Democracy in the Wake of the California Recall
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The recall of Governor Gray Davis and simultaneous election of Arnold Schwarzenegger provide a unique window on aspects of elections and democratic institutions that are not limited to statewide recall elections. Although one must be wary of drawing general conclusions about the political process from an unusual event such as the statewide recall, this election can serve as a way to think about broader issues relevant not only to future recalls but also to all candidate and issue elections in California and throughout the nation. In this article, I will discuss insights that the recent recall provides with respect to four familiar areas of law and politics. First, the recall demonstrated the significant and sometimes troubling role that money plays in modern campaigns, as well as the difficulty of constructing effective and comprehensive campaign finance laws. Second, the unusual structure of the recall election, where an election for Davis's successor was on the same ballot as the recall question, helps to assess the role of political parties in elections. It suggests that independent and minor party candidates can be part of an election without causing widespread voter confusion. Third, the over twenty lawsuits filed before the election was held – with one threatening to delay the election for months until an en banc panel of the Ninth Circuit stepped in – suggest that litigation is being used more aggressively as political strategy[1] in the wake of the Supreme Court's intervention into the 2000 presidential election.[2] Unless courts take a less activist role in cases affecting elections, this disturbing trend is likely to continue. Finally, I will conclude with a discussion of the interaction between direct democracy and

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[1] Rick Hasen used this phrase in a symposium at USC Law School on a proposal to reform the recall process, held on October 21, 2003. I have used his term here and will expand on the notion. For coverage of this event, see Laura Mecoy, *Scholars, Officials Urge Recall Changes,* Sac. Bee, Oct. 22, 2003, at A3.

[2] Bush v. Gore, 531 U.S. 1046 (2000). For my criticism of the Supreme Court's involvement in that election, see Elizabeth Garrett, *Leaving the Decision to Congress*, in The Vote: Bush, Gore and the Supreme Court 38 (C.R. Sunstein & R.A. Epstein eds., 2001).

representative democracy. In states with a hybrid system like California, these two forms of democracy influence each other – a reality that we witnessed in the days before the recall election and that we are likely to continue to see as Governor Schwarzenegger threatens to use initiatives to pressure a recalcitrant legislature to do his bidding.

I. Money, the Recall, and Elections

California adopted a statewide recall process in 1911 as part of an effort by John R. Haynes and other progressives to implement recall on the local and state levels as a way to remove corrupt officials, particularly those beholden to the mighty Southern Pacific Railroad.[3] Before the successful recall attempt in 2003, groups had attempted to qualify a gubernatorial recall for the California ballot thirty-one times, but all those efforts had been unsuccessful.[4] The California Constitution requires that petition circulators gather signatures equal to 12% of those who voted in the last gubernatorial election.[5] Because turnout had been so low in the lackluster general election between Davis and Republican Bill Simon, the recall forces needed to collect just over 900,000 valid signature to qualify the recall for the ballot. Even with that relatively low threshold, the drive would not have succeeded, at least in placing the recall on the ballot in the fall rather than in March when conditions would have been more favorable to Davis, without the support of an ambitious legislator, Republican Darrell Issa, who contributed more than $2 million to help foot the bill for paid circulators.[6] The sophisticated initiative industry in California includes companies which offer clients a money-back guarantee if they don't produce enough

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[3] See Joshua Spivak, *Why Did California Adopt the Recall?* (Sept. 15, 2003), *available at* http://hnn.us/articles/1682.html; Thomas E. Cronin, Direct Democracy: The Politics of Initiative, Referendum, and Recall 130-32 (1989).

[4] Margaret Talev, *Recall Attempts Old Hat in State*, Sac. Bee, June 9, 2003, at A1.

[5] Calif. Const., Art. 2, Sect. 14(b).

[6] Issa may have violated provisions of the Bipartisan Campaign Finance Reform Act (BCRA) which generally prohibit a federal lawmaker from raising soft money. The Act makes an exception for officeholders who are running for a statewide office and raising soft money in that campaign, but Issa may not qualify for that exception. Although he planned to run for governor in the recall election, he did not file because it was abundantly clear he would not be a leading contender, and the money he contributed went to the recall drive, not his own campaign. The FEC is considering a complaint against Issa, and it recently ruled on a related complaint filed against Representative Jeff Flake (R-Ariz.), who established a group to raise money outside the BCRA framework to fund an initiative petition drive. See FEC Advisory Opinion No. 2003-12 (July 29, 2003) (applying BCRA rules on federal officeholders' involvement in political fundraising to activities relating to issue elections).

valid signatures to qualify something for the ballot; in return, they are paid about $1.50 per signature.[7]

Since the Supreme Court held laws banning paid circulators unconstitutional,[8] a group seeking ballot qualification can be certain of success if it is willing to pay enough. Money is a sufficient condition for ballot access, although it does not assure that the ballot question will pass. Grassroots groups with broad-based support and energized members can still rely on volunteers to gather enough signatures, but even these groups are increasingly turning to paid circulators because of the guarantee of success. Recalls are no different from initiatives in this way – with $2 million dollars in their war chest, the pro-recall groups easily exceeded the signature threshold by a considerable amount. In the end, they turned in petitions with 1.36 million valid signatures.[9] Current recall drives in other states are similarly relying on paid circulators to ensure qualification.[10]

The great influence that money wields in the qualification stage of direct democracy has justifiably led to calls for reform. As Daniel Lowenstein has argued, capitalism is a strange way to allocate ballot access in a democracy (unless one is willing to defend the dubious proposition that wealth corresponds to merit in the political realm), but the reality is that money can buy a place on the ballot, even if it cannot entirely determine the outcome of the election.[11] Many of the reform proposals ostensibly designed to respond to the influence of money, including those currently being discussed in California in the wake of the recall, would simply raise the signature threshold. California's threshold for

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[7] See Elizabeth Garrett, *Money, Agenda Setting, and Direct Democracy*, 77 Tex. L. Rev. 1845, 1851-52 (1999).

[8] Meyer v. Grant, 486 U.S. 414 (1988).

[9] See California Secretary of State, Recall Signature Update (July 31, 2003) *available at* www.ss.ca.gov/elections/recall_sigs.htm (also noting that more than 1.6 million signatures were submitted).

[10] See, e.g., Meg Jones & Leonard Sykes, Jr., *Supreme Court Deadlocks on George Recall*, Milwaukee Journal Sentinel, Oct. 20, 2003, at 1B (describing use of paid circulators in successful recall drive relating to state senator). A recall drive aimed at the governor of Nevada failed to qualify; recall supporters relied on volunteers to gather signatures. See Peter Brownfield, *California Could Start Recall Trend* (Sept. 13, 2003), *available at* www.foxnews.com/story/0,2933,97222,00.html. The recall effort collected only 51,000 signatures, short of the more than 128,000 needed to qualify for the ballot. Brendan Riley, *Nevada's Governor Recall Drive Terminated*, Houston Chron., Nov. 25, 2003.

[11] Comments of Daniel H. Lowenstein, Post-Mortem Conference on the Recall held at USC Law School, November 14, 2003. For a survey of the scholarship on the role of money in initiative campaigns, see Elizabeth Garrett & Elisabeth R. Gerber, *Money in the Initiative and Referendum Process: Evidence of its Effects and Prospects for Reform*, in The Battle Over Citizen Lawmaking 73, 76-82 (M.D. Waters ed., 2001).

a statewide recall is the lowest in the nation,[12] and it is lower even than California's requirements for recalls of state legislators and judges. To recall those officials, petition gatherers need signatures equal to 20% of the votes cast in the official's electoral district.[13] The reform receiving the most attention in California, a constitutional amendment proposed by Assemblyman Mark Ridley-Thomas, would require signatures equal to 12% of persons registered to vote at the last election, not those who actually voted, to place a gubernatorial recall on the ballot.[14] This would change California from the most permissive state to one of the most rigorous states, and not surprisingly Ridley-Thomas was a vocal opponent of the recall process. Other proposals for reform would bring California in line with other states and require circulators to garner signatures equal to 25% of those who voted in the last election.[15]

Whether California's relatively low threshold for a gubernatorial is *too* low is unclear. After all, there has been only one effort that has qualified for the ballot in ninety years, and, for the past several decades, the initiative industry in California has surely been sophisticated enough to realize that a substantial warchest could necessarily qualify a recall just as it can an initiative. Nothing in the law or constitution changed in 2003 that made a recall suddenly more possible than it was five or ten years before. Any substantial increase in the number of signatures seems motivated more by a dislike of direct democracy than by a genuine desire to improve the process. In essence, these proposals reduce the number of recalls by raising the cost of petition drives. Rather than increasing the price of ballot access, thereby ensuring that only the well-funded will have the ability to use the recall tool, policymakers and voters should formulate reforms consistent with the purpose of direct democracy. The goal of direct democracy, whether ever realized or not,[16] is to allow the people ways to circumvent the traditional legislative

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[12] See Bruce E. Cain, *Do Better Next Time: The State's Recall Laws Clearly Could Use a Little Tweaking*, L.A. Times, Aug. 17, 2003, at M5 (noting that the norm is 25% of those who voted in the last election and that six of the eighteen states that allow governors to be recalled use a percentage of the total of eligible voters, not actual voters, as the threshold measure).

[13] Calif. Const., Art. 2, Sect. 14(b).

[14] See Assembly Constitutional Amendment 20, Calif. Legis., 2003-04 Regular Session, Sept. 9, 2003.

[15] See Bruce E. Cain, supra note 12; Richard Hasen, *Elect to Resolve Balloting Quandary*, Daily Journal, Aug. 18, 2003, at 6.

[16] See Daniel A. Smith & Joseph Lubinski, *Direct Democracy during the Progressive Era: A Crack in the Populist Veneer?* 14 J. Pol'y Hist. 349, 360-61 (2002); Daniel A. Smith, *Campaign Financing of Ballot Initiatives in the American States*, in Dangerous Democracy? The Battle Over Ballot Initiatives in America

process when it is dominated by powerful narrow interests. Although representing only a minority, such interest groups can disproportionately affect the legislative process either by taking advantage of vetogates to block change or by gaining benefits through logrolling. Elected officials may be extremely attentive to the wishes of organized groups with intense preferences because these groups have the ability to monitor the legislature closely and to reward their supporters with campaign contributions and other benefits. The initiative, referendum and recall processes are intended to give grassroots movements plausibly representing majority wishes methods to discipline elected agents when they are more responsive to minority interests rather than to the larger electorate. The design of direct democracy should be consistent with the objective of empowering the relatively unorganized many as they combat the clout of the organized but impassioned few in the legislative arena.

Signature thresholds were intended to serve as a signal of significant grassroots support for an issue before it was elevated to the ballot. At the time this mechanism was chosen as the triggering event for ballot access, the drafters of direct democracy provisions did not envision the widespread use of paid circulators or the involvement of a professionalized initiative industry of consultants. Simply raising the thresholds in response to the new reality may mean that fewer recalls will occur, but it does not serve the populist objectives of direct democracy. Instead, it strengthens the hand of those who can afford to spend substantial money on a petition drive and makes it even harder for all-volunteer efforts to succeed. For example, had it been in place in 2003, the Ridley-Thomas proposal would have required a successful recall drive to get more than 1.8 million signatures, more than double that required to qualify the Davis recall.[17] Raising signature thresholds alone means that many groups will be priced out of the market, including most truly grassroots groups. Thus, the few issues that qualify for the ballot will most certainly be the product of special interest money and organization. Such ballot questions may not be able to win in the election, although savvy groups will work to

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71, 73 (L.J. Sabato, H.R. Ernst & B.A. Larson eds., 2001) (both providing examples of special interest domination of the initiative process in the early years).

[17] See California Secretary of State, October 21, 2002 Report of the Registration for November 2002 General Election, *available at* http://www.ss.ca.gov/elections/ror_102102.htm. Many observers believe that the Davis recall forces would have been able to meet the higher threshold. See John M. Broder, *Bill is Proposed to Revise California's Recall Process,* N.Y. Times, Oct. 22, 2003, at A17.

qualify issues that resonate with voters and to frame ballot questions so that they seem consistent with the majority's preferences.[18] Furthermore, merely qualifying a recall and triggering an election may be sufficient to disrupt the political process in a way that serves proponents' interests, regardless of the outcome.[19]

More creative reform is required to reconfigure the ballot access process so it serves the populist objectives of recall and initiative. For example, Daniel Lowenstein and Robert Stern have proposed a volunteer bonus system that would require groups using paid workers to obtain many more signatures than groups exclusively using volunteers.[20] There are limitations to this proposal, and it may run afoul of the First Amendment.[21] Nonetheless, it is a promising idea, it is more consistent with the goals of recall and initiative, and it might pass constitutional muster if justified by reference to the purpose of signature thresholds. Thresholds are designed to demonstrate popular support. Groups that can persuade people to volunteer to circulate petitions have already produced one convincing signal of such support and should not need to gather as many signatures as an additional sign of popularity.

Lowenstein has also suggested requiring that those who support a petition drive go to a firehouse, library or other public location to sign a petition. As part of this proposal, he supports reducing the number of signatures required for ballot qualification because the greater effort required to sign an initiative would provide a reliable indicator of support and thus the importance of the signal of mere numbers would be reduced.[22] Making it more costly for voters to sign a petition – at least in terms of opportunity costs – would make signatures more meaningful. Another way to increase the costs of signing a petition in a way consistent with the notion of informed political discussion might be to require signers to complete a questionnaire designed to prompt critical thinking about the topic of the initiative. It would be difficult for paid circulators to convince people to

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[18] See Elisabeth R. Gerber, The Populist Paradox: Interest Group Influence and the Promise of Direct Legislation (1999) (discussing the need for grassroots support to win most initiative elections and detailing the power and limitations of money and economic interest groups).
[19] Cf. Elizabeth Garrett, supra note 7, at 1856-63 (discussing "spillover" effects of merely qualifying an initiative for the ballot).
[20] Daniel Hays Lowenstein & Robert M. Stern, *The First Amendment and Paid Initiative Petition Circulators: A Dissenting View and a Proposal*, 17 Hastings Const. L.Q. 175 (1989).
[21] See Elizabeth Garrett, supra note 7, at 1874-76 (assessing the volunteer bonus proposal).
[22] Comments of Daniel Lowenstein, supra note 11; Daniel H. Lowenstein, *Election Law Miscellany: Enforcement, Access to Debates, Qualification of Initiatives*, 77 Tex. L. Rev. 2001, 2007-08 (1999).

expend their time and energy traveling to a petition site or filling in a questionnaire unless the potential signers really supported the ballot question. In contrast, petition circulators report that they can convince voters to take a minute or two to sign almost any petition on their way into a Walmart or during a stroll through a shopping center. Lowenstein's proposal is consistent with the objectives of direct democracy in a way that the more typical proposals to increase signature thresholds are not. Of course, it is not foolproof. Presumably, well-heeled interests could provide voters with transportation to and from the venues where petitions are available; however, it is less likely that voters who care nothing about the ballot issue would be willing to take the bus to the firehouse. Remember that although petition circulators can be paid, those who sign petitions cannot be compensated.

Other interesting reform proposals would allow voters to "sign" petitions on the Internet, thereby reducing the cost of ballot qualification and allowing grassroots groups to qualify issues for the ballot more easily. This reform would result in many more recalls and initiatives, and would not eliminate the influence of money, but it would open the process up to grassroots groups with widespread popular support. The innovative use of the Internet by Howard Dean in his quest for the Democratic presidential nomination reveals that it can be a powerful tool to harness real grassroots support. Fifty-five percent of contributions to Dean's campaign have been less than $200, while only 22 percent have been $1,000 or more. Contrast that to the mix of George W. Bush's contributions: 84 percent have been $1,000 or more, and only 11 percent have been less than $200.[23] Yet even with this heavy reliance on small contributions, Dean has enough money to decline federal matching funds during the primaries. Any reform of direct democracy that uses the Internet to empower grassroots movements should be accompanied by an increase in the signature threshold, and perhaps it could also be combined with a volunteer bonus approach. Substantially increasing the signature threshold is a defensible reform only if it is passed together with a change in circulation methods which favors, or at least does not disadvantage, grassroots organizations.

One other reform to combat the role of money in petition drives, which should be adopted with other proposals, is to require that paid circulators wear badges identifying

[23] See Thomas B. Edsall, *Bankrolling a New Path to the Primary*, Wash. Post, Nov. 10, 2003, at A4.

them as PAID and also providing information about which group or individual is footing the bill.[24] Information that the circulator is a hired gun may well turn some voters off and make signature gathering more difficult. Politicians believe such information affects voter behavior because they work to publicize that their opponents are using paid circulators as a way to tarnish a petition drive and defeat the ballot question. A badge designating a circulator as PAID might encourage voters to ask about the source of the payment, thereby alerting them to the interests behind the petition drive. In issue elections, an effective voter shortcut is provided by information that reveals which groups support and oppose an initiative and the intensity of their views.[25] A signal like a PAID badge, which prompts further inquiry, may provide voters with information that allows them to reach better conclusions about whether they support placing a particular question on the ballot. Furthermore, if there is a stigma associated with paid circulators, then this information alone, which is apparent from the badge, will reduce the effectiveness of money in petition drives.[26]

Money was an important part of the 2003 recall story not just in the qualification stage, but also in the campaign itself. The role of money in the campaign and the sources of money used by candidates and recall organizations reflect the influence of money generally in candidate and issue elections. The bifurcated nature of the recall election meant that the regulatory regime for campaign finance in the campaign was bifurcated as well. Only those running for governor in the second part of the election were limited by the state's campaign laws to accepting contributions no greater than $21,200 from each individual. Committees formed to campaign for or against the recall – even those controlled by candidates or Gray Davis – were not subject to contribution limits, although they were required to comply with disclosure rules. This reality led to a variety of strategies by candidates to evade the effect of contribution limitations.

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[24] The constitutionality of the requirement that circulators wear badges identifying them as PAID or VOLUNTEER was not determined by the Supreme Court in *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999). The Court struck down the requirement that the circulators' names had to appear on the badge, but it did not pass on the label itself.

[25] See Michael X. Delli Carpini & Scott Keeter, What Americans Know About Politics and Why It Matters 51 (1996) (describing the use of membership in groups as a shortcut to broader conclusions about ideology); Arthur Lupia, *Shortcuts versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 Am. Pol. Sci. Rev. 63, 72 (1994) (studying voting cues in initiative elections affecting the insurance industry).

[26] See Elizabeth Garrett, supra note 7, at 1881-87 (discussing such a reform).

First, very wealthy candidates could spend as much of their own money as they wished because Supreme Court jurisprudence has disallowed expenditure limits while upholding contribution limits.[27] The largest single contributor in the entire election was Arnold Schwarzenegger who spent over $8.8 million of his own money through his Californians for Schwarzenegger committee.[28] The theme of his successful campaign was that he would stand for the people against special interests, and, as part of that strategy, he announced he would not take money from special interests but would instead spend his own money. He is rich enough, he told voters, that he would be beholden to no one. In the end, he did accept campaign contributions from a variety of interests including real estate developers, car dealers, insurance interests, and financial institutions.[29] It turned out that his definition of "special interests" included only Indian tribes and labor unions. But he also self-financed a great portion of his campaign, demonstrating the advantages for multi-millionaires willing to spend their own money in a campaign system where contributions from others are limited but overall expenditures are not. It is not clear that Schwarzenegger needed to spend so much money in political advertising because the celebrity status that allowed him to amass wealth also ensured him virtually unlimited media attention, not only from the traditional news outlets but also from entertainment shows and the international press corps. Other millionaire candidates who spent substantial sums on their campaigns were Peter Ueberroth, a Republican running as an independent who ultimately dropped out of the race, and Garrett Gruener, a virtually unknown candidate who spent about $460 for each vote he received.[30] Thus, being a millionaire willing to spend money on a campaign is a not a sufficient condition for electoral success, but it is increasingly a necessary one given the structure of the campaign finance rules.

A second evasive tactic for candidates was to take advantage of loopholes in the rules regulating campaign finance in candidate elections. The combination of contribution

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[27] Scholarly criticism of this bifurcated judicial treatment is voluminous. For a particularly good treatment, see Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. Davis L. Rev. 663 (1997).
[28] See California Common Cause, Recall Money Watch, Top 10 Contributors, *available at* http://recallmoneywatch.com/recallwatch/detail/recalldetail.html?type=contributor&id=5306.
[29] He continues to raise substantial money from these groups since the election. See Dan Morain, *Governor Raises $1 Million Since the Election,* L.A. Times, Nov. 18, 2003, at A20.
[30] Dan Morain & Joel Rubin, *Financially, the Recall was Business as Usual*, L.A. Times, Oct. 10, 2003, at A24.

limitations and millionaire competitors led Cruz Bustamante, the Democratic Lieutenant Governor, to resort to questionable, and ultimately impermissible, tactics to evade the $21,200 cap on contributions. Unlike the new federal law,[31] the California campaign laws do not increase contribution limits for those who are running against self-financed millionaires. In fall 2003, Bustamante still had an active campaign account that had been established before the enactment of the current restrictions. He argued that the campaign finance limitations did not apply to contributions made to that account. This account took nearly $4 million from donors who exceeded the contribution limit, including $1.5 million from the Viejas Tribal Government, an Indian tribe with substantial interests in casinos.[32]

Bustamante's efforts to evade the contribution limits may be understandable given the wealth of his competitors and the shortened campaign period of the recall, but it back-fired. The Lieutenant Governor was attacked in the press and by other candidates as the tool of special interests, an argument that resonated with voters who had been turned off by Davis' similar fundraising connections to interest groups.[33] Like Bustamante, Davis is not personally wealthy, so he could compete against millionaire competitors like Bill Simon only by aggressively raising money from well-heeled interest groups. Ironically, when the populace wants to elect an "ordinary person" who appears to be independent from interest groups, current campaign laws may leave voters only with a field of extraordinarily rich people. Bustamante was successfully sued by a Republican state senator who argued that the Lieutenant Governor could not evade contribution limits by

[31] See Jennifer A. Steen, *The "Millionaires' Amendment," in* Life After Reform: When the Bipartisan Campaign Finance Act Meets Politics 159 (M.J. Malbin ed., 2003) (discussing likely consequences of federal provision). The constitutionality of this provision was not decided in the recent case upholding most provisions of BCRA. See *McConnell v. FEC*, 540 U.S. __, 72 U.S.L.W. 4052, 4054 (2003) (opinion of Rehnquist) (finding provision nonjusticiable).

[32] See Top Contributors to Bustamante 2002 Committee for Lieutenant Governor, Recall Money Watch, supra note 28, *available at* http://recallmoneywatch.com/recallwatch/detail/recalldetail.html?type=allcontributors&stype=each&id=980194.

[33] Susan Pinkus, who runs the *L.A. Times* poll, reported that Bustamante's popularity took a substantial hit after his opponents began running negative advertisements on the support by Indian tribes and the sizable contributions. For example, polls indicated that voters were evenly split after those ads on whether Bustamante had the honesty and integrity to be governor. See Comments by Susan Pinkus, Post-Mortem Conference on the Recall, University of Southern California, Nov. 13, 2003.

using an old campaign account.[34] Although by the time of the lawsuit most of the money had been spent for television advertisements and thus had already affected the election, the judicial decision prompted further negative publicity.

A third method of evasion was possible because the election for governor was held at the same time as an election on two initiatives and on the recall itself. Contributions relating to direct democracy – whether to an initiative or to the recall election – are not limited by state law. To counteract charges of inappropriate special interest influence but still get some benefit from the large contributions from tribes and labor unions, Bustamante tried to take advantage of this bifurcation. He transferred the money collected in his old campaign account, in violation of the rules applying to candidate elections, to a committee he organized to oppose Proposition 54, the "Racial Privacy Initiative." This initiative, the brainchild of anti-affirmative-action activist Ward Connerly, would have prohibited the state from gathering data which classified people by race or ethnicity. The money played a large role in defeating the initiative, a matter important both to Bustamante and his constituents, and it allowed the Lieutenant Governor to spend the money in a way designed also to help his campaign. He appeared in many of the ads, and the people who were likely to turn out to vote against Proposition 54 were also likely to vote for him. Bustamante is not the first California gubernatorial candidate to use an initiative to improve his electoral chances. Jerry Brown used an initiative on campaign finance and lobbying reform to underscore his commitment to clean government, and Pete Wilson used an initiative denying state-provided services to undocumented workers to turn out voters he hoped would also vote for him.[35]

Other candidates used committees organized to oppose or support the recall to raise unlimited amounts of money that they could use to influence both parts of the election. First, although not a candidate in the second part of the election, the target of the recall, Gray Davis raised nearly $17.5 million through his anti-recall committee Californians Against the Costly Recall of the Governor, a sum made possible by the absence of

[34] Johnson v. Bustamante, Case Number 03AS04931 (Sacramento Cal. Super. Court Sept. 22, 2003) (granting preliminary injunction). Bustamante has appealed this decision. In addition, the Fair Political Practices Commission has sued Bustamante for his use of the old campaign committee to evade contribution limits; the Commission is seeking $9 million in fines. Nancy Vogel, *Bustamante Accused of Violations*, L.A. Times, Jan. 8, 2004, at B1.

[35] See David D. Schmidt, Citizen Lawmakers: The Ballot Initiative Revolution 28 (1989); Peter Schrag, Paradise Lost: California's Experience, America's Future 225-34 (1998).

contribution limitations.[36] Thus, unlike Bustamante, Davis, a long time civil servant and man of modest economic means, was able to legally accumulate a warchest comparable to that of his rich competitor, but only because he was operating under different rules. However, the need to raise large sums of money in this campaign and in past ones, possible in many cases only by going to interests which would be vitally affected by decisions Davis made in office, led to the public dissatisfaction with Davis and fueled the recall effort. So his success in fundraising was a double-edged sword in the political realm.

The bifurcated campaign finance system also allowed candidates for governor to form separate pro-recall committees and raise unrestricted money for those efforts. For example, Schwarzenegger's Total Recall committee raised $3,467,558 that it spent largely on advertisements supporting the recall.[37] As with Bustamante's ads against Proposition 54, the Total Recall advertisements featured Schwarzenegger as spokesman. Unless a viewer noticed the fine print identifying the sponsor of the ad, she would be hard pressed to tell the difference between one funded by the Schwarzenegger campaign committee and one paid for by the Total Recall committee. Schwarzenegger continues to use the bifurcation of campaign finance laws to his advantage. Schwarzenegger is likely to implement some of his policies through voter initiative, and he will be active in raising money to fund those efforts.[38] In this fundraising, he will be unfettered by contribution limits, but it is incredibly naïve to think that Schwarzenegger will be less grateful to interests that fund ballot questions vital to his agenda (and to his reelection) than to those who contribute directly to his campaign committee.

Thus, the recall campaign presented an unusual example of the usual machinations when candidates devise strategies within a system of some limitations, many loopholes and unregulated channels of money, and different rules for different kinds of campaigns

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[36] See Top Contributors to Californians Against the Costly Recall of the Governor, Recall Money Watch, supra note 28, *available at* http://recallmoneywatch.com/recallwatch/detail/recalldetail.html?type=allcontributors&stype=each&id=1256416.

[37] Ibid.

[38] For example, on November 17 at a lunch with the California Chamber of Commerce, the new governor announced plans to use the initiative process to enact various reforms, including of the workers' compensation system. See Peter Nicholas & Joe Mathews, *Schwarzenegger Sworn In, Rescinds Car Tax Increase*, L.A. Times, Nov. 18, 2003, at A1, A18. See also infra text accompanying notes 110 through 118 (discussing use of initiatives as part of his governing strategy).

that can nonetheless be run to complement each other. Some loopholes can be closed – as occurred with Bustamante's 2002 campaign committee and might occur if campaign finance restrictions are extended to apply to recall campaigns. Others will remain; for example, Supreme Court jurisprudence suggests that fewer limitations on campaign finance are allowed in the context of initiatives than in candidate elections.[39] Thus, as long there are states with hybrid systems, candidates can use ballot questions to influence their elections and to evade some of the restrictions on candidate committees.[40] Unregulated avenues for campaign fundraising and spending are increasingly important in the wake of *McConnell v. FEC*, where the Supreme Court upheld the new federal law that cut off methods used in the past to evade contribution limitations, such as soft money raised by political parties. The recall election dramatically emphasizes the reality of campaign finance regulation: effective regulation is very difficult because wily political actors learn how to take advantage of unregulated avenues of influence.[41]

Even if reformers wanted to plug some of the holes in the regulatory system, it is not clear that contribution limits could be extended fully into a recall campaign. The incumbent governor is susceptible to *quid pro quo* corruption in the same way that any candidate for elected office is, as are candidates affiliated with recall committees. Thus, current jurisprudence might support application of contribution limitations to committees these politicians control, but it is unlikely to support comprehensive campaign finance regulation of other participants in a recall. Not all committees organized to support or oppose the recall are coordinated with candidates; some, and perhaps a good number, are legitimately focused on the recall itself without any connection to either the incumbent or a potential successor. They are more like traditional initiative campaign committees; thus, first amendment challenges to contribution restrictions are likely to succeed. Bifurcation of the rules within the recall campaign itself would be undesirable. To apply

[39] See Citizens Against Rent Control v. Berkeley, 454 U.S. 290 (1981); First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

[40] For discussion of the ability of candidates to take advantage of loopholes and unregulated avenues of spending money, see Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 Tex. L. Rev. 1705 (1999). See also *McConnell*, 540 U.S. at ___, 72 U.S.L.W. at 4052 (2003) (opinion of Stevens and O'Connor) (concluding that "[m]oney, like water, will always find an outlet").

[41] For a discussion of this pragmatic objection to campaign finance, see Elizabeth Garrett, *The William J. Brennan Lecture in Constitutional Law: The Future of Campaign Finance Reform Laws in the Courts and in Congress*, 27 O.C.U. L. Rev. 665, 672-73 (2002).

limits only to groups controlled by the target of the recall and not to many of the committees seeking his ouster seems even more inequitable than the current system in candidate elections where self-financed millionaires are at an advantage relative to those of more modest means.

One final wrinkle in campaign finance regulation was also highlighted by the California recall. Campaign fundraising strategies and the timing of expenditures are both likely to change as a result of another feature of modern elections, very much in evidence in the recall. Voting now takes place over weeks, not all on one day when voters go to the polling booth. Substantial numbers of voters use absentee ballots; in the 2002 California general election over 27% of all voters cast absentee ballots.[42] In addition, in this recall election, voters in Los Angeles County could vote on touch screen machines for several days before the official Election Day on October 7. The change in how and when people vote will be considered as candidates devise strategies and time their fundraising appeals. For example, one study since the recall has found that absentee voters made up their mind by one month before Election Day; thus, advertising, media coverage, and debates after that time did not influence about one-fourth of the voters.[43] The longer voting period also changes the effect of campaign disclosure laws, which usually apply to both candidate and issue elections.[44] If laws do not require frequent and timely disclosure reports, then information about campaign contributors may not be available when absentee voters are making their decisions. California disclosure laws are relatively aggressive and require frequent disclosure that is disseminated widely over the Internet, but California and other states must reassess their campaign finance rules in light of the extended period of voting that is increasingly commonplace.

II. Political Parties

[42] See Absentee Voting Statistics in California, Secretary of State's webpage, *available at* http://www.ss.ca.gov/elections/hist_absentee.htm.
[43] See Matt A. Barreto & Ricardo Ramirez, *Minority Participation and the California Recall: Latino, Black, and Asian Voting Trends, 1990-2000*, 36 PS __ (forthcoming 2004).
[44] See Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors: The Real Threat to Campaign Disclosure Statutes* (2003), *available as* Working Paper No. 13 in the USC/Caltech Center for the Study of Law and Politics Working Paper Series (discussing disclosure laws applying to direct democracy).

135 candidates appeared on the recall ballot in the election to succeed the governor in the event that he was recalled. So many candidates were listed on the ballot because poorly drafted statutes provided no clear rules for ballot access, and the rules chosen by the Secretary of State in the exercise of his discretion as the chief election officer posed only minor hurdles for people seeking to add "Gubernatorial Candidate" to their resumes. In the early days of recall in California, potential candidate had to obtain signatures equal to one percent of those who voted in the last election. At the time of the adoption of this constitutional provision, that requirement meant that candidates would have needed about 4,000 signatures.[45] This provision, originally in the Constitution and then placed in statute, was repealed in 1976 and replaced with directions to use "the manner prescribed for nominating a candidate to that office in a regular election."[46] However, the provision regulating ballot access for primary elections explicitly states that it does not apply to recall elections.[47]

In the face of a conflicting and badly drafted statutory scheme, the Secretary of State determined that the very permissive ballot access rules for primary elections would be used, notwithstanding the language to the contrary. Thus, candidates needed to obtain only 65 signatures and pay $3,500 or to obtain 10,000 signatures. That opened the door for the multitude of candidates, the majority of whom ran for reasons other than the hope of winning. A few were concerned with broadly publicizing particular political issues or concerns. Some, like Gary Coleman, the former child actor, Mary Carey, the current porn star, and Gallagher, the melon-wielding comedian, ran to enhance their visibility in other careers. Perhaps many ran to be able to claim at future family reunions that they once were candidates for governor.

This ballot, unusual in statewide races which typically feature two or a few more candidates for each position,[48] is noteworthy for more than the carnival aspect of dozens of candidates listing interesting professions such as "retired meat packer," "fathers' issues

[45] Comments by Fredric Woocher, Post-Mortem Conference on the Recall, University of Southern California, Nov. 14, 2003.
[46] See Section 11381 of the Calif. Elections Code. See also Burton v. Shelley, 2003 Ca. Daily Op. Service 7066 (Calif. 2003) (providing the drafting history of the ballot access provisions for recall election).
[47] See Sections 8000 and 8062 of the Elections Code.
[48] Large numbers of candidates are not unheard of in races for local elections. For example, Jerry Brown won his first elective office in 1969 (for Los Angeles Junior College Board) in a field of 133 candidates.

author," and "marijuana legalization attorney."[49] Two other features deserve mention because they are relevant for more typical elections. First, the long and unusual ballot presents a case study of the potential for voter confusion. Second, the lack of party control over access to the general election ballot had significant effects on which candidates appeared on the ballot and which were frontrunners. To take the most dramatic example: Arnold Schwarzenegger, who would probably not have survived a closed party primary, is now the governor of California.

Consider this election as a case study of unusual ballots and the potential for voter confusion. Judges dealing with challenges to strict ballot access provisions are often faced with claims by state officials that the possibility of voter confusion justifies rigorous regulation of who can get on the ballot. Defenders of access restrictions argue that voters confronted with a ballot containing many candidates for one office, or with ballot notations beyond party affiliation, will not be able to vote accurately because they will be overwhelmed. Virtually none of the judicial cases includes actual evidence of voter confusion; instead, mere assertion of this phenomenon is usually accepted as a substantial enough state interest to protect the regulation from constitutional attack.[50]

The recall ballot provides a good test of whether relatively unlimited ballot access results in confused voters. The ballot had other features that might be expected to contribute to confusion. It provided next to each candidate's name a notation of party affiliation and occupation.[51] Furthermore, candidates were listed in random order, to minimize first-order effects,[52] and the order was changed from district to district, meaning that effective voter education using sample ballots had to be different in each district. Finally, voting technology in some counties further complicated the ballot; for example, punch card ballots required seven pages to list all the candidates. Election

[49] See Sample Ballot for the Statewide Special Election, Oct. 7, 2003, disseminated by the California Secretary of State.
[50] See, e.g., Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997); Munro v. Social Workers Party, 479 U.S. 189, 195-96 (1986).
[51] See Monika L. McDermott, *Candidate Occupations and Voter Information Shortcuts* (work-in-progress, unpublished manuscript 2003) (assessing importance of information about candidate occupation as a voting cue).
[52] See Jon A. Krosnick, Joanne M. Miller & Michael P. Tichy, *An Unrecognized Need for Ballot Reform: The Effects of Candidate Name Order on Election Outcomes*, *in* Rethinking the Vote: The Politics and Prospects of American Election Reform 51 (A.N. Crigler, M.R. Just & E.J. McCaffery eds., 2003).

officials worried that voters would try to vote for one candidate per page, rather than just one in the list of 135.

Many observers predicted confusion in large part because of the ballot design but also because of the reduced numbers of polling places, some of which were relocated from past elections. There is evidence of some confusion about the nature of the race. For example, Roderick Kiewiet and Michael Alvarez, who conducted exit polls of voters, found that 6.6 percent of Davis supporters voted "yes" on the recall – a vote clearly contrary to their preferences. These voters were less educated in general than other voters, suggesting they were less likely to understand the unusual format. The study also suggests other voting mistakes occurred because the obscure candidates whose names appeared either immediately above or immediately below the names of Schwarzenegger, Bustamante, or McClintock picked up more votes than would have been predicted. Presumably most of these votes were mistakes.[53] Furthermore, subsequent studies have suggested that the use of punch card ballots did lead to significantly more undervoting than occurred in precincts using different technology.[54] The undervote was not significant enough to cast the results of the election into doubt because the recall and Schwarzenegger both won so decisively.

Notwithstanding these problems, none of which was substantial enough to affect the outcome of the election, the recall experience suggests that most voters are able to cope with some complexity in ballots. They can handle a ballot with more than two candidates for each office – and perhaps with significantly more than two candidates. Alvarez and Kiewiet's study, which focused on the choice among Davis, Schwarzenegger, Bustamante, and McClintock, supports the conclusion that voters cast their ballots in ways that were consistent with their preferences. Moreover, even though the multi-candidate ballot raised the specter of vote cycling or other irrationalities of voting, the study demonstrates that the Condorcet winner in all pair-wise contests – Schwarzenegger – won the plurality voting as well.[55] That was not an inevitable result, and Kiewiet's discussion sets out ways that an irrational result could have emerged under the recall

[53] See Presentation of D. Roderick Kiewiet, Post-Mortem Conference on the Recall, University of Southern California, Nov. 14, 2003 (from work with Michael Alvarez and forthcoming as a book).
[54] See Michael P. McDonald (2003), *California Recall Voting: Nuggets of California Gold for Voting Behavior*, The Forum: Vol. 1: No. 4, Article 6. http://www.bepress.com/forum/vol1/iss4/art6.
[55] Presentation of D. Roderick Kiewiet, supra note 53.

format, but it is a heartening result all the same. At the least, state officials relying on voter confusion to support stringent regulation of ballot access ought to be required to provide more than mere assertions in the political and judicial arenas. Courts should be more skeptical of these claims and understand that they are likely to be superficially neutral rationales offered for regulations designed to protect the two major parties and to lock out new voices.[56] The recall election should also encourage reformers to seek greater ballot access in traditional candidate elections for independent candidates and third-party candidates. If voters can handle a more complicated ballot, then much of the state's rationale for restricting ballot access has been undermined. Given the hostility of major-party officials to broader ballot access, reformers may need to turn to the initiative process to effect such changes.

Although many of the 135 candidacies were frivolous, the California recall campaign was unusual because several serious minor party and independent candidates were relatively high profile and participated in a series of statewide debates. In addition to two Republicans, Tom McClintock and Arnold Schwarzenegger, and Democrat Bustamante, independent candidates Arianna Huffington and Peter Ueberroth and Green Party candidate Peter Camejo received relatively extensive media coverage. Huffington benefited from her celebrity as an author, talk show regular, and former wife of a wealthy politician. Ueberroth had some celebrity as former baseball commissioner, and he also spent some of his own fortune to gain media attention. Camejo was able to garner sufficient support in the polls to be included in televised debates. Inclusion of minor party candidates and independents in a widely televised debate with all the major candidates is unusual in California.[57]

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[56] I have argued elsewhere that courts should decline to become involved in many of these cases, regardless of the state interest. See Elizabeth Garrett, *Is the Party Over? Courts and the Political Process*, 2002 Sup. Ct. Rev. 95 (2003). However, if they do not adopt a policy of restraint, courts should be less willing to accept without proof empirical claims of state actors. See also Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 Stan. L. Rev. 643 (1998) (describing some ballot access rules as partisan lockups).

[57] See Lee Romney, *Green Party's Man is Tickled Pink Over Debate*, L.A. Times, Sept. 5, 2003, at A26 (noting this was the first time the Green Party candidate – or any third party candidate – had participated in a widely televised gubernatorial debate). See also George Skelton, *Refreshing Gubernatorial Debate Is a Break from Usual Hot Air,* L.A. Times, Sept. 19, 2002, at A8 (noting that non-televised debate in 2002 election which included Camejo did not include Davis and garnered an audience of 100 and five TV news crews).

The debate that included all six candidates did not support the notion that multi-candidate debates are appreciably more confusing or chaotic than debates with only the two major candidates.[58] Just as Ross Perot's inclusion in the 1992 presidential debates focused attention on issues that the major party candidates hoped to avoid, such as the federal budget deficit, the participation of candidates other than the two leading contenders in gubernatorial debate altered the topics covered and the arguments made. For example, Huffington, although generally clownish and extreme, challenged Bustamante on the contributions to his campaign by Indian tribes in a way that raised the salience of the issue. Camejo and McClintock presented the most detailed substantive proposals of all the candidates, providing voters a range of policies to consider and providing a sharp contrast to the virtually policy-free presentation of Schwarzenegger. The debate was not a model of rational argumentation, of course, but it was no worse than many less crowded ones, and any absurdities could be attributed as often to the major candidates as to the minor party and independent candidates. Many Californians indicated that the televised debate in which Schwarzenegger, Bustamante, McClintock, Camejo, and Huffington participated was valuable in making up their minds at the polls.[59]

None of the independents nor the Green Party candidate had a chance of winning, but this is not the role of minor parties in the American political system. As Justice Thurgood Marshall observed in *Munro v. Socialist Workers Party*, "The minor party's often unconventional positions broaden political debate, expand the range of issues with which the electorate is concerned, and influence the positions of the majority, in some instances ultimately becoming majority positions."[60] To play this role in public debate, however, minor parties and independent candidates need press coverage. In this election, celebrity ensured media attention for some candidates like Huffington. But for others, like Camejo, the ability to qualify for ballot access relatively easily and inclusion in

[58] See Arkansas Educational Television Commission v Forbes, 523 U.S. 666 (1998) (accepting similar arguments to allow a state actor to limit political debates to two major candidates). See also Jamin B. Raskin, *The Debate Gerrymander*, 77 Tex. L. Rev. 1943 (1999) (critiquing *Forbes*).
[59] See Richard L. Hasen, *Learning from the California Recall Experience*, Findlaw commentary, Oct. 13, 2003.
[60] 479 U.S. at 200.

widely-televised debates allowed them to put forward new ideas and to challenge the traditional positions of the major party candidates.

Even though vast confusion did not result, California statutes should be amended to establish a clear process for access to the second part of the recall ballot. A not-insignificant number of signatures should be required, although the threshold must be realistic in the context of a condensed campaign period. The old constitutional standard – 1 percent of those who voted in the last election – would now require more than 75,000 signatures,[61] too onerous for candidates who would need to qualify quickly. Half that number of signatures would be a more reasonable threshold to discourage frivolous candidacies but still allow the possibility of access for serious minor party and independent candidates.

Some reformers have suggested eliminating the election for a successor and allowing the Lieutenant Governor to take over if the governor is recalled.[62] This reform is problematic and, not surprisingly, is often supported by those generally hostile to direct democracy. Because the Governor and Lieutenant Governor are elected separately in California and can be from different parties, such a reform could encourage the Lieutenant Governor's party to mount a recall drive and might erode any possibility of cooperation between the two. When the two top officers are from the same party, the voter disgust that leads to a recall is likely to be targeted at the administration, and the recall should provide an opportunity to begin governing with a clean slate. Moreover, if the recall stems from popular belief that the incumbent leaders are too attentive to powerful economic or other special interests, voters may want the opportunity to elect an outsider, as they did in this election. For these reasons, most states that allow gubernatorial recalls also provide for an election of a successor, not the automatic elevation of the second-in-command. On the other hand, the independence of the elections of the two top state officers and the possibility that they will be from different parties might support a reform that allows the Lieutenant Governor to move up after a successful recall. Her administration is more likely to be break from the past, which is

[61] See Secretary of State, Statement of Vote, 2002 General Election, *available at* http://www.ss.ca.gov/elections/sov/2002_general/reg.pdf.
[62] See, e.g., Mark Ridley-Thomas & Erwin Chemerinsky, *Now that It's Finally Over, Let's Revamp the Recall*, L.A. Times, Oct. 29, 2003, at B15.

the point of a recall. On balance, however, this proposal has more drawbacks than promise, in my view.

In addition to clarifying the ballot access provisions, consideration should be given to adopting some sort of run-off system to ensure that a successor is not elected with a very small plurality – perhaps with fewer votes than those voting against the recall. That possibility, which did not occur in 2003 because Schwarzenegger's popularity provided him a substantial victory and more votes than the "no" votes on the recall, could undermine the legitimacy of the successor's administration. Even though a "no" vote on recall is not the equivalent of a vote for the incumbent – after all, some who vote no may just be opposed to a recall without having much enthusiasm for the current occupant of the office – it could be difficult for a newcomer to govern after a narrow plurality win. Some commentators have suggested that an instant run-off process could allow a decision to be made with one election.[63] Alternatively, a traditional run-off held shortly after the recall election would not be terribly disrupting because the recalled governor would remain in office in the interim. As the California experience demonstrates, the state continues to function without serious problems during the lame duck period.

Some attention must be paid, however, to the need to resolve the recall and return to normal governance relatively quickly. Accordingly, a proposed reform to elect the successor to the recalled official in a separate election[64] held some time after the recall is problematic because it lengthens any intermediate period when either a recalled governor remains in power or a Lieutenant Governor runs a caretaker administration, while likely also running for the top position permanently. The period between a recall and successor election would necessarily be longer to allow a full campaign than the period between a combined election and any necessary run-off. The proposal to separate the two decisions is also unattractive because a voter's decision whether to recall the governor is

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[63] See, e.g., Vikram David Amar, *Governor Davis's Claim to Run as His Own Successor is Meritless, But the Fear of a "Fringe" Winner is Serious: How the Risk Can be Eliminated in the Future*, Findlaw.com column, Aug. 8, 2003, *available at* http://writ.news.findlaw.com/amar/20030808.html.

[64] For example, three of four panelists on legal and constitutional changes in the wake of the recall favored such a reform. See Comments by M. Dane Waters, Pamela Karlan and Fredric Woocher, Post-Mortem Conference on the Recall, University of Southern California, Nov. 14, 2003. Eight states with the recall have a second election to replace any recalled official, whereas six hold simultaneous elections. See National Conference of State Legislators, Recall of State Officials, Table 2 (Aug. 13, 2003), *available at* http://www.ncsl.org./programs/legman/elect/recallprovision.htm.

necessarily dependent on who is likely to succeed the incumbent. Structuring a process so that voters cannot be sure who will be running to replace the recalled official denies voters important information when they make the initial decision on the recall.

My preference is for a simultaneous election of a successor at the time of the recall vote, with serious consideration given to an instant run-off to resolve any close plurality vote quickly. Moreover, although states differ on this issue, it seems sensible to prohibit the incumbent target of the recall from running to succeed himself; after all, if he is recalled, he has received a resounding vote of no confidence. Disallowing his candidacy in the successor election may mean that a recalled official in the last term of a term-limited office may never be able to run for that office again. In California, for example, the constitutional term limitation would preclude Gray Davis from running again for governor because if he won, he would serve more than two terms – in this case about a year more than two terms.[65] In offices not subject to term limits, a recalled official should be able to run in elections after the replacement election and to convince voters that he has learned from his mistakes or that they were wrong to throw him out.

The recall election was notable for more than the sheer number of candidates; the structure, which dispensed with party primaries and allowed candidates direct access to the general election ballot, meant that voters could choose among different kinds of candidates. In traditional elections, Californians nominate party candidates for the general election through partially closed party primaries; only registered party members and independents are allowed to vote. Access to the primary ballot is relatively easy and not controlled by the party, which may endorse one of the candidates but cannot block access. However, the semi-closed primary format means that motivated party activists who tend to vote disproportionately in such elections exert substantial influence over who appears on the general election ballot. A candidate like Schwarzenegger would have faced significant hurdles to winning the party primary because committed Republican activists find many of his positions on social issues distasteful and doubt his commitment to fiscal conservatism. Schwarzenegger ran as a relatively moderate candidate, publicly relying on a bipartisan group of advisers and underscoring his relatively liberal positions

[65] See Schweisinger v. Jones, 68 Cal. App. 4th 1320, 81 Cal. Rptr. 2d 183 (Cal. Ct. App. 1998) (so ruling in the case of a state legislator recalled in her last term who attempted to run for another full term).

on abortion and gay rights, while also seeking to establish his anti-tax credentials. A candidate with similar policy positions, although with substantially more political experience, Richard Riordan was defeated in the 2002 Republican primary by a much more conservative Bill Simon. Although candidates like Simon may move slightly to the center in the final campaign, their public positions during the primary undermine the credibility of those moves.

Disappointed with their choices in general elections, a majority of voters in California adopted a blanket primary system in 1996. A blanket primary format, in which voters can vote in different party primaries for different offices, is likely to result in the election of candidates who appeal more to the median voter than to activists. Blanket primaries are moderating devices designed to move political parties closer to the center. In the words of the California ballot pamphlet, blanket primaries are intended to "weaken" party "hard-liners" and empower "moderate problem-solvers."[66] In *California Democratic Party v. Jones,* the Supreme Court struck down the blanket primary law on the ground that it impermissibly infringed on the First Amendment rights of party members. This opinion has led to the invalidation of blanket primary systems in Washington and Alaska,[67] states where the blanket primary had long been used and, at least in the case of Washington, had not significantly weakened political parties.[68]

California Democratic Party v. Jones prohibits the people or legislatures from imposing blanket primaries on political parties; it does not prohibit the parties themselves from adopting different primary systems. In the wake of the *California Democratic Party*, the major parties in California opened their party primaries to independents, although they did not go so far as to allow open primaries. To be responsive to voters' preferences demonstrated by this recall and the enactment of the blanket primary, party leaders should restructure their primary rules so that they shift power to the median voter and away from the party activist. Parties would not be helpless under such a system. Through endorsements, recruitment efforts, campaign spending and assistance, parties

[66] California Democratic Party v. Jones, 530 U.S. 567, 570 (2000).
[67] See O'Callaghan v Kowalski, 6 P. 3d 728 (Alaska 2000); Democratic Party of Washington State v. Reed, 343 F.3d 1198 (2003) (striking down Washington blanket primary). I have criticized the Court's decision in *California Democratic Party v. Jones* in Elizabeth Garrett, supra note 56, at 126-30.
[68] See Richard L. Hasen, *Do the Parties or the People Own the Electoral Process?*, 149 U. Pa. L. Rev. 815, 834 (2001).

can influence the outcomes of more open primaries. Perhaps party organizations will be more willing to consider this course of action now than they have been in the past. The recall campaign demonstrated that party leaders are willing to be pragmatic and put aside ideological purity for a real chance at victory when they are forced to by a different election format. When it became apparent that Schwarzenegger had survived the only public debate in which he participated, party leadership began to endorse him and encourage even the staunchest party activists to vote for a likely winner rather than the more conservative McClintock. And many activists did so.

Political parties cannot afford to ignore the dissatisfaction of voters with the choices that emerge from current structure of primary elections. Currently an effort is underway in California to qualify a new initiative which would require that all elections be nonpartisan,[69] an option that the Court in *California Democratic Party* left open as a constitutionally permissible reform.[70] At least in cities and states with direct democracy, political parties that continue on the current path may find that very unpalatable system imposed on them. If the parties are not willing to move to more open primaries, beyond the decision to allow independents to participate, leaders should consider throwing their support behind more centrist candidates in the primaries so that they are in a stronger position to win the general election.

This is only one of the various messages of the recall election with broader application to California and the nation. The strong anti-incumbent tone in exit interviews with voters, as well as surprising voting behavior by certain ethnic and other demographic groups, will no doubt provide strategists food for thought as they look toward the 2004 presidential election and the next statewide election in California. For example, women and Hispanic voters supported the recall and Schwarzenegger in much larger numbers than had been predicted. The lukewarm support Hispanic voters provided

[69] The California Chamber of Commerce announced that it would seek to qualify an initiative for the 2004 ballot implementing a nonpartisan primary. The Chamber proposes listing the party affiliation of the candidates on the primary ballot, and the two top vote getters would run in the runoff election, even if they were from the same party. Dan Morain, *Bid Launched to Bring Back Open Primary,* LA Times, Nov. 13, 2002, at B6. See also Richard J. Riordan, *Set the Voters Free*, N.Y. Times, Oct. 31, 2003, at A23 (advocating in favor of nonpartisan elections in New York City and California).

[70] See *California Democratic Party*, 530 U.S. at 585-86.

a Hispanic Democratic candidate was a surprise, and one that both major parties will assess in future months.[71]

III. Lawsuits as Political Weapons

The short campaign period was nonetheless long enough for more than fifteen lawsuits to be filed in federal and state courts.[72] Had the election been closer, more lawsuits would have been filed in its aftermath. Election-related lawsuits are not a new phenomenon,[73] particularly in the context of direct democracy where federal and state courts have invalidated initiatives or ruled that they cannot appear on the ballot. However, the litigation in the California recall seems quantitatively and qualitatively different from what we have witnessed before. Moreover, the amount of media attention focused on the lawsuits appears greater, transforming litigation into a method to make issues salient for journalists and voters. These two changes feed on each other as the media attention encourages more filings and as more filings catch the attention of journalists. Some of the recall cases were entirely driven by political considerations, such as the early lawsuit[74] attacking the qualifications of the petition circulators mostly on grounds rejected by clear Supreme Court precedent. The main purpose of the lawsuit was not to succeed in court, but rather to frame the recall effort as controlled by out-of-state wealthy interests and thus not a true California grassroots movement. Because the media is now particularly focused in election-related lawsuits after *Bush v. Gore*, a court battle was an effective way to make the nature of the petition drive salient for potential voters.

A puzzle generally in politics is why a particular process that has been available to strategic actors in the past suddenly becomes a more important tool in their arsenal. For

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[71] See Matt A. Barreto & Ricardo Ramirez, supra note 43. See also *The Recall Election: Times' Exit Poll Results*, L.A. Times, Oct. 9, 2003, at A26.

[72] See Litigation Update 10/17/2003, prepared by Karen Getman for the Gubernatorial Recall Process Forum held at USC, Oct. 21, 2003.

[73] Samuel Issacharoff, Pamela S. Karlan & Richard H. Pildes, When Elections Go Bad: The Law of Democracy and the Presidential Election of 2000 (rev. ed. 2001) (providing analysis and discussion of such cases as well as the lawsuits surrounding the 2000 presidential election).

[74] Robins v. Shelley, case number BC299066, filed in L.A. Superior Court July14, 2003 (dismissed after became moot).

example, initiatives were used extensively in the early part of the twentieth century, and then fell into disuse, only to re-emerge as a potent political force after the success of Proposition 13 in 1978.[75] In part, the rejuvenation of direct democracy occurred because a political entrepreneur "discovered" the potential of the largely moribund process, and his success inspired others to follow his lead, spawning an industry that fostered further use of initiatives.[76] The catalyst for the aggressive use of lawsuits as a political strategy in the recall election was the litigation surrounding the 2000 presidential election, which successfully aborted the political process and ensured a Bush victory.

Even without *Bush v. Gore,* some litigation probably would have occurred during or after the recall campaign for several reasons: the unusual nature of a statewide recall election, the shortened campaign period and its interaction with a planned change in voting technology effective March 2004, and problems inherent in poorly-drafted and little-used election laws. However, *Bush v. Gore* also played a vital role. Justice Ginsburg's prediction that *Bush v. Gore* was a "one of a kind case"[77] was premature (or perhaps wishful thinking). Although the Supreme Court may never cite it as "precedent … on anything,"[78] as Ginsburg forecast, the case taught political strategists that the courts are yet another battleground in a campaign. That lesson was extended in the recall as strategists demonstrated that the judicial fight need not wait until after votes have been cast. Indeed, recourse to the courts may serve its political purposes best if a lawsuit is brought during the campaign when it can affect voter turnout and how votes are cast.

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[75] See David B. Magleby, Direct Legislation: Voting on Ballot Propositions in the United States 5-6 (1984) (discussing rise and fall and second rise of initiatives); Daniel A. Smith, Tax Crusaders and the Politics of Direct Democracy 42-84 (1998) (discussing role of Proposition 13 in rejuvenating direct democracy).

[76] A similar "discovery" led to the importance of soft money in federal campaigns. This election law loophole was not new when it was used in unprecedented ways first by Democrats in 1996. See Anthony Corrado, Thomas E. Mann, Daniel R. Ortiz, Trevor Potter & Frank J. Sorauf, Campaign Finance Reform: A Sourcebook 167-68 (1997); Diana Dwyre & Robin Kolodny, *National Parties After BCRA*, *in* Life After Reform: When the Bipartisan Campaign Act Meets Politics 83, 89-90 (M.J. Malbin ed., 2003). This loophole has apparently been closed by the BCRA, and the Supreme Court upheld these provisions in *McConnell v. FEC*.

[77] See Charles Lane, *One More Round for Bush v. Gore*, Wash. Post, Sept. 16, 2003, at A1 (reporting comments of Justice Ginsburg at law school in San Diego).

[78] Other courts, however, likely will use it as precedent. See, e.g., Black g. McGuffage, 209 F. Supp. 2d 889, 899 (N.D. Ill. 2002) (applying *Bush v. Gore* in opinion denying motion to dismiss lawsuit challenging punch card voting machines as violating equal protection). And a panel of the Ninth Circuit would have delayed the recall election using *Bush v. Gore* as precedent had the decision not have been overruled by the en banc panel. See Southwest Voter Registration Education Project v. Shelley, 344 F. 3d 882 (9th Cir. 2003) (vacated by an en banc hearing order); Southwest Voter Registration Education Project v. Shelley, 344 F. 3d 914 (9th Cir. 2003) (en banc).

Although plaintiffs challenging aspects of the petition drive, campaign or election were successful in only one of the cases,[79] the many other lawsuits affected the recall in significant ways. The most potentially disruptive lawsuit, the challenge to the punch card voting machines used in the most populous counties in the state, occurred at the end of the period to register to vote and at a time many absentee ballots were being cast. The three-judge panel rendered an opinion a week before the deadline for voter registration; had this opinion gone into effect, the election would have been delayed, perhaps until March. The en banc panel did not reverse the decision until the day after the deadline for registration had passed. Some who might have registered to vote may have been discouraged from doing so because they thought the election had been postponed. Although registration for the recall was substantial, the uncertainty caused by the litigation likely deterred some people until after the deadline had passed.

Lowenstein has argued that the opinion, even though superseded, caused other mischief, including disrupting candidates' fundraising and other strategic planning and diverting voters' attention away from the election.[80] These harms are overstated in this case. The period between the opinion of the three judges and the reversal by the en banc court was brief, so candidates probably did not change their strategies substantially or find their fundraising abilities impaired. Certainly, their campaigns would have been significantly disrupted had the election been postponed; fundraising and money-spending plans had been determined in light of the condensed campaign period. The fear that voters were sidetracked by the coverage of the lawsuit is also not entirely convincing. The media attention on the opinions and the televised oral argument before the en banc court may well have heightened voter interest in the recall rather than diverted it.

Nonetheless, Lowenstein's larger point is valid. Had the election been postponed, election officials would have faced serious problems. With widespread use of absentee voting in California, hundreds of thousands of ballots had already been submitted. In modern elections, the actual process of voting now takes place over many days –

[79] See Portney v. Shelley, No. 03CV1460 BTM (JFS) (United States District Court, Southern District of California 2003) (ruling that voters could vote in the election for governor even if they did not vote on the recall itself and holding statute that required a vote in the recall as a condition to vote for a successor unconstitutional).

[80] Daniel H. Lowenstein (2003): *An Irresponsible Intrusion*, The Forum: Vol. 1: No. 4, Article 4. http://www.bepress.com/forum/vol1/iss4/art4.

sometimes weeks – so developments in the last days of a campaign implicate the voting process itself. The Los Angeles County Registrar informed the en banc panel that she did not believe the unusual recall ballot could be accommodated in the March election which was scheduled to serve as a test of a new voting technology, the Inka-Vote system.[81] Not only is new technology prone to unexpected "bugs" when it is first implemented, but the Inka-Vote system has a limited capacity. The recall plus the regularly scheduled presidential primary would have resulted in a ballot too long for the system.

Perhaps dealing with such logistical challenges is warranted in a very few cases where an election is plagued by serious constitutional infirmities that cannot be remedied after the election. Cases brought under Section 5 of the Voting Rights Act, which have occasionally delayed elections, are examples of such cases.[82] Those who advocate judicial intervention tend to raise appalling hypotheticals where the state action described would egregiously deprive many voters of their right to cast a ballot that will be counted. Such a parade of horribles is a neat advocate's trick, but it is far removed from the reality of modern elections. The trend since *Bush v. Gore* is for political actors to use litigation as merely another tool to change the rules once the game has started by demanding something near to perfection from elections and those who run them. In these cases, lawsuits are brought opportunistically to force changes by judges who often do not have good information about the implications of any decision in the larger context of the election. For example, the three-judge panel did not have information about the logistical difficulties of a March election when it rendered its decision; instead, the arguments were presented in a letter from the Los Angeles County Registrar to the en banc panel. The price of judicial involvement is uncertainty and the specter of unfairness as political battles are fought in the courts.

One way to combat this new and more aggressive use of litigation as a political tool would be for the courts to refuse to entertain such suits in all but the most extreme cases. Although filing the suits would still result in some publicity and help frame political issues in ways that would help particular candidates, media and public attention would

[81] See Declaration of Conny B. McCormack filed in *Southwest Voter Registration Education Project v. Shelley*, Sept. 17, 2003, *available at* http://news.findlaw.com/hdocs/elections/svrepvshlly91703ami.la.pdf.
[82] Several Section 5 cases were brought during the recall campaign, but they were dismissed after the Department of Justice cleared the changes in procedures.

wane if courts backed out of the political realm and refused to follow the Supreme Court's example in the 2000 election.[83] Unfortunately, many judges do not seem eager to exit from the political thicket, although it is noteworthy that only one of the plethora of recall cases succeeded in court (with some of the Section 5 cases resulting in Department of Justice action). Perhaps reiteration of the strong presumption that courts should not intervene in elections before the actual vote, but rather should wait to see if challenges are lodged after the election, would reverse the post-*Bush v. Gore* developments.[84] Some firm statement by courts is necessary to convince political actors not to resort to lawsuits when it serves their political interests. As long as there is a possibility of success, together with spillover benefits such as publicity and framing, politicians are unlikely to be deterred from filing suit and injecting at least some element of uncertainty into the political sphere. Just as politicians have continued to file suits on internal congressional matters and interbranch disputes even though the D.C. Circuit used an equitable doctrine to avoid the merits of many of these cases and now the Supreme Court has limited congressional standing,[85] candidates will use lawsuits as long as there is a chance of a political and media upside and very little downside. But an inhospitable judicial doctrine would surely deter some of these cases, and the press will not be as interested in clear losers.

Other solutions that do not depend on the judiciary's commitment to the passive virtues might offer more promise of reducing the number of election-related lawsuits. Often elections that are plagued by judicial challenges result in sweeping election law reform,[86] and California should immediately embark on a project to clean up and modify its rules concerning recalls. Constitutional changes are difficult, so, for example, changing the threshold of signatures required to qualify a recall for the ballot may not be easily achieved. However, the legislature has the power to amend the election laws, and

[83] I have argued that court involvement in political party cases generally should be very minimal, and the factors that militated in favor of judicial restraint there also apply in many of the campaign and election lawsuits. See Elizabeth Garrett, supra note 56.
[84] See Daniel H. Lowenstein, supra note 80 (supporting this presumption and arguing that "[i]n our republic, political controversies should be resolved through politics, not law suits").
[85] See William N. Eskridge, Philip P. Frickey & Elizabeth Garrett, Cases and Materials on Legislation: Statutes and the Creation of Public Policy 446-49 (3d ed. 2001) (discussing cases).
[86] See Bruce E. Cain, *Flaws Everywhere: A Review of a Badly Flawed Election*, 2 Elect. L.J. 525, 526 (2003) (discussing such state and federal reform efforts after the 2000 presidential mess).

it should begin to address issues raised by the many lawsuits.[87] The legislature should consider whether it is appropriate to place on the recall ballot any initiatives that have qualified and are awaiting a vote. The en banc panel suggested strongly that the shortened recall campaign period was not conducive to thoughtful consideration of other ballot questions and that state lawmakers should consider excluding other ballot questions from the recall election.[88] The laws governing statewide recall elections must be rewritten to eliminate problems like the failure to provide workable ballot access regulations. The campaign period should be reassessed and perhaps extended slightly to account for the logistics of holding a statewide election with tens of thousands of polling places. Other issues could have given rise to litigation but thankfully did not; they should nevertheless be addressed. Thought should be given to what would happen if the governor had resigned before the election but after the petitions had been verified by the Secretary of State.[89] Some registrars permitted overseas absentee ballots to be faxed, which raised a question of whether faxed ballots violate the requirement of a secret ballot.[90]

As reforms are debated, drafters must work to avoid adopting changes that actually increase the opportunity for judicial involvement in the political realm. One proposal that has been discussed would amend the constitutional recall provisions to set forth only certain grounds that could support a recall. Currently, the Constitution requires groups seeking a recall to provide reasons and to include those reasons on the petitions that they circulate.[91] The explanation for the recall is also provided to voters in the Official Voter Information Guide. Unlike impeachment,[92] the state's recall provisions do not specify particular grounds that may sustain a recall. In my view, that constitutional silence is

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[87] See Vikram David Amar, *Adventures in Direct Democracy: Constitutional Lessons from the California Recall Experience*, __ Cal. L. Rev. __ [8-9] (forthcoming 2004) (listing various problems in the California election laws relating to recalls), *available as* USC-Caltech Center for the Study of Law and Politics Working Paper No. 21, http://lawweb.usc.edu/cslp/pages/papers.html.

[88] Southwest Voter Registration Education Project v. Shelley, 344 F. 3d at 914, 919 (9th Cir. 2003) (en banc).

[89] See Nathan C. Masters, *Davis Resignation Scenario Murky, Experts Say*, Cybercast News Service, Aug. 13, 2003. See also Remarks by Fredric Woocher, Post-Mortem Conference on the Recall, University of Southern California, Nov. 14, 2003.

[90] See Sandy Kleffman & Dogen Hannah, *Legality of Faxing Ballots Adds to Confusion*, Contra Costa Times, Sept. 12, 2003, at A23.

[91] Calif. Const., Art. 2, section 14(a).

[92] See Calif. Const., Art. 4, section 18(b) (allowing impeachment of state elected officials for "misconduct in office" and referring to the possibility in some cases also of criminal punishment).

appropriate. Recall is aimed at removing officials who have acted "corruptly" in the sense that they are no longer representing the people but are serving the interests of a powerful minority. This kind of "corruption" is very difficult to define or specify; it is something more ineffable than bribery or outright conflict of interest. It is the kind of concern that motivates campaign finance reform efforts, lobbying reform and other "good government" initiatives. The protection against the inappropriate use of recall is not through additional substantive standards that attempt to define something that is context-specific and hard to delineate precisely. The protection should be procedural. This is the same sort of protection provided by the federal Constitution in the case of expelling a member of Congress. The Constitution provides no substantive criteria for the legislature, but protects against misuse through supermajority voting requirements. Accordingly, constitutional reform of recall should target the signature threshold, but with the objectives of direct democracy in mind, and other procedural hurdles that are designed to ensure there is widespread dissatisfaction with an official before she is recalled.

If drafters disagree, however, and decide to include substantive grounds that are the sole grounds for a recall,[93] they should be careful not to invite judicial meddling in the process. To be consistent with the purpose behind the recall device, the criteria must include some notion of corruption or over-compliance with the wishes of powerful minority interests. To limit recall to the misconduct in office amounting to or close to criminal behavior, the grounds that usually support impeachment, would unduly constrain the recall mechanism. Use of vague standards like "corruption," however, will invite judicial second-guessing, and any intervention is likely to be hostile toward recall efforts generally because judges are wary of direct democracy and of unusual political arrangements that seem chaotic or dangerous.[94] Vikram Amar has proposed that the Constitution specify the permissible bases for a recall because this reform "might make some would-be signers a bit more thoughtful," but he is careful to propose that the

[93] Seven states that allow recall of statewide offices specify particular grounds. See National Conference of State Legislators, Recall of State Officials, supra note 64 (providing list of states and reasons).
[94] See generally Richard H. Pildes, *Democracy and Disorder*, in The Vote: Bush, Gore and the Supreme Court 140 (C.R. Sunstein & R.A. Epstein eds., 2001) (discussing judicial distaste for unusual and more open political arrangements and institutions).

adequacy of the reasons given in a particular petition drive should be unreviewable by either the Secretary of State or the courts.[95]

Bush v. Gore did not invent election-related litigation. Close and contentious elections have spawned litigation in the past, although more frequently lawsuits are brought after the election, rather than before. But the Supreme Court's unwise intervention into the 2000 presidential election legitimated a more activist judiciary in this arena. It demonstrated that judges could essentially decide an election without much harm to their reputation, and it taught wily political strategists a new trick. Not surprisingly, political actors are now pushing the boundaries, moving litigation earlier into the election process. It may be difficult to put this genie back in the bottle, as long as there are at least some judges willing to entertain the cases and as long as it garners media attention.

IV. The Interplay between Representative Democracy and Direct Democracy

The recall forcefully underscores the interaction between representative democracy and direct democracy. A recall is essentially a popular vote of no confidence in a public official that precipitates an electoral evaluation before the regularly scheduled vote. Cronin concludes his analysis of recall by labeling it "a helpful yet crude safety valve at the state and community levels."[96] Critics of the California recall decried it as undemocratic because it undermined an element of representative democracy, namely, regularly scheduled elections which allow for political accountability at regular periods but do not introduce the specter that one unpopular decision will result in backlash that can oust an official before the end of her term. Although this feature of representative democracy may have some advantages, it is not a necessary part of democratic institutions. Parliaments can be dissolved unexpectedly upon a vote of no confidence, for example. In California and some other states, constitutions set up a hybrid democratic system that has elements of representative democracy and elements of direct democracy. Critics may argue that California has the balance wrong – with too much popular

[95] Vikram David Amar, supra note 87, at [7]. Currently, the sufficiency of the reasons provided by recall supporters is unreviewable. Calif. Const. Art. 2, section 14(a).
[96] Thomas E. Cronin, supra note 3, at 156.

involvement and not enough leeway for representatives – but the elements of direct democracy are not "undemocratic."[97] Rather than attacking problems by mislabeling them, commentators would do better to devise reforms to ensure that California's hybrid system leads to better governance. A hybrid system appropriately includes the possibility of recall as one way for voters to reduce the principal-agent slack that inevitably develops between voters and representatives, particularly when the latter are not term-limited.[98]

This recall election underscored the relationship between the two parts of the state's hybrid system in several more subtle ways than the fact that the recall is a popular device to remove a representative. First, the recall was possible in part because turnout for the 2002 gubernatorial election was so small that the threshold for ballot qualification was unusually low. Remember that the trigger for ballot access is tied to a percentage of those voting in the last election for the office. Thus, the public's lack of enthusiasm for the lackluster candidates in the previous regular election – Gray Davis and Bill Simon – resulted in a low turnout, which in turn made all tools of direct democracy easier to wield. Ironically, part of Gray Davis' strategy in the 2002 election was to depress voter turnout, setting the stage for his unprecedented ouster. Not only are initiatives and recalls formally less difficult to use when voter dissatisfaction yields low turnout, but voter disgust with politicians encourages groups seeking change to bypass the traditional legislative process.

Second, many have argued that the budget problems faced by California are caused in part by the frequent use of initiatives to commit budgetary resources to particular projects. The concern with the influence of initiatives on budget resources is that when lawmakers begin work on the state's annual budget, they find a tremendous amount of revenue has already been committed to particular projects and is not available for uses determined appropriate by lawmakers. For example, Proposition 98 passed in 1988 mandates that funding for education from kindergarten through community college at least equal the previous year's spending, adjusted for inflation and population growth. It also commits the state to spending half of any budget surplus on education, which then

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[97] Cf. Dan M. Kahan, *Democracy Schmemocracy*, 20 Cardozo L. Rev. 795 (1999) (arguing that "democracy" has many different meanings and can be realized through different institutions).

[98] For a discussion of term limits and legislator incentives, see Linda Cohen & Matthew Spitzer, *Term Limits*, 80 Geo. L.J. 477 (1992); Elizabeth Garrett, *Term Limitations and the Myth of the Citizen-Legislator*, 81 Cornell L. Rev. 623 (1996).

goes into the base for computing next year's financial commitment. Under Proposition 98's terms, currently about $30 billion of the state's budget must be spent on education from kindergarten through community college. Other propositions may indirectly claim a share of the state's resources. Proposition 184, the nation's toughest three strikes law, would seem to require significant resources for prison construction and maintenance. When it was on the ballot, the Legislative Analyst estimated that Proposition 184 could cost the state up to $3 billion annually in the short term and $6 billion annually over the long term, plus $20 billion in increased prison construction costs.[99]

The total amount of the budget earmarked each year by initiatives has become the subject of debate in California and elsewhere.[100] Laura Tyson wrote that 70 percent of the state's budget has been earmarked by initiatives; she provided no support for the figure she asserted.[101] A new study by John Matsusaka attempts to systemically test the claims that the initiative process has effectively removed substantial portions of the state's budget from the control of legislative policymakers. He found that 32 percent – not 70 percent – of the state's total 2003-04 budget of $101 billion was earmarked by initiatives, and most of that money was committed to education by Proposition 98.[102] He also discovered that some initiatives expected to cost the state significant money, such as the three-strikes law, have not yet affected the state's bottom line.[103] Not only is the amount of "budget paralysis" caused by direct democracy overstated by Tyson and

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[99] See Official Title and Summary for Proposition 184, Prepared by the Attorney General (1994), *available at* http://holmes.uchastings.edu/cgi-bin/starfinder/8565/calprop.txt (providing summary of legislative analyst's estimate of net fiscal impact). RAND estimated that the three-strikes law would cost between $4.5 and 6.5 billion annually. See RAND Research Brief, California'a New Three-Strikes Law: Benefits, Costs, and Alternatives (1994), *available at* http://www.rand.org/publications/RB/RB4009/RB4009.word.html.

[100] For example, in recent hearings about the rules governing initiatives in Florida, one lawmaker warned against the "Californification of Florida" and stated that California's budget deficit was largely caused by initiatives. See Bill Cotterell, *Petition Process Going Awry?*, Tallahassee Dem., Dec. 9, 2003.

[101] Laura D'Andrea Tyson, *A New Governor Won't Fix What Ails California*, Bus. Week, Sept. 22, 2003, at 24.

[102] See John Matsusaka, Have Voter Initiatives Paralyzed the California Budget?, USC-Caltech Center for the Study of Law and Politics Working Paper No. 23 (Nov. 2003) (study of all initiatives approved since 1912). Legislative measures put on the ballot may exacerbate the problem. For example, a proposition passed in 2002 required that some gasoline taxes be used only for transportation. Although the people are involved in passing such initiatives, they are put before the people by the legislature; accordingly, any blame for these enactments should be shared by the legislators and voters. Matsusaka reviewed legislative initiatives passed since 1990 and preliminarily found that bond issues, the most important of these ballot questions, earmark about $2.4 billion for debt service. See John Matsusaka, supra note 102, at 7-8.

[103] See John Matsusaka, supra note 102, at 10 (description of costs of Prop. 184, noting that RAND revised its estimates after some experience with the three-strikes law).

others, according to Matsusaka, but it seems likely that the state would spend money in ways mandated by initiatives even without the voter directive. Californians voted for Proposition 98 because they value education and want that to be reflected in the state's budget priorities; representatives are likely to spend a considerable portion of the state's revenues on education with or without Proposition 98. Of course, they might not have allocated about 30 percent of the budget to kindergarten through community college programs, and in cases of fiscal crisis, they might have been forced to make some reductions in those programs not allowed by Proposition 98's terms. This new study casts doubt on the claim that direct democracy has played the major role in budgetary crises, at least to the extent that the claim is based on earmarking. Matsusaka is clearly correct that the budget crisis is more a political crisis than the product of direct democracy:[104] that is, elected officials do not want to face the hard choices of cutting popular programs, raising taxes, or both.

However, the influence of direct democracy on the state's economic and political environments is more extensive than that caused by ballot questions which earmark funds. In California, many of the structural hurdles that the legislature faces in raising revenue to meet budget shortfalls are the product of initiatives. Proposition 13 lowered property taxes and limited future increases, making localities more dependent on income and other tax revenues from the state. In turn, the state has fewer resources to meet its own obligations. Voters also imposed two-thirds supermajority voting requirements in the legislature for any tax increase. Other problematic provisions on the state Constitution that are the product of legislatively initiated ballot measures. California has a two-thirds supermajority voting requirement to pass the state budget, whether or not it increases taxes – the highest voting threshold for passing a budget of all the states.[105] The Constitution limits the amount of indebtedness that the state can incur to $300,000 (unless the voters approve higher debt or if necessary to repel invasion or suppress insurrection in time of war),[106] effectively imposing a balanced budget. All of these difficult issues and high voting thresholds in the budget arena are faced by inexperienced

[104] John Matsusaka, supra note 102, at 8.
[105] Charlene Wear Simmons, A Summary of Recommendations for Reforms to the State Budget Process 6 (2002) (noting that nine states have supermajority requirements, but no other state requires a two-thirds vote).
[106] Calif. Const., Art. 16, sect. 1.

lawmakers because voters decided to impose legislative term limits that went into effect in 1996.[107]

Thus, the fiscal and budget crisis that Gray Davis and lawmakers have faced over the past few years is the result in part of structural features of state and local government, many of which have been imposed by initiative. Not surprisingly, groups have turned to the initiative process again to change the structure of California government to allow lawmakers more flexibility to deal with difficult economic times. For example, in March 2004 voters will decide on the Budget Accountability Act; this initiative would reduce the supermajority required to pass a budget from two-thirds to 55 percent.[108] The Schwarzenegger administration will ask the people to approve a $15 billion deficit bond to deal with the state's immediate budget crisis; the initiative sweetens the deal for fiscally conservative voters by being tied to passage of another initiative that would require the legislature to pass a balanced budget and establish a reserve fund.[109] The important point here, regardless of the details of these ballot questions and their likelihood of success, is that the recent poor performance of representative democracy in California is a partly a consequence of the decisions made through initiatives that have substantially reduced lawmakers' options and changed politics in ways that make it less likely lawmakers will be able to respond effectively to fiscal challenges.

This analysis, indicting initiatives and referendums as a cause of poor representative government, overlooks the more complex relationship between direct and representative democracy. Although certain structural changes put in place through popular votes may have made governing more difficult for state legislators and produced inexperienced lawmakers less able to make effective policy, the impetus for these ballot questions was voter dissatisfaction with the representative process. In other words, the resurgence of direct democracy in the 1970s was partially the result of public disgust with and distrust

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[107] John M. Carey, Term Limits and Legislative Representation 12 (1996).
[108] See Proposition 56 to be on the March 2004 ballot, *available at* http://www.ss.ca.gov/elections/elections_bpd.htm.
[109] See Supplemental Ballot Pamphlet, March 2004 Election, Description of Propositions 57 & 58, *available at* http://www.ss.ca.gov/elections/elections_bpsupd.htm. See also Donna Arduin, *Back in Balance: The Golden State, From Red to Black,* Wall St. J., Dec. 4, 2003 (explaining details of Schwarzenegger proposal). The proposal for a hard spending limit she discusses was replaced by the balanced budget requirement as a result of compromise between the governor and Democrats. See infra text at note 117.

of representative institutions. As a result, the public has approved initiatives and referendums that constrain lawmakers; some of those constraints may well improve the legislature, and some certainly make effective governing difficult. The relationship between direct democracy and traditional representative institutions is circular – each reacts to the other. Meaningful reform of either will require attention to both parts of the democratic system; for example, the proposal to reduce the legislative vote required to pass a budget in California represents a positive move to allow the legislature more flexibility while maintaining a constraint more substantial than a simple majority vote. Proposals to use direct democracy to change the process of redistricting for federal and state legislators are similarly promising developments to harness direct democracy to improve representative bodies and to overcome the self-interest of entrenched players.

A third interaction between direct and representative democracy was also apparent in the recall environment. Scholars have increasingly studied the effect of the presence of the initiative process on the laws considered and enacted by the legislature. Elisabeth Gerber and others have demonstrated that lawmakers in states permitting initiatives enact a different sort of legislation than do legislators in states without initiatives. Gerber terms this the indirect influence of direct democracy.[110] She has concluded that, under certain conditions, legislation on issues that are likely to be the subject of popular vote will be closer to the preferences of the median voter.[111] In other words, strategic lawmakers understand that their decisions can be second-guessed by voters if a ballot question is qualified, and they take that reality into consideration when determining what laws to pass and the content of those laws. Lawmaking does not occur in a vacuum; it is affected by all parts of the political environment.[112] Although Gerber's work suggests that the initiative process favors legislative outcomes close to the median voter's preferences, different conditions in the political environment can move the legislative outcome so that

[110] See Elisabeth R. Gerber, The Populist Paradox: Interest Group Influence and the Promise of Direct Legislation 50-58 (1999).
[111] See Elisabeth R. Gerber, *Legislative Response to the Threat of Popular Initiatives*, 40 Am. J. Pol. Sci. 99 (1996); John G. Matsusaka & Nolan M. McCarty, *Political Resource Allocation: Benefits and Costs of Voter Initiatives*, 17 J. of Law, Econ. & Org. 413 (2001).
[112] Note that this analysis suggests that absent the initiative process, lawmakers in California might *not* have allocated 30 percent of the budget to K-14 education as they were mandated to do by Proposition 98. See supra text at notes 102. On the other hand, interest groups like teachers unions usually ensure that a state spends a high proportion of its revenues on education, although perhaps not in ways that the people would prefer.

it is closer to outlying preferences rather than the median voter's. For example, if the voters likely to turn out in an election on a ballot question have extreme preferences, then the legislative response to head off a vote will be targeted at appeasing those interests, and not the median voter's.[113]

As this scholarship would predict, the reality of a recall affected the legislation that was passed by the Democratic legislature and signed by the governor. Compromise was reached in the summer of 2003 on a state budget in part because Davis and the Democrats wanted to "solve" the current budget crisis, albeit using indebtedness of dubious constitutionality, before the recall vote. Dozens of bills were passed in the waning days of the legislative session, often without committee hearings and through a process called "gut and amend." Using this technique, a bill that had gone through all the constitutionally mandated procedures was used as a shell with all its language replaced by an entirely new and unrelated proposal that had not been considered by committee or been available for lawmakers to analyze before floor deliberation and the vote.

In many cases, these laws were not passed to placate the median voter, but instead they were passed to appeal to voters that Davis and Democratic legislators believed were likely to vote against the recall. The laws were intended both to convince relatively liberal voters that Davis, who as a governor had pursued a somewhat centrist agenda, was responsive to their concerns and to encourage those voters to come to the polls. For example, after vetoing similar legislation before, Davis signed a law permitting undocumented workers to obtain drivers licenses. The legislation itself had not changed appreciably, and certainly not in a way to assuage Davis' earlier concerns. Instead, the threat of a recall prompted legislative action and gubernatorial approval in the hope that the action would influence the outcome of the election. With hindsight, commentators have concluded that some of these actions actually hurt Davis in the election because many voting in the recall opposed the drivers' license measure and it did not seem to generate substantial turnout among voters who would oppose the recall. But miscalculation is also part of the political process and does not undermine the scholarly conclusion that politicians act in the shadow of direct democracy.

[113] See John G. Matsusaka & Nolan M. McCarty, supra note 111.

Interaction between direct and representative democracy will continue to be seen during Schwarzenegger's term. Schwarzenegger is a Republican facing a Democratic legislature and working on an agenda that runs counter to some of the priorities of legislators. Schwarzenegger has announced that he is willing to resort to the initiative and referendum to enact his agenda over the next few years. He has organized political committees to raise money for campaigns for ballot measures he supports, as well as for lobbying activities in Sacramento and for coordinating grassroots movements to further his policy agenda.[114] He has already pledged to use direct democracy to pass bond issues and to enact reforms of the workers' compensation system. As he told the California Chamber of Commerce on his inauguration day, "All of those kinds of reforms we want to put on the ballot. And it will take some pushing. It will take millions of dollars. So I will be coming back to you and saying, open your wallets again."[115]

Schwarzenegger will not actually govern entirely by initiative, a strategy that does not allow for coordinated policy or thoughtful legislating on complex issues. Initiatives must comport with the single-subject rule, their language cannot be changed as a result of compromise once they have qualified for the ballot, and they do not allow for continuous policymaking because voters come to the polls only a few times a year. Using ballot questions as a way to circumvent recalcitrant legislators occasionally may improve democratic institutions; using them as the main method of governing is inefficient, unwise, and impossible. Schwarzenegger's rhetoric about resorting to initiatives if the legislature stands in the way of reform is a political strategy. He is making a credible threat that he will take issues to the people as part of his negotiations with an unfriendly legislature.

Lawmakers are pragmatic politicians. They understand that the recall reflects general voter distaste for incumbent politicians and politics as usual. They also know that Schwarzenegger's celebrity, wealth, and popularity may allow him to get around the legislature if they stand in the way of his policy agenda. Schwarzenegger's personal fortune, his ability to raise money, and the tremendous amount of publicity that surrounds

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[114] Dan Morain, *Governor Will Raise More Funds*, L.A. Times, Jan. 1, 2004, at B1.
[115] See Peter Nicholas & Joe Mathews, supra note 38, at A18. See also Evan Halper & Peter Nicholas, supra note 109, at A31 (noting that Schwarzenegger's staff has made it clear "he is willing to put his ideas directly in front of voters if the legislature balks").

his every move provide credibility to his threat to go over the heads of state lawmakers. If Schwarzenegger successfully uses direct democracy quickly in his term, his threat will be even more credible and likely to leverage compromise. Legislators and Schwarzenegger also know, however, that frequent use of direct democracy to enact laws is unwieldy and costly. Furthermore, even with the governor's popular appeal, success at the polls is not a sure thing. Thus, both sides – the governor and the legislature – have incentives to reach legislative compromises when the bargaining taking place in the shadow of the initiative and referendum process that can be used to great advantage by a popular governor.

Threatening to use direct democracy has already been a successful tactic with regard to one of Schwarzenegger's campaign promises. Within weeks of his taking office, the same Democratic legislature that passed the law permitting undocumented worker to get drivers licenses repealed it. They acted quickly both because they understood that this law had been extremely unpopular with voters and because they were aware that Schwarzenegger and his supporters would repeal the law through a referendum if the legislature ignored the popular will. By taking the lead, lawmakers sought to mitigate the fallout from their unpopular political decision, and they hoped to soothe supporters of the law by eliciting a promise from Schwarzenegger to discuss an "improved" version of the law.[116]

The influence of Schwarzenegger's credible threat to bypass the legislature also played a pivotal role in the negotiations with the legislative branch about placing a $15 billion deficit bond on the ballot. The California Constitution requires that a bond of that size be approved by the people, and the measure could appear on the March ballot only if the legislature agreed to submit it to the people. If the Governor had been forced to qualify his proposal through the petition gathering process, the vote would have been delayed until November which would not be soon enough to avoid drastic budget cuts and substantial and costly short-term borrowing. Thus, the Governor needed the cooperation of the legislature, but lawmakers understood that if they did not reach an agreement, they could be circumvented, albeit at some cost. Negotiations broke off on

[116] See Nancy Vogel, *Panel OKs Repeal of License Law,* L.A. Times, Nov. 26, 2003, at B8 (noting Governor's promise to have an "open discussion" about a revised version of the bill in the future).

the eve of the apparent deadline for placing a legislative initiative on the March ballot because Democrats would not agree to the hard spending cap proposed by the Governor and demanded by Republican legislators. Deadlines, however, can often be postponed, and in the next week of negotiations, Schwarzenegger agreed to back away from a hard spending cap and to accept instead a constitutional requirement that the legislature pass a balanced budget and establish a reserve fund to pay down the deficit bonds and to meet unexpected financial crises. Although this compromise upset some fiscal hard-liners in the Governor's party, it garnered enough votes to be sent to the people this spring.[117]

The upcoming campaign to convince voters to pass the deficit bond and the balanced budget requirement is crucial – not just for the state's fiscal health but also for Schwarzenegger's credibility in future negotiations. His strength in bargaining comes from his immense electoral popularity, financial resources, and ability to attract nearly constant media attention. With these tools, he can credibly threaten the legislature with government by initiative. If he cannot translate those attributes into success at the polls, his ability to use the threat to change legislative outcomes will be vastly reduced. The Governor and his staff recognize this. When his advisers talk of the need to keep his popularity high, they do not talk just in terms of his reelection, but mainly about its effect on "his ability to push through reforms by ballot initiatives."[118]

V. Conclusion

The recall election is a dramatic variation on the long-running interplay between representative institutions and direct democracy. The recall has also cast new light on familiar issues relevant to the electoral process at the national level and in states without the recall process. It demonstrates the increasing use of lawsuits as a political weapon, and it provides perspective on questions that those working in the law of democracy have been studying – questions relating to political parties, independent candidates, and ballots. In short, the recall, when put into context, is not a radical departure, but it does

[117] See Dan Morain & Carl Ingram, *Revived Fiscal Plan Goes to Ballot,* L.A. Times, Dec. 13, 2003, at A1.
[118] Evan Halper & Joe Mathews, *Governor's Muscle Squeezed GOP First,* L.A. Times, Dec. 13, 2003, at A1, A30.

provide a new frame for the analysis of difficult choices of design of democratic institutions.