supra* note 33. Hasen rightly notes that the FPPC's regulations may be attacked on non-constitutional grounds. See *id.* at [14 n.53].

⁴⁷ 124 S.Ct. 619, 660-65 (2003).

⁴⁸ Dan Morain, *Tickets to Schwarzenegger Fundraiser in New York Will Cost Up to \$500,000*, L.A. Times, Feb. 5, 2004, at B8 (noting that those who paid \$500,000 would be designated Team Chairs and describing other fundraisers for the Recovery Team in the state).

⁴⁹ Cal. Admin. Code, tit. 2, § 18530.10.

run the issue committees, which would be unfettered by limitations, but still endorse the ballot measures, publicizing those endorsements using money raised within contribution limits. In much the same way that candidates know now who is spending substantial sums in independent expenditures in candidate elections, presumably candidates will be aware of which interest groups are supporting initiatives that they view as crucial to their election or their policy agenda. The connection will be less direct, but still fully capable of providing the appearance of corruption or even actually corrupting in the way the Court understands that concept in campaign finance cases. Although there are ways to argue that contribution limits could be constitutionally applied to all issue committees, whether or not aligned with candidates and officeholders,⁵⁰ this is a much harder argument to make in light of well-established precedent.

To understand the possibilities for circumvention of rules designed to regulate some aspect of campaigns, then, one has to have a full sense of the dynamics of Hybrid Democracy. Moreover, the arguments reformers make to justify regulations can be keyed to the interactions among various parts of this complex system, so that, for example, restrictions on spending with regard to direct democracy should not be viewed in an antiseptic and unrealistic world where there are no candidates to corrupt.⁵¹ On the contrary, candidates are strategically involved in issue campaigns and will be grateful for financial support of their efforts related to ballot measures. This gratitude may be demonstrated through preferential access or other subtle forms of influence, actions similar to those elicited by contributions made directly to candidates.⁵² A Hybrid Democracy perspective may also suggest that, in a world of hydraulic campaign money flowing through multiple canals, campaign finance regulation may be a never-ending battle of building a dam across one stream of money only to divert it to another.⁵³ In some cases the new stream poses new challenges; for example,

⁵⁰ Hasen makes some of these arguments from existing jurisprudence. See Hasen, *supra* note 33, at [28-38].

⁵¹ See *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 787-88 n.26 (1978) (rejecting *quid pro quo* rationale in elections without candidates).

⁵² See John de Figueiredo & Elizabeth Garrett, *Paying for Politics*, 78 S. Cal. L. Rev. ____ (forthcoming 2005) (analyzing empirical literature that indicates contributions cause subtle changes in policy that are “under the radar screen” rather than buying votes or elections).

⁵³ See Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 Tex. L. Rev. 1705 (1999). See also *McConnell*, 124 S.Ct. at 706 (2003) (“We are

Schwarzenegger is also associated with several non-profit groups that lobby the legislature, pay for his accommodation in the Sacramento Hyatt Hotel, and encourage economic development in the state.⁵⁴ The tax laws that govern these groups do not require public disclosure of the sources of their funds; thus, they are veiled political actors in a way that issue committees are not.⁵⁵ Policymakers and judges must consider all of these possibilities and the complexities of the system as they determine the best course for reform. Understanding Hybrid Democracy is therefore a necessary condition for effective regulation and reveals how difficult finding successful answers will be.

II. Hybrid Democracy and Electoral Institutions

In politics, the regulators are often also the regulated. Inevitably, self-interest will influence institutional design decisions when elected officials choose the rules that determine whether they will retain office and that shape their behavior in office.⁵⁶ Legislators can manifest self-interest in various ways: the party in power can work to ensure its continued domination of the political channels;⁵⁷ the two major parties can work together to reduce the influence of minor parties and independent candidates;⁵⁸ and incumbents can collaborate to

under no illusion that BCRA will be the last congressional statement on the matter. Money, like water, will always find an outlet.”).

⁵⁴ See Tom Chorneau, *Nonprofits Tangle Schwarzenegger's Fund-Raising Machine*, Sac. Bee, Nov. 19, 2004; Margaret Talev, *Foundation Will Pay Governor's Hotel Tab*, Sac. Bee, Nov. 17, 2004.

⁵⁵ For a discussion of these veiled political actors in politics, see Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors: The Real Threat to Campaign Disclosure Statutes*, USC-Caltech Center for the Study of Law and Politics Working Paper No. 13 (2004).

⁵⁶ See Dennis Thompson, *Just Elections* 133-35 (2002) (noting that self-interest will drive legislators to adopt rules that favor incumbents and penalize challengers and concluding that “no democratic institution should have the final authority to determine the rules or settle the disputes about its own membership”).

⁵⁷ See Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 Harv. L. Rev. 28, 59-60 (2004) (discussing in context of partisan gerrymandering by one party to remain in power); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 Stan. L. Rev. 643, 670-74 (1998) (discussing ban on write-in candidates in Hawaii as part of the Democratic Party's larger strategy to remain firmly in control of state government).

⁵⁸ See Issacharoff & Pildes, *supra* note 57, at 683-87 (discussing fusion case as a partisan lockup by both major parties against minor parties strengthened by the possibility of fusion

reduce competitiveness of elections and virtually eliminate the possibility of success for challengers.⁵⁹ In a Hybrid Democracy, however, legislatures are not the only place to adopt laws shaping the electoral realm and governance institutions. Instead, voters can bypass self-interested legislators and adopt reforms that redesign institutions to make them more likely to produce outcomes the majority favors, rather than results that benefit the elected few, and more likely to offer a different sort of candidates to voters in more competitive general elections. Furthermore, because so many different democratic arrangements are consistent with the relatively meager constitutional requirements, giving fuller voice to the people in determining which structures will govern them is especially consistent with the value of popular sovereignty which undergirds our democracy.⁶⁰

Although historians often characterize direct democracy as a populist reaction to the power of industrial interests,⁶¹ its early advocates also saw it as a mechanism to bypass self-interested legislators and enact governance reforms supported by Populists, such as the direct primary and laws to eliminate corrupt practices.⁶² Some reformers spoke about the legislature in terms that resonate of today's academic literature that describes the

candidacies); Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 Sup. Ct. Rev. 331 (1997) (assessing fusion case as an example of duopolistic behavior).

⁵⁹ See Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv. L. Rev. 594 (2002); Pildes, *supra* note 57, at 60-61; Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 Elect. L.J. 179 (2003); Gene R. Nichol, Jr., *The Practice of Redistricting*, 72 U. Colo. L. Rev. 1029, 1034 (2001) (all discussing "sweetheart" gerrymandering to protect incumbents). Because incumbents are overwhelmingly from the two major parties, this type of self-interested behavior may just be a manifestation of the two-party partisan lockup.

⁶⁰ See Dennis F. Thompson, *The Role of Theorists and Citizens in Just Elections: A Response to Professors Cain, Garrett and Sabl*, 4 Elect. L.J. __ (forthcoming 2005). The observation in the text also suggests that courts should be less aggressive in insisting on one view of democracy over other, equally plausible views, and they should be more willing to allow states to experiment with various institutional designs as long as they comport with the minimal constitutional requirements. See Elizabeth Garrett, *Is the Party Over? Courts and the Political Process*, 2002 Sup. Ct. Rev. 95 (2003) (arguing for a much reduced role of courts in political process cases).

⁶¹ See Joshua Spivak, *California's Recall: Adoption of the "Grand Bounce" for Elected Officials*, 81 Cal. Hist. 20, 23-26 (2004) (discussing reaction to Southern Pacific Railroad in California); Steven L. Piott, *Giving Voters a Voice: The Origins of the Initiative and Referendum in America* 251 (2003) (describing various industries – railroads, mining companies, and cattle barons – that sparked the populist reaction).

⁶² See Smith & Tolbert, *supra* note 11, at 5 (citing Oregonian Jonathan Bourne, Jr., an early proponent of the initiative process).

representative process as stymied by partisan lockup. J.W. Sullivan, author of a book in 1892 called *Direct Legislation through the Citizenship*, wrote that before electoral reform could succeed, “radical reformers” had to abolish “the lawmaking monopoly. Until that monopoly is ended, no law favorable to the masses can be secure. Direct legislation would destroy this parent of monopolies.”⁶³

Some argue that the initiative process is currently being used in states with Hybrid Democracy to modify institutions of representative government in a particular way: so that candidates and results are more consistent with the wishes of the median voter.⁶⁴ Issacharoff has argued that the success of partisans in protecting their jobs and eliminating competition from many federal and state elections has produced a “rebellion of the median voter” who feels unrepresented by those elected through current institutional arrangements.⁶⁵ Not only are elections uncompetitive so that voters have no real choices, but primaries are constructed so that the candidate selected is likely to reflect more extreme positions. Although Issacharoff characterizes the role of initiatives as “troubling and complicated” in a representative democracy, he seems to approve of its role as a “last ditch safety valve for the electorate at large to claim some accountability from the governing political class.”⁶⁶ Not only does he see the recall of Davis and election of Schwarzenegger as part of this revolt of the median voter made possible by Hybrid Democracy, but he also notes that voters can use the initiative to frustrate the ability of legislators to gerrymander and reduce competition. Enactment of a blanket primary in California,⁶⁷ ruled unconstitutional by the Supreme Court, is another example of this median voter revolt. I have also identified the initiative process as a promising avenue for reform of the electoral process in ways that legislators are likely to

⁶³ Steven L. Piott, *supra* note 61, at 35 (quoting Sullivan, *Direct Legislation through the Citizenship* 100 (1892)).

⁶⁴ For a discussion of why initiatives as currently configured lead to results consistent with the median voter’s preferences, while legislative outcomes tend to be driven more by those with outlying preferences, see Robert D. Cooter, *The Strategic Constitution* 145-47 (2000).

⁶⁵ Samuel Issacharoff, *Collateral Damage: The Endangered Center in American Politics*, 46 *Wm. & Mary L. Rev.* 415, 416 (2004). See also Peter Schrag, *supra* note 15, at xvi (describing factors that increased polarization in California while competitiveness of elections decreased, both which led to higher levels of voter dissatisfaction with politics and politicians).

⁶⁶ Issacharoff, *supra* note 65, at 416.

⁶⁷ *California Democratic Party v. Jones*, 530 U.S. 567 (2000).

resist – reforms such as adoption of redistricting commissions, public financing of elections, lobbying reform, open or blanket primaries, etc.⁶⁸

Although the lens of Hybrid Democracy reveals the possibility of governance reform through initiative, questions remain. First, we need empirical work to determine if states with a robust initiative process have different electoral structures than states without a true Hybrid Democracy. The comparison would not merely be between structures enacted by initiative and those by traditional legislation because the presence of the initiative process in a Hybrid Democracy influences the output of representative institutions. Strategic lawmakers, aware that they can be bypassed by direct legislation, will systematically enact different legislation than lawmakers in states insulated from popular control through initiative and referendum. Gerber terms this the indirect effect of direct democracy,⁶⁹ and it has been documented in a variety of contexts.⁷⁰ Thus, the appropriate comparison is of the laws, however enacted, in states with initiatives and states without initiatives.

Surprisingly, however, very few studies have compared electoral institutions in states with Hybrid Democracy to those without it. 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 rules.”⁷¹ In a more comprehensive analysis, Cully Anderson and Persily describe findings that “undermine[] the strong claims that are often made about legislative capture inhibiting election reform.”⁷² After considering a number of electoral reforms throughout the history of direct democracy, they find that only legislative term limits are “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.⁷³ They believe that political culture may be the more important factor in these reforms, although, of course, the presence or absence of Hybrid Democracy may itself be a

⁶⁸ See Elizabeth Garrett, *Who Chooses the Rules?*, 4 *Elect. L.J.* __ (forthcoming 2005) (review of Thompson, *supra* note 56).

⁶⁹ See Elisabeth R. Gerber, *The Populist Paradox: Interest Group Influence and the Promise of Direct Legislation* 23-26 (1999).

⁷⁰ See, e.g., studies cited *supra* note 8.

⁷¹ Caroline J. Tolbert, *supra* note 6, at 187.

⁷² Cully Anderson & Persily, *supra* note 6, at [36].

⁷³ *Id.*

function of political culture. They find that the existence of the initiative process has no effect on the rate of adoption of most of the other reforms that they study, including design of primaries, term limits for governor, women's suffrage, and campaign finance reform that applies to non-legislative offices. Cully Anderson and Persily urge more empirical work be done, but their study suggests that those of us who have seen Hybrid Democracy's greatest promise in the area of electoral reform may need to reassess our arguments in light of the facts.

The Cully Anderson/Persily conclusion that redistricting commissions are more frequently used in states with Hybrid Democracy, although usually passed by the legislature, not enacted by initiative, is particularly interesting because it appears that this may be an issue presented to California voters soon, perhaps in a special election this year.⁷⁴ Recognizing the potency of the indirect influence of direct democracy, Governor Schwarzenegger has announced that before he presents redistricting and other reforms to the people, he will call the legislature into a special session to consider them.⁷⁵ Only if he is dissatisfied with the legislature's response will he go around them to the voters. The near total absence of competitive elections in California and across the nation at the federal level for House of Representatives and in state legislative races has become an increasingly salient issue for commentators and the public. The Texas redistricting battle fought in 2002 and 2003, which included the spectacle of Democratic state legislators' fleeing the state to temporarily prevent passage of a gerrymander strongly favoring the Republicans, provided a dramatic example of the importance of partisan redistricting for politicians.⁷⁶ The 2004

⁷⁴ See California Secretary of State, 2004 Initiative Update, Petition No. 1068 on Redistricting (delegating drawing district boundaries to a 3-member panel of retired judges), available at http://www.ss.ca.gov/elections/elections_j.htm#1068 (initiatives spearheaded by Ted Costa). Governor Schwarzenegger's support of the reform increases the chance it will be on the ballot soon and that it will pass. See *infra* text at note 112 (discussing Schwarzenegger's support).

⁷⁵ Peter Nicholas, *Gov. to Call for Special Session*, L.A. Times, Jan. 1, 2005, at A1.

⁷⁶ See William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, 2004 Supplement to Cases and Materials on Legislation: Statutes and the Creation of Public Policy (3d ed.) 21-22 (2004). The redistricting plan was ultimately adopted after two special sessions and a decision by the Lieutenant Governor to suspend the two-thirds rule required for the Senate to proceed to consideration of the plan. It is still under attack in the courts. See *Session v. Perry*, 298 F. Supp. 2d 451 (E.D. Tex.), *vacated and remanded sub nom.*, *Jackson v. Perry*, 125 S.Ct. 351 (2004).

elections also forcefully demonstrated the nearly total lack of competition throughout the country. Only a handful of House seats were competitive, and many states had no real competition in the vast majority of state legislative races.⁷⁷ Pildes contrasts the stunning lack of competition in state legislative and House races with the more robust competition for governorships and Senate seats in 2004, races that cannot be gerrymandered.⁷⁸

With the increased salience of the issue after November and the redistricting battles in Texas and Colorado, together with the Supreme Court's decision in *Vieth v. Jubelirer*⁷⁹ to largely, and perhaps entirely, stay out of the political thicket of partisan gerrymandering, independent redistricting commissions may be increasingly popular reform proposals. Commission-based redistricting can take a variety of forms. Twelve states primarily use commissions to draw state legislative districts, and seven states use them to draw federal congressional districts.⁸⁰ Renewed interest in removing the power to redistrict from the

⁷⁷ See David S. Broder, *No Vote Necessary*, Wash. Post, Nov. 10, 2004 (discussing various races for House, including some where there were no challengers and one in Florida where the law automatically elected the unopposed incumbent without his appearing on the general election ballot); Nicholas D. Kristof, *No More Sham Elections*, N.Y. Times, Nov. 20, 2004. See also *Serving the Pols, Not the People*, L.A. Times, Nov. 10, 2004, at B10 (noting that although there are some new faces in Sacramento, the partisan line-up remained the same and not one seat of 153 changed parties). For a discussion of the absence of competition in legislative races in the last decade or so, see Samuel Issacharoff, *supra* note 59, at 623-26.

⁷⁸ Pildes, *supra* note 57, at 63-64. Although the contrast in 2004 was noteworthy, partisan redistricting alone cannot explain the lack of real competition in elections because incumbents typically have a substantial advantage in gubernatorial races that are unaffected by redistricting. See Stephen Ansolabehere & James M. Snyder, *The Incumbency Advantage in U.S. Elections: An Analysis of State and Federal Offices, 1942-2000*, 1 Elec. L.J. 315, 328-29 (2002). See also Gary W. Cox & Jonathan N. Katz, *Elbridge Gerry's Salamander: The Electoral Consequences of the Reapportionment Revolution 127-205* (2002) (identifying gerrymandering as a significant cause of incumbency advantage and lack of competition in political races).

⁷⁹ 124 S.Ct. 1769 (2004). The Court's decision to vacate and remand the challenge to Texas's redistricting plan further muddies the waters, although the Court's ultimate reaction to the three-judge panel's decision may clarify whether and when courts will become involved in partisan gerrymandering cases.

⁸⁰ See National Conference of State Legislatures, *Redistricting Law 2000*, App. D, E & F (Jan. 1999), available at <http://www.senate.leg.state.mn.us/departments/scr/redist/red2000/red-tc.htm>. Three states use commissions in an advisory capacity in state legislative redistricting, and five use commissions as backups if the state legislatures fail to draw new districts to govern their elections. One of the states with an "advisory" commission has delegated more substantial

legislature moves the United States closer to the practice of many other democracies, which use nonpartisan commissions for redistricting and election oversight because of concerns about legislators' conflict of interest.⁸¹

If initiatives are used more frequently to make decisions about electoral structures and institutional design, then we must work to better understand the ability of voters to make these decisions competently. Realistic assessments of voter behavior must focus on the ability of citizens with limited time, attention and interest to make decisions that are consistent with their preferences in a low-information environment.⁸² As in other areas of life where people must make important choices with limited information, voters rely on particular pieces of information as shortcuts for decision making.⁸³ Ideally, voting cues can

authority to the commission with respect to state and federal legislative boundaries than might be expected from the advisory classification. The five-member nonpartisan commission in Iowa advises the Legislative Service Bureau in drawing maps, using computer programs to create compact and contiguous districts without considering data about party affiliation; the plan is submitted to the legislature, which is required to consider it under rules which prohibit amendments and force a straight up-or-down vote. Only after two plans have been rejected does the legislature play a more active role. See Iowa General Assembly – Legislative Service Bureau, *Legislative Guide to Redistricting* 9-12 (Dec. 2000), available at <http://www.legis.state.ia.us/Central/LSB/Guides/redist.htm>. See also Mark Monmonier, *Bushmanders and Bull winkles* 101 (2001) (“No redistricting commission is as independent as Iowa’s Legislative Service Bureau, which provides research and bill-writing support to the legislature.”). Some argue that “nonpartisan” commissions merely shift the partisan wrangling to an earlier stage as politics can play a significant role in the process appointing commissioners. See, e.g., Nichols, *supra* note 59, at 1030 (observing “intensely political process” with respect to appointments by political actors, but less for appointments by judges).

⁸¹ See Pildes, *supra* note 57, at 78-79; see also Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 *Tex. L. Rev.* 1643, 1694 (1992) (describing English Boundary Commission). Pildes notes that these countries shifted redistricting out of the legislature through decisions made by the legislators themselves, suggesting that lawmakers can overcome self-interest even in the absence of robust Hybrid Democracy. *Id.* at 80.

⁸² See, e.g., Samuel L. Popkin, *The Reasoning Voter: Communication and Persuasion in Presidential Campaigns* 9 (2d ed. 1994) (presenting a theory of how voters really make decisions called “low-information rationality”); Elisabeth R. Gerber & Arthur Lupia, *Voter Competence in Direct Legislation Elections*, in *Citizen Competence and Democratic Institutions* 147 (S.L. Elkin & K.E. Soltan eds., 1999) (defining and discussing voter competence in initiative elections).

⁸³ Popkin, *supra* note 82, at 8-9; Elizabeth Garrett, *Voting with Cues*, 37 *U. Rich. L. Rev.* 1011, 1022-34 (2003) (discussing cues used by voters in direct democracy); Arthur Lupia &

allow busy people to vote in the same way that they would have if they had spent more time learning about ballot measures and candidates. With the right voting cues, even busy people can vote competently using bits of information.⁸⁴ The study of voting cues in initiative elections has mainly focused on policies other than electoral reform, analyzing, for example, voting on ballot measures affecting the insurance industry.⁸⁵ In an initiative campaign dealing with policies with substantial economic consequences, trade and business groups will be active, often on both sides of the issue, providing voters with a shortcut to voting on the initiative as long as they clearly understand the economic interests of the groups.⁸⁶ For example, because the vast majority of Americans interact with the insurance industry and so have a sense of whether their interests are aligned with this industry, knowing which side of a ballot measure insurance companies support and how much money they are spending in the campaign provides an effective heuristic.

Different kinds of groups are likely to be active in initiative campaigns on electoral reform issues, however. For example, political parties may take positions and work to publicize them. In the 2004 election, the California Republican Party spent about \$2 million to send out five million slate mailers informing recipients of Governor Schwarzenegger's position on nine of the sixteen ballot measures.⁸⁷ Major and minor political parties were

Richard Johnston, *Are Voters to Blame? Voter Competence and Elite Maneuvers in Referendums*, in *Referendum Democracy: Citizens, Elites and Deliberation in Referendum Campaigns* 191, 202 (M. Mendelsohn & A. Parkin eds., 2001) (noting that people "employ information shortcuts for nearly every conscious decision they make," relying on cues such as brand names, reputations, and party ideologies).

⁸⁴ See, e.g., Arthur Lupia & Mathew D. McCubbins, *The Democratic Dilemma: Can Citizens Learn What They Need to Know?* (1998) (deriving conditions necessary for learning and use of cues by voters, including condition that person receiving information believe that the source has knowledge or expertise and condition that the source of information be credible). See also Arthur Lupia & John G. Matsusaka, *Direct Democracy: New Approaches to Old Questions*, 7 *Annu. Rev. Poli. Sci.* 463, 467-70 (2004) (reviewing literature).

⁸⁵ See, e.g., Arthur Lupia, *Shortcuts versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 *Am. Pol. Sci. Rev.* 63 (1994).

⁸⁶ See Garrett & Smith, *supra* note 55, at 6-9 (discussing cue provided by economic groups); Garrett, *supra* note 83, at 1028-29 (same).

⁸⁷ See Margaret Talev, *Governor's Picks Coming Your Way: He's Sending Voter Guides on a Host of Ballot Measures*, *Sac. Bee*, Sept. 18, 2004, at A1. After the voter guides had been printed and mailed, Schwarzenegger announced his positions on two additional ballot

active in California's November election opposing Proposition 62, which would have mandated a top-two "open" primary for state offices. Not only did the parties spend significant money to defeat the initiative,⁸⁸ but the parties-in-government also put Proposition 60 on the ballot, a constitutional amendment that preserved the status quo allowing political parties to determine primary format.⁸⁹ Although in the end Proposition 60 passed and 62 failed, delivering a complete victory to the political parties, the parties' strategy likely was to use a competing ballot measure to at least convince voters to vote against both, which would also have the effect of preserving the status quo ante.⁹⁰ Proposition 60 was characterized as preserving the rights of political parties and voters' choice, while the top-two primary was characterized as the first step to turning California into a larger version of Louisiana, a state described as rife with corruption. Political parties were active in this campaign, in contrast to their decision in 1996 to stay out of the campaign surrounding Proposition 198, the Blanket Primary Initiative, because they were concerned that they might not prevail in court this time in light of the dicta in *California Republican Party v. Jones*.⁹¹ Political parties are generally active in issue campaigns, not only with respect to the design of electoral institutions but also

measures – supporting both the open primary and a \$3 billion bond for stem cell research; the California Republican Party opposed both.

⁸⁸ See, e.g., California Secretary of State, Campaign Finance Activity, Californians for Election Accountability, No on 62, available at <http://cal-access.ss.ca.gov/Campaign/Committees/Detail.aspx?id=1266426&session=2003> (nearly \$500,000 contributed by the two major parties).

⁸⁹ The form in which the legislature passed Proposition 60 ran afoul of the California Constitution's separate vote requirement, Cal. Const. Art. XVIII, § 1, because it also contained provisions affecting the proceeds from the sale of surplus property. An appellate court severed the two parts of the legislative proposal into two ballot measures in time for the election, and the case is before the California Supreme Court. *Californians for an Open Primary v. Shelley*, 121 Cal App. 4th 222 (2004), review granted, opinion depublished, and stay denied by 95 P.3d 810 (Cal. 2004).

⁹⁰ See Magleby & Patterson, supra note 13, at 167 (discussing this strategy generally). Similarly, the parties will not be terribly disappointed if the California Supreme Court rules both Propositions 60 and 60A invalid because they violated the separate vote requirement (when placed on the ballot initially as one measure) because Proposition 60 merely codifies the status quo ante.

⁹¹ 530 U.S. at 585-86 (indicating that nonpartisan primaries would not run afoul of the First Amendment).

with regard to policy,⁹² and their increasing importance in this arena is another illustration of the interactions in Hybrid Democracy.

Economic groups may be active as well with regard to governance initiatives, but they may be less helpful to voters seeking cues because it can be less clear how their economic interests are implicated by the initiative. The California Chamber of Commerce considered supporting the top-two “open” primary in November, even taking a lead role initially in qualifying such an initiative,⁹³ although it ultimately backed away from supporting the measure after pressure from the major political parties.⁹⁴ In some cases, however, activity by economic groups with respect to an initiative that seems primarily motivated by non-economic factors provides voters easy insight into some of the consequences of a ballot measure. For example, the extraordinary support provided by developers and financiers to California’s stem cell measure in November signaled that these groups anticipated substantial financial gain from the bond.⁹⁵

More research is required to determine which voting cues are available to voters in campaigns about electoral and governance structures and how effectively voters can use those cues to vote competently.⁹⁶ This work must also determine how new limitations on contributions to politician-controlled issue committees, in a system where other issue committees can raise unlimited funds, affect voting cues that political actors can provide. Campaign finance regulations are affected by another aspect of Hybrid Democracy when

⁹² For discussion of the role of political parties in initiative campaigns, see Daniel A. Smith & Caroline J. Tolbert, *supra* note 11, at 116-27; Richard L. Hasen, *Parties Take the Initiative (and Vice Versa)*, 100 Colum. L. Rev. 731 (2000); Smith, *supra* note 22, at [6-9].

⁹³ See Dan Morain, *Bid Launched to Bring Back Open Primary*, L.A. Times, Nov. 13, 2002, at B6.

⁹⁴ See Aurelio Rojas, *Westly Supports Open Primaries*, Sac. Bee, June 21, 2003.

⁹⁵ See California Secretary of State, Campaign Finance Activity, Yes on 71: Coalition for Stem Cell Research and Cures, *available at* <http://ca-access.ss.ca.gov/Campaign/Committees/Detail.aspx?id=1260661&session=2003>. This is not to say that the members of these groups who supported the stem cell bond were solely driven by economic factors. Most, if not all, of the main backers of the bond also had family members with illnesses that may be alleviated or cured by stem cell research. For example, Robert Klein, who is also going to lead the commission overseeing the implementation of the initiative, is a real estate developer in Palo Alto and also has a child with diabetes and a parent with Alzheimer’s disease.

⁹⁶ See, e.g., Kousser & McCubbins, *supra* note 10, at [17-21] (detailing challenges facing voters using cues and providing a sense of the empirical research required to better understand cues and how to empower voters to use them competently).

they are applied to political parties in issue campaigns. California's aggressive disclosure law requires that broadcast advertisements reveal the committee funding them, and the two top contributors of \$50,000 or more to the committee.⁹⁷ In this way, the regulation seeks to pierce through the veils that cover some political actors in order to reveal the true forces behind a campaign. A recent lower court decision in California, however, enjoined enforcement of this disclosure provision with respect to political parties who had formed "general purpose committees" to support or oppose more than one issue or candidate.⁹⁸ The court worried that identifying two top contributors to a political party's communication could be misleading in an issue campaign because donors support a political party for a variety of reasons and may not support the issue campaign in which the advertisement appears. Indeed, one of the parties before the court, the California Teachers Association, was officially neutral on two of the propositions for which the California Democratic Party purchased ads.⁹⁹ One of the Republican Party's largest donors, the New Majority Committee, actually was actively supporting the initiative for a nonpartisan, top-two primary that the Party strongly opposed with advertisements.¹⁰⁰ This recent decision to issue a preliminary injunction is not a final one on the merits, and it applies only to political parties, which already have an ideological brand name. Failing to require disclosure of top contributors to minor parties, without the reputations of the major parties or well-known third parties, could be more problematic because they could be used as veils in much the same way that some interest groups are.

Another challenge presented by using initiatives to design electoral institutions in a Hybrid Democracy stems from the design of ballot questions. The binary nature of ballot measures, which are often governed by single-subject rules,¹⁰¹ may not allow voters to appropriately consider some of the complex trade-offs inherent in changing governance structure, even with the help of voting cues. However, too much complexity is disastrous in direct democracy because voters cannot be expected to become policy experts or to understand details of intricate proposals. Hybrid Democracy should be constructed to engage

⁹⁷ Cal. Gov't Code § 84503.

⁹⁸ See *California Republican Party v. Fair Political Practices Commission*, 2004 U.S. Dist. LEXIS 22160 (E.D. Ca. Oct. 27, 2004) (order granting preliminary injunction).

⁹⁹ *Id.* at [13].

¹⁰⁰ *Id.* at [14].

¹⁰¹ For a discussion of the single-subject rule in direct democracy, see Daniel H. Lowenstein, *Initiatives and the New Single Subject Rule*, 1 *Election L.J.* 35 (2002).

the populace without expecting unrealistic expertise. Thought should therefore be given to other ballot formats that would allow voters to vote competently but in a more sophisticated way than allowed by binary formulations. Of course, not all decisions about governance require more than the traditional yes/no format: the decision to adopt term limits, for example, can be made competently in this way.¹⁰² But more difficult questions of changing primary formats or perhaps altering the way states redistrict for federal and state legislative races might be better made through a process that allows consideration of more than just two options: a reform selected by proponents of the ballot measure and the status quo.

Consider, as a possibility, the example of New Zealand. In the early 1990s, Voters discarded the first-past-the-post (FPTP) system for parliamentary elections in favor of a mixed member proportional (MMP) election system in a two-stage initiative process that presented them with four options for reform. Voters were first asked in a non-binding vote whether or not to replace FPTP, and then in a second multi-part question, they were asked which of four electoral systems they would prefer instead. Eight-five percent of voters rejected FPTP, and MMP was the first choice of 65% of voters.¹⁰³ The advisory referendum then served as a backdrop for a commission which formulated a detailed plan for an alternative voting scheme that was adopted in a second binding popular vote. Although this relatively complicated system may have been devised by incumbent legislators hoping to retain FPTP,¹⁰⁴ and it could be more confusing to voters than the more typical binary format, it also demonstrates the adaptability of institutions. It also suggests that institutional reform can be achieved through the use of a variety of entities in appropriate circumstances – in the New Zealand case, the reform was a product of three entities: the legislature, the people, and an expert commission.¹⁰⁵

¹⁰² However, even some seemingly straightforward governance decisions can be more complex than they initially appear. See Elizabeth Garrett, *The Law and Economics of “Informed Voter” Ballot Notations*, 85 Va. L. Rev. 1533, 1571-81 (1999) (discussing complexity in informed voter ballot notations).

¹⁰³ Jack H. Nagel, *What Political Scientists Can Learn from the 1993 Electoral Reform in New Zealand*, 27 PS 525, 526 (1994).

¹⁰⁴ *Id.*

¹⁰⁵ Dennis Thompson advocates much more extensive use of commissions in electoral reform. See Thompson, *supra* note 56, at 168-84.

When voters choose to enact comprehensive reforms, like campaign finance reform or larger anti-corruption regimes, it is advisable to provide the legislature some ability to modify the regulatory structure in the future to take account of changed circumstances or to solve problems caused by infelicitous wording. California’s Political Reform Act, enacted by voters in 1974 to impose limitations on campaigns and lobbying and to adopt ethics provisions for officeholders, allowed the legislature to modify its provisions as long as the amendments “further[ed] the purpose” of the Act and were passed by a two-thirds vote of each house.¹⁰⁶ The California legislature has amended the Act more than 150 times, and in virtually all these cases, reformers have been satisfied with the changes.¹⁰⁷ Allowing legislative modification of a statutory initiative in California is unusual; the default rule is that no statute adopted by the people can be changed in any way by the legislature, but only by another popular initiative. Only if the statutory initiative explicitly permits the legislature a role can it tinker with the product of direct democracy.¹⁰⁸ The reason for this protection is clear. Presumably, supporters of a particular law took the avenue of the initiative – a choice in a Hybrid Democracy – because they could not obtain the necessary support in the legislature. Thus, advocates of the reform have good reason to fear that legislators will use any power to modify to undermine the reform. Legislatures and executive branch officials can work to undercut popularly-enacted reforms even when they cannot directly repeal them either because the initiative disallows legislative intervention or because lawmakers fear public reprisal if their resistance is known.¹⁰⁹

Given the conflict of interest that lawmakers often suffer with regard to reform of governance institutions, there is a risk to allowing legislators to retain a role in the future development of electoral and governance reforms. However, the Fair Political Practices Act

¹⁰⁶ Cal. Gov’t Code § 82013.

¹⁰⁷ See California Commission on Campaign Financing, *Democracy by Initiative: Shaping California’s Fourth Branch of Government* 119 (1992).

¹⁰⁸ Art. II, § 10(c) of the California Constitution. Of course, initiatives that amend the state constitution can be repealed or changed only through another popular vote. Initiative states other than California do allow legislative modification of statutory initiatives although some require supermajority votes of the legislature to repeal or amend. See Waters, *supra* 1, at 27.

¹⁰⁹ See Gerber, et al., *supra* note 9. For an example of the lengths to which a state legislature will go to undermine an initiative without repealing it, see the discussion of the Massachusetts state legislature’s response to public financing passed by initiative, described in Eskridge, Frickey & Garrett, *supra* note 76, at 24-25.

demonstrates that a popular reform can survive amendment, and that an initiative can be structured to take advantage of the fact that legislative change is less cumbersome than another issue campaign and popular vote. Moreover, some electoral reform – such as term limits or the adoption of a particular kind of primary – requires changes that even busy and relatively inattentive voters would notice if they fail to occur because the legislature used its power to undermine the initiative. Gerber, Lupia, McCubbins and Kiewiet note in their work studying the resistance of established political actors to reforms put in place through ballot measures that lawmakers find it harder to resist reforms where compliance by implementing officials is easy to observe and to sanction.¹¹⁰ The risk provided by allow legislative involvement in a law passed by initiative is outweighed by the benefit of providing an easier way to modify laws to take account of changed circumstances, drafting errors, or unintended consequences. Another reform that responds to these concerns would be to sunset all legislation passed by popular vote and to require periodic reenactment by either the people or the legislature.¹¹¹

Representatives certainly understand that the environment in which they work and seek reelection can be dramatically reshaped by ballot measures. For example, savvy lawmakers who prefer to run virtually unopposed are very aware that Californians may respond enthusiastically to the notion of moving redistricting out of the legislature and into a nonpartisan commission. Perhaps the savviest California politician, Governor Schwarzenegger, also understands how much state lawmakers dislike competitive elections and how much they value power to redistrict in ways that serve their self-interest, entrench incumbents and increase polarization. He is aggressively backing redistricting reform, as a package with other reforms of the legislative branch that would result in a legislature more likely to work with him to implement his agenda.¹¹² This demonstrates the third aspect of

¹¹⁰ Gerber, et al., *supra* note 9, at 21-22.

¹¹¹ Some have proposed sunseting all legislation to reduce the problem of entrenchment. This proposal is not realistic when applied to the thousands of laws passed by legislatures, but it is a possible reform of direct democracy, and it responds to some of the characteristics of direct democracy that can be troubling such as the inability to amend to account for changed circumstances or correct mistakes.

¹¹² See Peter Nicholas, *Governor Considers a Special Election*, L.A. Times, Dec. 7, 2004, at A1 (discussing Governor's consideration with top officials of a package to reform Sacramento including redistricting reform, reform of the executive branch along the lines

Hybrid Democracy: governing in the traditional legislative arena through the threat of initiative.

III. Hybrid Democracy and Governing by Threat of Initiative

Many who study direct democracy are focusing on the effect of the initiative process on policies enacted by legislature and implemented by executive – the indirect effect of direct democracy, to use Gerber’s term.¹¹³ The first year of Arnold Schwarzenegger’s term as governor of California has provided the most sustained and well-publicized example of the indirect influence of initiatives in Hybrid Democracy. Since he entered office in November 2003, Republican Schwarzenegger has used the threat of initiative to govern a state where Democrats control both houses of the legislature, his copartisans are more conservative than he is on many issues, policy inertia has been the primary response to problems in the past few years, and a continuing fiscal crisis has made budget reform necessary even as supermajority voting requirements make passing an annual budget a significant challenge. His use of the initiative process should not have surprised anyone. Schwarzenegger’s first foray into politics occurred during the 2002 general election when he spent \$1.1 million of his own money to support Proposition 49, requiring funds be spent on after-school programs.¹¹⁴ His support of this ballot measure was in part a way for him to test the political waters and to associate himself in voters’ minds with the popular issue of education.

The effect of Schwarzenegger’s threat to use direct democracy to bypass the legislature was apparent immediately. Days after the Governor took office, the legislature repealed a

proposed by Schwarzenegger, and a hard constitutional spending limit); Peter Nicholas, *Governor Considers a Power Play*, L.A. Times, Dec. 13, 2004, at B1 (noting that Schwarzenegger is considering changing voting rules in the legislature to pass his restructuring proposal and putting it on the ballot with other reforms such as redistricting); John Harwood, *Gov. Schwarzenegger Brings Star Power to a Thankless Task*, Wall St. J., Dec. 15, 2004, at A4 (noting lack of competitive elections in California and elsewhere and stating that Schwarzenegger might only threaten the initiative or take it to the people).

¹¹³ See Gerber, *supra* note 69, at 23-26. For work studying this indirect effect, see *supra* note 8.

¹¹⁴ See David L. Schecter, *Rights of Removal: Recall Politics in the Modern Era* 22 (paper presented at the American Political Science Association Meeting in Chicago, IL, Sept. 2-5, 2004).

law it had passed only weeks before which would have allowed undocumented workers to obtain driver licenses.¹¹⁵ Opposition to this law, signed by Davis in an attempt to woo Hispanic voters in the recall after he had opposed similar proposals in the past, had been part of Schwarzenegger's platform and a salient campaign issue. Although the strong backlash by voters to the law¹¹⁶ was the main reason for the quick legislative turn-around, lawmakers were also aware that a petition to put a referendum to overturn the law on the ballot was being circulated. Schwarzenegger appeared likely to back such a referendum. Even the author of the law understood that the referendum would likely succeed, stating that the legislature might as well repeal the weeks-old law because "[t]here'd be no value in validating its unpopularity" in a spring election.¹¹⁷

In his first State of the State address in January 2004, Schwarzenegger used the threat of initiative to put pressure on the legislature to pass a reform of the workers compensation system.¹¹⁸ Reform of the system had been another plank in his platform and part of his promise to change the state's economic climate to provide more favorable conditions for business and investment. He threatened to take his own proposal to the voters directly if the legislature did not send him an acceptable bill. His threat became more persuasive in March after his notable success in securing passage of an initiative authorizing a \$15 billion bond to tackle the state's accumulated deficit. This bond, which was tied to another initiative requiring a balanced budget, garnered the support of only about one-third of the voters immediately after the legislature put the measures on the ballot.¹¹⁹ After a vigorous campaign, primarily financed by the issue committees controlled by the Governor and raising substantial funds through unlimited contributions, both propositions won decisively.¹²⁰

¹¹⁵ S. 60, 2003-04 Leg., Reg. Sess. (Cal. 2003).

¹¹⁶ Michael Gardner, *Illegal-Immigrant Driver License Law Could Test Incoming Administration*, San Diego Union-Trib., Oct. 10, 2003, at A1.

¹¹⁷ See Nancy Vogel, *Panel OKs Repeal of License Law*, L.A. Times, Nov. 26, 2003.

¹¹⁸ Governor Arnold Schwarzenegger, State of the State Address (Jan. 6, 2004).

¹¹⁹ See Rene Sanchez, *Political Muscle: Schwarzenegger Demonstrates Strength with Ballot Triumph*, Wash. Post, Mar. 4, 2004.

¹²⁰ See California Secretary of State, California Primary Election, March 2, 2004, *State Ballot Measures, Statewide Returns* (showing Proposition 57 (bond) winning with over 63% support and Proposition 58 (balanced budget) winning with 71% support), available at <http://primary2004.ss.ca.gov>Returns/prop/00.htm>

His success in March made his threat to resort to the ballot box to enact his proposals even more credible and influential. The campaign demonstrated that his substantial popularity and ability to command media attention translated not just to success when he ran for office, but also to success for his policies on Election Day. This victory and the collection of 1.2 million signatures on a petition to put workers compensation on the November ballot pressured the legislature to enact relatively sweeping reform in April 2004.¹²¹ Both the legislature and Schwarzenegger preferred to enact legislation through the traditional means. Lawmakers wanted to control the details of the reform and to enact a law somewhat different from the one that would have been placed on the ballot. The Governor wanted reform in place earlier than would have been possible had he been forced to wait for the November ballot. In addition, it was in his interest to avoid an expensive campaign in which he would have faced well-funded and well-organized opposition. Winning on the bond was a victory, given the low support at the beginning of the campaign, but the \$15 billion bond measure did not face opponents with substantial war chests, and virtually all politicians, including popular Democratic Senator Dianne Feinstein, supported the bond.¹²² Schwarzenegger knew he would face a very different environment – where electoral success was far less certain – had he been forced to enact workers compensation reform through an initiative.

In 2004, the Governor also used the threat of initiative to reach compromises with Indian tribes that enabled him to bandage over the state's continuing fiscal crisis. Succeeding again where Gray Davis had failed, Schwarzenegger convinced tribes with gambling operations to pay the state more of their revenues because the tribes knew that there would be initiatives on the ballot in November that would either require them to pay even more to the state or to lose their gambling monopoly. In return for their increased contribution to the state's coffers, Schwarzenegger strongly opposed the initiatives, proving so successful that the supporters of Proposition 68, which would have eliminated the tribal monopoly unless tribes agreed to pay 25% of their revenues to the state, pulled out of the campaign several weeks before the

¹²¹ See John Fund, *Less is More*, OpinionJournal.com, April 19, 2004, available at <http://www.opinionjournal.com/diary/?id=110004974>.

¹²² See Sanchez, *supra* note 119.

election.¹²³ Supporters, such as private card clubs, racetrack owners, and others with gambling interests like Larry Flynt, conceded that they had no chance to beat the Governor, even after they had spent nearly \$25 million and planned to spend another \$25 million.¹²⁴

The Governor also hammered out a deal with local government officials that allowed him to get a budget through the legislature in 2004; in return, the legislature put Proposition 1A on the ballot to amend the Constitution to somewhat protect local governments' property tax and sales tax proceeds from state raids in the future.¹²⁵ In this case, however, it was the group bargaining with Schwarzenegger who used the threat of initiative to gain advantage in negotiations. The local governments qualified Proposition 65 for the November ballot, which would have required voter approval for any reduction of local governments' vehicle license fee revenues, sales tax revenues, or share of local property taxes.¹²⁶ This constitutional amendment would have much more severely limited the ability of the state to use these revenues in an emergency than does Proposition 1A. The latter, the product of a deal reached by local governments, legislative leaders, and the Governor, provides that its protections can be suspended if the governor declares a fiscal necessity and two-thirds of the legislature approves. Any funds suspended under the emergency must be repaid in three years. Once a deal was reached, the local governments dropped their support of Proposition 65 and joined the campaign for Proposition 1A.¹²⁷

¹²³ See Robert Salladay & Dan Morain, *Prop. 68 Backers Fold 'Em*, L.A. Times, Oct. 7, 2004, at B1. See also Proposition 68 on the November 2004 ballot, available at <http://www.voterguide.ss.ca.gov/propositions/prop68-title.htm>. The Governor also opposed Proposition 70, available at <http://www.voterguide.ss.ca.gov/propositions/prop70-title.htm>, drafted and supported by the Agua Caliente Indian tribe, that would have expanded tribal gaming and required tribes to pay the state a percentage of their revenues equivalent to the corporate income tax rate. See Dan Morain, *Gambling Initiatives; Defeats Don't Mean the Dealing's Done*, L.A. Times, Nov. 4, 2004, at B8; George Skelton, *Schwarzenegger is a Sure Bet as He Steps On Fight to Beat Gambling Measures*, L.A. Times, Oct. 7, 2004, at B5.

¹²⁴ See California Secretary of State, Campaign Finance Activity for Yes on 68 Issue Committee, available at <http://cal-access.ss.ca.gov/Campaign/Committees/Detail.aspx?id=1260733&session=2003>.

¹²⁵ See Tom Chorneau & Doug Haberman, *Local Officials Seek End to State Raids on Funds*, Press Enterprise, Oct. 25, 2004.

¹²⁶ See Proposition 65, available at <http://www.voterguide.ss.ca.gov/propositions/prop65-title.htm>.

¹²⁷ See Proposition 65, Excerpts from Voter Information Pamphlet, available at http://www.sa.ca.gov/elections/bp_nov04/supplemental/vig_sup_65_entire/pdf (providing no argument in favor of Proposition 65 and urging voters to pass Proposition 1A, "a new and

The November election was critical to the Governor's continued ability to use the threat of initiative to defeat legislative obstructionist tactics during the rest of his first term. He took positions on eleven of the sixteen ballot measures, most critically opposing the two gambling initiatives.¹²⁸ His position prevailed in all but one of those races; he supported Proposition 62 that would have established a nonpartisan, top-two primary, but that measure failed.¹²⁹ This one loss is unlikely to tarnish his reputation, however, because he did not take a very public position in support of the initiative, coming out in favor of it only after the Republican Party had mailed five million voter guides publicizing his endorsements on nine of the measures.¹³⁰ Schwarzenegger's threat to resort to the initiative continues to be persuasive because of his success through the ballot; his popularity with voters which remains at around 65%;¹³¹ his personal wealth and fundraising prowess; and his command of media attention. If it survives a likely judicial challenge, the FPPC's new regulation limiting contributions to his issue campaigns will reduce his ability to raise large sums of money through six-figure campaign contributions. Given Schwarzenegger's other advantages, however, he can probably expand his fundraising operation to bring in more contributions at the contribution limit and continue to mount well-funded issue campaigns.

better measure ... to prevent state raids of local government funding"). Proposition 1A passed with 83% of the vote; Proposition 65 was handily defeated. See California Secretary of State, California General Election, November 2, 2004, State Ballot Measures, Statewide Returns, *available at* <http://vote2004.ss.ca.gov>Returns/prop/00.htm>.

¹²⁸ See Margaret Talev, *supra* note 87, at A1.

¹²⁹ The other measure he supported late, after the slate mailing, and in a relatively low-key way was Proposition 71, the bond for stem cell research, which won decisively.

¹³⁰ See Talev, *supra* note 87. Schwarzenegger's California Recovery Team made no contributions to any issue committee supporting Proposition 62, in contrast to the large contributions the Recovery Team made to committees, some also controlled by the Governor, supporting Propositions 57 and 58 in March and opposing Propositions 68 and 70 in November. See California Secretary of State, Campaign Finance Activity, Governor Schwarzenegger's California Recovery Team, Contributions Made, *available at* <http://cal-access.ss.ca.gov/Campaign/Committees/Detail.aspx?id=1261406&session=2003&view=contributions>.

¹³¹ See Mark Baldassare, PPIC Statewide Survey: Californians and Their Government vi (Aug. 2004). An October survey found that 61% of California adults and 69% of likely voters approve of the Governor's performance in office. PPIC, *Just the Facts: Recall Election – One Year Later* 1 (Oct. 2004).

Schwarzenegger's success on ballot measures has not translated into success in influencing legislative outcomes.¹³² Thus, the Assembly and Senate he faces after the November election is virtually the same as the houses he dealt with during his first term of office. Although he can bargain with them, using the threat of initiative as part of his strategy to force compromises he can support, he will find governing difficult in the next two years of his term, in part because passing a budget in California requires two-thirds support in the legislature.¹³³ The need to change the composition of the legislature so that it contains a greater number of moderate lawmakers probably influenced Schwarzenegger's decision to back the nonpartisan, top-two primary initiative which would have produced less ideologically extreme candidates in the general election than does the current closed primary structure. His objective to change the lawmakers which whom he is forced to bargain is also a driving force behind his advocacy of redistricting reform and his threat to back an initiative to make the legislature a part-time body.¹³⁴ He announced in his 2005 State of the State Address that he would submit redistricting reform to the voters if the legislature does not create an independent redistricting commission composed of retired judges.¹³⁵ He has a second objective in this particular threat game, however. Even if he ultimately backs away from mounting a serious effort to qualify these initiatives, the mere mention of such reforms – extremely distasteful to legislators in Sacramento – may strengthen his bargaining position on the budget and other matters.

The keys to success for the Governor's use of Hybrid Democracy in his bargaining strategy is that the threat to resort to the initiative process must be credible, the threat must be an unattractive prospect to lawmakers who will be willing to compromise to avoid it, and the compromise that is possible must be acceptable to the Governor so he has reason to abandon

¹³² See Nancy Vogel, *Voters Slow Governor's Drive to Change Balance of Power*, L.A. Times, Nov. 4, 2004, at B10.

¹³³ He also faces a growing budget deficit that he cannot continue to hide with smoke and mirrors. See Evan Halper & Jenifer Warren, *State May Face Bigger Budget Gap*, L.A. Times, Dec. 16, 2004, at B1.

¹³⁴ For his threat to back a proposal for a part-time legislature, see John Fund, *Part-Time Pols*, OpinionJournal, Aug. 9, 2004, available at <http://www.opinionjournal.com/diary/?id=110005457>.

¹³⁵ See Dion Nissenbaum, *Show of Compromise Hides Governor's 2nd Year Strategy*, San Jose Mercury News, Jan. 6, 2005; John M. Broder, *Schwarzenegger Proposes Overhaul of Redistricting*, N.Y. Times, Jan. 6, 2005.

his threat. Schwarzenegger goes into his second year with more credibility than he had after his recall victory because of his sustained string of victories at the polls. The structural reforms he has been considering are anathemas to legislators. Schwarzenegger has an incentive to compromise because he knows that he cannot govern entirely by initiative; he needs to use both parts of Hybrid Democracy and to rely mainly on the traditional legislative process. Frequent use of initiatives to enact laws is unwieldy and costly. Furthermore, even with the Governor's popular appeal, success at the polls is never a sure thing. In particular, initiatives establishing redistricting commissions have been on the California ballot before, and they have not passed.¹³⁶ Both sides in the policymaking game – Governor and legislators – have incentives to reach legislative compromises when the bargaining takes place in the shadow of an initiative and referendum process that a popular governor has used to great advantage.

Schwarzenegger has used the initiative threat more systematically than other politicians and political actors in the past, and few in the future may have the attributes that allow him to credibly and frequently threaten to take issues to the people. However, he is not the first to blast through legislative gridlock using Hybrid Democracy. During the 1998 election in California, Silicon Valley entrepreneur Reed Hastings led a group of venture capitalists and electronics executives in a negotiation with the legislature to expand the charter school system. The largest arrow in Hastings' quiver was a petition drive, financed by \$3.5 million to gather 1.2 million signatures, to amend the California Constitution to institute the group's vision of charter schools. Not only did their ability to gather double the number of required signatures demonstrate the credibility of their threat, but they also announced they would spend up to \$12 million more on a campaign. All players in this game understood that charter schools were an issue likely to resonate with many voters and thus likely to succeed.¹³⁷ Legislators and teachers' unions knew the ballot measure stood a good chance of being adopted if it appeared on the ballot, so, within a short time, a compromise bipartisan bill expanding charter schools passed the legislature and was signed by Governor Wilson.

¹³⁶ For example, an initiative that would have shifted redistricting to a commission of retired appellate judges (Measure 119) was defeated in 1990. A similar initiative (Measure 39) was defeated in 1984, and an initiative to establish a nonpartisan commission of members selected by judges and political parties (Measure 14) failed in 1982.

¹³⁷ See Garrett, *supra* note 13, at 1859-60.

Legislators can also resort to the ballot if they are unsuccessful in passing their proposals through the legislature. Hasen's analysis of 198 ballot measures from 1990 to 2004 found that more than 63% "featured at least one argument or rebuttal signed by at least one current state senator, assembly member, or other public official elected in a statewide election."¹³⁸ Schwarzenegger's aggressive use of the initiative threat may encourage legislators to turn to this route of policy making with more frequency, although no current state legislator or official commands the media attention of the governor, has his fundraising prowess, or enjoys comparable name recognition and popularity. Nonetheless, the Democrats are considering ballot measures to implement politically liberal programs like low income housing and health programs that they fear the Governor might veto.¹³⁹ These politicians have no doubt noticed that some liberal ballot measures, including measures increasing the minimum wage in Florida and Nevada and a Colorado measure requiring utilities to produce a certain amount of energy from renewable fuel, fared well in other states in November.¹⁴⁰

When particular initiatives sponsored by lawmakers succeed at the polls, those pushing similar programs may find themselves strengthened in legislative bargaining. Consider Proposition 63 on the November ballot in California, which passed with nearly 54% voting in favor.¹⁴¹ This law provides hundreds of millions of dollars annually for mental health services in the state, funded by an additional 1% tax on taxable income over \$1 million. Its primary advocate was Democratic Assemblyman Darrell Steinberg, who had not been able to convince his fellow lawmakers to appropriate a substantial level of funding for mental health services through the traditional budget process. Supporters of Proposition 63 were able to raise over \$3.5 million in relatively small contributions, while opponents raised only thousands of dollars.¹⁴²

¹³⁸ See Hasen, *supra* note 33, at [19 & App. tbl. 1).

¹³⁹ See Jordan Rau, *Ballot Items Aimed at Gov.*, L.A. Times, Dec. 25, 2004, at A1.

¹⁴⁰ See Initiative and Referendum Institute at USC Issue Paper No. 10, *2004 Election Summary*, and Issue Paper No. 11, *Post-Election: Environment*, both available at <http://www.iandrinstitute.org/ballotwatch.htm>.

¹⁴¹ See California Secretary of State, *supra* note 127.

¹⁴² See California Secretary of State, Campaign Finance Activity, Campaign for Mental Health – Yes on 63, available at <http://cal-access.ss.ca.gov/Campaign/Committees/Detail.aspx?id=1254533&session=2003>. Interestingly, the ballot committee supporting the mental health initiative was not controlled by Representative Steinberg. See Campaign for Mental Health, Yes on 63, Electronic

The success of Proposition 63 demonstrates that voters are willing to support higher taxes – as long as they are raised on a small handful of the very wealthy and the proceeds are earmarked for popular programs. This may well improve the position of those in the legislature who argue for some revenue increases during the next budget cycle, which will be more difficult than it was during the 2004 budget negotiations which relied mainly on one-time revenue enhancements and gimmicks to meet balanced budget requirements. On the other hand, because voters trust direct democracy more than representative government, it may be the case that they are willing to tolerate taxes only if they are raised by the ballot box and not by the legislature.¹⁴³ Nevertheless, it will be interesting to watch how this ballot measure's success influences the upcoming deliberations on the continuing fiscal crisis in California.

Some would argue that recourse to the ballot box to raise taxes and fund programs like mental health is inevitable because initiatives have virtually eliminated the flexibility of elected officials to deal responsibly with budget crises. Again, the budget situation demonstrates the need to understand the political process through the lens of Hybrid Democracy. Initiatives constrain lawmakers as they budget, a situation that, in turn, forces groups to turn to initiatives to enact taxes and other revenue raisers earmarked for particular programs. Moreover, the entire cycle may have been started by voters' perception that their representatives were irresponsible with the public's money and more accountable to special interests than the public interest. In response, the public may have voted for initiatives that reduced the lawmakers' power over budgeting.

The perception that initiatives have earmarked the vast majority of California's budget, thereby reducing the discretion of elected officials to deal with fiscal challenges, is widespread and leads opponents of direct democracy to warn ominously of the prospect of "Californi-fication" of other states.¹⁴⁴ Pundits claim that around 70% of California's budget

Filings, Form 460, *available at* <http://cal-access.ss.ca.gov/PDFGen/pdfgen.prg?filingid=1051131&amendid=2>. Thus, contributions to it would not have been limited had the FPPC's regulations been in effect during the 2004 election, unless advertisements it funded mentioned the legislator.

¹⁴³ For some speculation that this is the case, see Evan Halper, *To Raise Taxes, Some Pin Hopes on State Ballot Box*, Mar. 29, 2004, at A1, A14.

¹⁴⁴ See, e.g., Bill Cotterell, *Petition Process Going Awry?*, Tallahassee Democrat, Dec. 9, 2003 (reporting on Florida hearings to reform the initiative process there).

is determined each year by previously enacted ballot measures.¹⁴⁵ The most comprehensive study of the California budget puts the figure well below this – the 32% of the state’s 2003-04 budget that has been earmarked by popular initiatives is largely the product of one initiative, Proposition 98, that required the money be spent for grades K-12 and community college education.¹⁴⁶ Interestingly, one of the reforms the Governor described in his 2005 State of the State is to reconsider funding formulas that have so dramatically reduced the ability of the legislature to control spending. Although his address was vague on details, it is clear that one of the formulas targeted for significant revision is that mandated by Proposition 98.¹⁴⁷ Thus, Schwarzenegger is flexing his initiative muscle to combat a fiscal situation caused by the initiative process. The legislature’s ability to budget responsibly and take account of economic downturns has been affected by more than just the initiatives that earmark funds for particular programs, however. Term limited legislators are less experienced in budget negotiations and so have difficulty reaching compromises, particularly when the rules require supermajority votes to enact a budget, and other initiatives have constrained the state’s ability to tap certain potential sources of money or have reduced localities’ ability to raise money, making them more dependent on the state.¹⁴⁸

Again, the point of all this description of the complex interactions between governing and the initiative process is a simple one. To understand any issue – here, budgeting – in a Hybrid Democracy, we cannot focus solely on its direct components or solely on its representative components. Instead, we must analyze the entire system, assess how each part directly and indirectly affects the other, and propose solutions to problems that account for all the features of Hybrid Democracy. At least in California, we cannot help but think in

¹⁴⁵ See, e.g., Laura D’Andrea Tyson, *A New Governor Won’t Fix What Ails California*, *Bus. Wk.*, Sept. 22, 2003, at 24 (providing 70% figure with no support); Jonathan Weisman, *Voter Initiatives Limit California’s Wiggle Room*, *Wash. Post*, Aug. 14, 2004, at A1 (quoting Professor John Ellwood of Berkeley that initiatives along with federal mandates swallow up “60 to 80 percent of the state budget”).

¹⁴⁶ See John G. Matsusaka, *Have Voter Initiatives Paralyzed the California Budget?* (Nov. 2003) (USC-Caltech Center for the Study of Law and Politics Working Paper No. 23), available at <http://www.usc.edu/cslp/pages/papers.html>.

¹⁴⁷ See Duke Helfand & Joel Rubin, *Educators Warn of Plan’s Dire Impact*, *L.A. Times*, Jan. 7, 2005 (stating that Schwarzenegger is expected to alter Proposition 98 as part of his budget reform proposal).

¹⁴⁸ See Garrett, *supra* note 33, at 276-77 (discussing effects of direct democracy on budgeting other than earmarking funds).

terms of Hybrid Democracy because of the governing strategy of the current Governor. As his administration works to put together a budget in times of a serious budget deficit and bleak fiscal picture, his spokespeople are quick to identify the initiative process as way to solve problems. In noting that one long-term budget solution might be to place on the ballot a package of budget reforms, one aide noted that Schwarzenegger is “more than willing to take issues directly to the people.”¹⁴⁹

IV. Conclusion

Hybrid Democracy is the form of government under which nearly three-quarters of Americans live. If we fail to appreciate this reality, we cannot completely understand the political process or accurately assess the consequences of a particular reform. My purpose in this essay has been a modest one, but one important to all of us who study the law of the political process. When we talk about democratic institutions in our work, we must be aware that we live in a Hybrid Democracy and take account of its complexities in our scholarship.

¹⁴⁹ Stan Rosenberg, *California's Debt Ratings Remain Low, Deficit Remains Wide*, Wall St. J., Dec. 24, 2004, at C2 (quoting Finance Department spokesman H.D. Palmer).