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(The Henry Lecture, University of Oklahoma Law School,
October 13, 2005)**

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The Promise and Perils of Hybrid Democracy

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For most Americans, democracy in the United States is not entirely representative in structure, and none of us lives in a pure direct democracy where laws are made only through popular votes. Instead, for over seventy percent of Americans, including those in Oklahoma,¹ government is a hybrid democracy – a combination of direct democracy and representative institutions at the state and local levels, which in turn influences national politics.² Until recently, scholarship in law and social sciences has been incomplete because analysts have focused mainly on representative institutions or occasionally on the initiative process, but nearly always as separate institutions. With political science leading the way, the interactions between the two forms of democratic institutions have moved to center stage. For example, empirical work identifies the ways in which the presence of an initiative process in a state influences the content of laws passed by the legislature,³ how voter turnout and campaigns in candidate elections are affected by the presence of an initiative on the ballot,⁴ and how elected and appointed officials often work to undermine the implementation of initiatives.⁵ These studies illustrate that

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¹ See John G. Matsusaka, *For the Many of the Few: The Initiative, Public Policy, and American Democracy* 8 (2004) (seventy-one percent of Americans live in state or city that allows initiative). For a brief description of the initiative process in Oklahoma, see M. Dane Waters, *The Initiative and Referendum Almanac* 342-57 (2003). Many of Oklahoma's cities and towns, including Oklahoma City, Tulsa, Lawton, Norman and Bartlesville, have direct democracy on the local level.

² See Elizabeth Garrett, *Hybrid Democracy*, 73 *Geo. Wash. U. L. Rev.* __ (forthcoming 2005).

³ See, e.g., Elisabeth R. Gerber, *The Populist Paradox: Interest Group Influence and the Promise of Direct Legislation* (1999).

⁴ See, e.g., Daniel A. Smith & Caroline J. Tolbert, *Educated by Initiative: The Effects of Direct Democracy on Citizens and Political Organizations in the American States* (2004).

⁵ See, e.g., Elisabeth R. Gerber, Arthur Lupia, Mathew D. McCubbins & D. Roderick Kiewiet, *Stealing the Initiative: How State Government Responds to Direct Democracy* (2001).

considering hybrid democracy as a whole is more likely to produce a realistic view of democratic institutions and point the way to meaningful reform.

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

I. Candidates and Initiatives: Making Credible Policy Commitments

Hybrid democracy entails hybrid elections, which have different dynamics than elections that solely concern selecting representatives. The presence of an initiative on a ballot that also includes candidate elections will affect those races, and vice versa. In their book *Educated by Initiative*, Daniel Smith and Caroline Tolbert find that initiatives increase overall voter turnout. In presidential elections, each ballot measure boosts

turnout by half a percentage, and in midterm elections, each ballot measure increases turnout by 1.2 percent.⁶ Of course, the additional voters are not random citizens but are people motivated to come to the polls by the subject matter of the initiative, so the increased turnout does not necessarily benefit both candidates equally. For example, the initiative to ban cockfighting on the Oklahoma ballot in 2002 increased rural turnout as opponents of the ban made the effort to vote primarily because of the ballot question. But once they came to the polls, many also voted for Brad Henry, the Democratic candidate for governor who was seen as the better representative of rural interests.⁷ Although Henry took a position on the ban in the campaign (he opposed it),⁸ using this ballot measure in a hybrid election to boost turnout favorable to him was presumably not part of his original campaign strategy. Rather, he benefited from an initiative that other groups had placed on the general election ballot.

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

A. The Perils of Hybrid Elections: Crypto-Initiatives

Other scholars have described the use of initiatives by candidates in campaigns as manipulative. Thad Kousser and Mathew McCubbins labeled such initiatives as “crypto-

⁶ See Smith & Tolbert, *supra* note 4, at 39-42 (also finding that at a certain point, each additional measure does not further increase turnout).

⁷ See John Greiner, *Independent Candidate Affected Vote, Observers Say*, The Daily Oklahoman, Nov. 7, 2002, at A1. Interestingly, although rural opponents of the cockfighting ban may have played a decisive role in Henry's narrow victory over Steve Largent, they did not succeed in their main objective of defeating the ban. It was enacted with about 56% of those voting on the question supporting it. Oklahoma Secretary of State, “State Question 687”, at <http://www.sos.state.ok.us/exec_legis/InitRef.asp?intId=687>.

⁸ *Moving On: Cockfight Bill Should Meet Early Demise*, The Daily Oklahoman, Dec. 17, 2002, at A6.

initiatives” and argued that they are cynically used by candidates and consultants to take advantage of voters who do not have enough information to vote competently on the ballot measures.⁹ They contend that the policies embodied in crypto-initiatives are unlikely to be welfare-enhancing or particularly effective at achieving their goals. Politicians using crypto-initiatives are mainly attentive to their effect on the dynamics of the campaign, such as voter turnout, not to whether they are well-drafted or represent beneficial reform. Thus, “strategic political actors will pick strategies ... to serve partisan goals even if they lead to the passage of bad policies.”¹⁰

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

Some of the other marriage initiatives, such as those in Michigan and Ohio, were likely part of a more coordinated strategy to place them on the ballot of battleground states in the presidential election so that they would help reelect President Bush. They also had grassroots support, but it seems very likely that national strategists encouraged those efforts in states pivotal to the Electoral College vote where the margin of victory was expected to be close. Although some strategists have credited the ballot measure for

⁹ Thad Kousser & Mathew D. McCubbins, *Social Choice, Crypto-Initiatives, and Policy making by Direct Democracy*, 78 Cal. L. Rev. 949 (2005).

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

¹¹ See James Dao, *Gay Marriage: Same-Sex Marriage Issue Key to Some G.O.P. Races*, N.Y. Times, Nov. 4, 2004, at P4. See also Kousser & McCubbins, *supra* note 9, at 971.

Bush's narrow and crucial victory in Ohio,¹² preliminary results from ongoing empirical studies draw that claim into question.¹³ Certainly, however, the numerous ballot measures on this topic, together with the press attention on developments in Massachusetts and San Francisco, framed some of the "values" discussion in the election that helped President Bush and Republicans.

Although some might argue that these issues allow voters to draw valid conclusions about the presidential candidates' characters and thus are relevant to voter competence, the measures had generally pernicious effects on the federal elections. They diverted attention from major issues with greater significance for the future of the country – for example, America's invasion and continuing involvement in Iraq and the burgeoning budget deficit and the related looming crisis in entitlement programs. They are the sort of initiatives that Kousser and McCubbins indict, used and sometimes generated by political operatives to enact unwise or unnecessary policies in the absence of robust debate solely to affect outcomes of candidate elections. Except in Oregon, there was little opposition to the measures, and it seems likely that many voters were not aware that some of the initiatives did more than define marriage to include only traditional marriages but also ruled out civil unions and eliminated other rights of same-sex committed couples.¹⁴ They were unnecessary in most, if not all, of the states in which they were enacted because there was little threat that courts or legislatures in Utah, Mississippi, Oklahoma or other similarly red states were likely to endorse same-sex unions.

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

¹² See Dao, *supra* note 11; Brian Friel, *Both Sides Claim Ballot-Issue Victories*, 45 Nat'l J. 3415 (2004).

¹³ Compare Alan Abramowitz, *Terrorism, Gay Marriage, and Incumbency: Explaining the Republican Victory in the 2004 Presidential Election*, *The Forum*, vol. 2, Iss. 4, Art. 3 (2004) (finding no effect from anti-same-sex marriage ballot measures), with Todd Donovan, Caroline Tolbert, Daniel A. Smith & Janine Parry, *Did Gay Marriage Elect George W. Bush*, paper prepared for the 2005 State Politics Conference, East Lansing, MI (May 14-15, 2005), available at http://polisci.msu.edu/sppc2005/papers/fripm/dtsp_sppc05.pdf (finding that the Ohio measure mobilized turnout of voters more likely to vote for Bush).

¹⁴ Eight of the eleven initiatives that passed in November 2004, including the one in Oklahoma, not only defined marriage in the traditional way, they also banned civil unions or other domestic partnership benefits. See Kavan Peterson, *50-State Rundown on Gay Marriage Laws*, *Stateline.org* (Nov. 3, 2004), available at <http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=15576>.

Although crypto-initiatives may be a peril of hybrid elections, it is not the case that all ballot measures used by candidates are crypto-initiatives with largely negative consequences on policies and campaigns. On the contrary, combining a candidate election with a ballot measure or series of initiatives may empower voters in both realms of hybrid democracy.¹⁵ First, coordinating a candidate campaign with an initiative can allow politicians to make credible policy commitments to voters. Candidate campaigns consist of a series of promises by people running for elected office. It is difficult for voters to know which promises are credible and which are “cheap talk.”¹⁶ Voters’ only recourse when they discover a candidate has failed to follow through on campaign promises is to refuse to reelect her. Candidates are likely to heavily discount this penalty when they are running for office, and they know that reelection is unlikely to hinge on one issue or one broken promise. The problem of making credible campaign promises is particularly acute for challengers who have no record of public service that voters can analyze to determine ideology in order to evaluate the trustworthiness of campaign pledges.

Hybrid democracy provides all candidates, challengers and incumbents, a means to credibly communicate with voters about their policy agendas. If a candidate spends time or money on an initiative, she sends a costly, and therefore more trustworthy, signal about her views on the issue.¹⁷ So, for example, Jerry Brown did more than just talk about reforming politics and campaigns when he ran for California Governor in 1974; he also championed the Political Reform Act that was on the same ballot.¹⁸ Voters who supported his reform agenda but worried that he would back away from these promises once he gained office could reduce his ability to renege on his promises by simultaneously electing him and enacting comprehensive reform. Speaking to a different audience, Governor Pete Wilson more convincingly proved to conservative Republicans

¹⁵ Some of this discussion is drawn from Elizabeth Garrett, *Crypto-Initiatives in Hybrid Democracy*, 78 S. Cal. L. Rev. 985 (2005).

¹⁶ See David Austen-Smith, *Strategic Models of Talk in Political Decision Making*, 13 Int’l Pol. Sci. Rev. 45 (1992) (discussing “cheap talk” in politics). See generally Glenn R. Parker, *Self-Policing in Politics* 59 (2004) (discussing difficulty for voters to obtain trustworthy information about how faithful politicians will be with respect to promises they make).

¹⁷ See Arthur Lupia & Mathew D. McCubbins, *The Democratic Dilemma: Can Citizens Learn What They Need to Know?* 20 (1998).

¹⁸ See Peter Schrag, *Paradise Lost: California’s Experience, America’s Future* 226 (2004).

that he would implement policies they valued when he ran together with the country's harshest three-strikes law and an initiative that would have denied public services to undocumented workers.¹⁹ He thus made a costly commitment to key voters that he would not support social policies they found distasteful, both because the initiatives would shape the political environment and because it would be harder for him to reverse course after concretely associating himself with the measures.

Using hybrid democracy in this way – to elect officials and simultaneously enact policies that limit their discretion²⁰ – reduces the amount of monitoring required of voters to determine whether politicians keep their campaign promises. It is therefore a way to reduce principal-agent slack between voters and representatives. Of course, enacting the initiative would constrain either candidate's discretion once elected, whether or not she supported the initiative. My argument is not that the initiative will bind only the candidate supporting it – it will bind whoever is elected – rather that the candidate's support is a more costly signal than a promise in a platform. Politicians understand this; therefore, associating themselves with an initiative is a more credible signal than using the same themes in their platforms.

Second, candidate involvement in initiative elections may provide voters with better cues so that they can vote competently with limited information on the ballot measures. The vast majority of voters do not go to the polls with comprehensive knowledge of all races, just as they do not go to the store with complete information about all the products they want to buy. In both cases, they rationally rely on shortcuts that they believe will allow them to decide in a way that is consistent with their preferences but which economizes on information costs.²¹ In candidate elections, the primary voting cue is party affiliation, which appears on the ballot; in addition, the cue of incumbency can be

¹⁹ See Stephen P. Nicholson, *Voting the Agenda: Candidates, Elections, and Ballot Propositions* 98 (2005). Proposition 187 pertaining to undocumented workers was struck down as unconstitutional. See *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995) and *League of United Latin American Citizens v. Wilson*, 997 F. Supp. 1244 (C.D. Cal. 1997).

²⁰ For a discussion of other ways initiatives can limit executive discretion, see John G. Matsusaka, *Direct Democracy and the Executive Branch* (2005) (paper presented at the conference on the Impact of Direct Democracy), available at http://lawweb.usc.edu/csfp/conferences/direct_democracy/directdemocracy_05.html.

²¹ See, e.g., Arthur Lupia & Richard Johnston, *Are Voters to Blame? Voter Competence and Elite Maneuvers in Referendums*, in *Referendum Democracy: Citizens, Elites and Deliberation in Referendum Campaigns* 191, 194-95 (M. Mendelsohn & A. Parkin eds., 2001).

evident from the ballot in some states. Initiative campaigns are relatively low-information environments because they do not provide these easy shortcuts for voters, who must instead work to determine which groups support or oppose the ballot measure, the intensity of their views, and how the groups' preferences line up with voters'.²²

Kousser and McCubbins argue, by contrast, that crypto-initiatives will impair voter competence. In developing such initiatives, candidates search for issues that will not elicit opposition, because that might turn out people who will vote for their opponents. In the absence of vigorous advocacy on both sides of an issue, voters are less likely to gain sufficient information to make competent choices.²³ Although some crypto-initiatives are constructed to minimize the extent of voting cues because they are designed to avoid strong opposition, other aspects of hybrid elections suggest that voting cues may be enhanced when politicians are aligned with ballot measures. Close association between an initiative and a candidate allows voters to use the familiar cue of political party in both parts of hybrid democracy. Political parties are already relatively active in many ballot measure campaigns, and they work to publicize their involvement through slate mailings and advertisements.²⁴ Candidates using ballot measures as part of their campaign strategy will also make their endorsements clear to voters, who can use the affiliation to draw conclusions about the ballot measure, just as they use the policy promoted by the initiative to draw conclusions about the candidates' priorities

Moreover, it is not necessarily the case that initiatives associated with candidate campaigns will inevitably fail to produce vigorous opposition. If candidate elections are competitive – which is, unfortunately, not the reality in many legislative races, but may be true in other races – then the opponent of the candidate running with a ballot measure has an interest in ensuring that the initiative faces opposition as well. For example, many view the California special election in November 2005 as a prelude to the 2006 gubernatorial election.²⁵ Likely opponents of Governor Schwarzenegger are active in

²² See Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 *Elect. L.J.* ____ (forthcoming 2005) (discussing voting cues in issue campaigns).

²³ *Id.* at 957-60.

²⁴ For a discussion of the involvement of political parties in initiative campaigns, see Smith & Tolbert, *supra* note 4, at 116-27; Richard L. Hasen, *Parties Take the Initiative (and Vice Versa)*, 100 *Colum. L. Rev.* 731 (2000).

²⁵ See Michael Finnegan, *Special Election Rattles '06 Races*, *L.A. Times*, June 19, 2005, at B1.

campaigns to defeat his ballot initiatives²⁶ in the hope that he will fail at the polls, find himself unable to govern effectively, and enter the race for reelection substantially weakened. Drawing the wisdom of the initiative into question challenges its supporter's judgment and underscores policy differences for the voters. More empirical work on voting cues and how they are used most effectively by citizen to cast their ballots competently is necessary, but it seems likely that under some circumstances hybrid elections can improve voter competence rather than undermine it.

C. Reforms of Hybrid Campaigns

Hybrid elections, in which candidates increasingly coordinate their campaigns with initiative campaigns, are a reality in many states and are not necessarily a negative development for politics. But the perils posed by such campaigns suggest that we should consider certain reforms of the direct democracy elements of our hybrid system. To combat the concern that initiatives, particularly crypto-initiatives used by candidates solely for their spillover effects, may enact unwise policies that will lead to lower social welfare,²⁷ the laws they enact should be less durable. Statutory initiatives should be subject to revision and repeal by the legislature; constitutional initiatives should have sunset provisions so that they expire unless re-enacted.

All states except California allow legislatures to modify statutory initiatives; in California, statutory initiatives are insulated from subsequent legislative involvement unless specifically authorized by the initiative itself.²⁸ California should adopt something similar to Oklahoma's approach, allowing repeal and amendment, although perhaps only after two years of experience or only through a supermajority vote.²⁹ Some protection

²⁶ See, e.g., Press Release, Statement from California Treasurer Phil Angelides Regarding the Governor's Decision to Call a Special Election (June 13, 2005) (Democratic candidate for governor attaching the call for a special election and vowing to "fight hard against the Governor's harmful agenda"), available at http://www.angelides.com/getinformed/releases/2005_0613_special.html.

²⁷ See Kousser & McCubbins, *supra* note 9, at 954-55 (making that argument because voters do not consider dead weight losses). But see Garrett, *supra* note 15, at 992 & n.19 (questioning whether this is necessarily true when candidates are associated with ballot measures).

²⁸ Cal. Const. art. II, § 10(c).

²⁹ See Waters, *supra* note 1, at 27 (providing rules in all states with initiatives). See also Okla. Const. Art. V, section 7 ("The reservation of the powers of the initiative and referendum in this article shall not deprive the Legislature of the right to repeal any law, propose or pass any measure, which may be consistent with

from the legislature is required, and should be considered in Oklahoma, because lawmakers are often hostile to initiatives, which have been used to circumvent the traditional process to enact policy. Initiatives supported by politicians and political parties may not face the same danger that they will be undermined; indeed, incumbents have an incentive to produce results because voters may evaluate their performance in part on the basis of how well the ballot measures they supported have been implemented. But an initiative backed by the governor and supported by the people may be one resisted by the legislature – in fact, the governor may have turned to direct democracy because of obstruction by lawmakers.³⁰ That obstruction will presumably continue after the election. Moreover, any proposed reform must apply to all initiatives, not just those associated with politicians, because there is no practical way to separate the two kinds of measures, so a degree of protection from the legislature is warranted.

Many initiatives are constitutional amendments and thus cannot be changed by the legislature, but only by a subsequent popular vote. These initiatives should expire after a certain period of time, requiring either that the legislature resubmit them to the people or that proponents again gather signatures to place them on the ballot for extension.³¹ The analysis of hybrid elections provides guidance about how long the popularly-initiated constitutional amendments should remain in effect before they expire. In order to effectively bind politicians to promises made credible by association with a ballot measure, these constitutional provisions should remain in effect at least as long as one

the Constitution of the State and the Constitution of the United States.”) Others have proposed changing the California system to allow more legislative involvement in statutory initiatives. See, e.g., California Commission on Campaign Financing, *Democracy by Initiative: Shaping California’s Fourth Branch of Government* 118-19 (1992); Tracy Westen & Robert M. Stern, *Ending a Love-Hate Relationship*, Ca. Bar J. (July 2005) (referring to 1992 study and continuing to support such changes).

³⁰ There are allegations in California that the Attorney-General, a Democrat, has used his powers in the initiative process to undermine the Governor’s proposals by approving unfairly worded titles and descriptions and by applying technical requirements rigorously to keep some of Schwarzenegger’s proposals off the ballot. See Robert Salladay, *Lockyer is Accused of Stacking Deck Against Initiatives*, L.A. Times, Aug. 1, 2005, at A1. Whatever the truth of these charges, they demonstrate that even initiatives supported by powerful politicians may still face opposition by those who have responsibility for implementation.

³¹ The right answer about the durability of any re-enactment is less clear to me. If the constitutional amendment is re-enacted after the legislature puts it, or a modified version, on the ballot, then there should be no sunset. One might argue that any re-enactment, even if put on the ballot by the people and not the legislature, shows sufficient public support for a constitutional change to justify eliminating the sunset on the re-enactment. On the other hand, the concerns about drafting errors, manipulation of voter opinions, crypto-initiatives, and other problems in the initiative process could justify retaining sunsets of any constitutional change qualified through the petition process.

term of office, and perhaps longer so that the push for re-enactment becomes separated from the candidate's re-election campaign and reflects a strong independent desire to retain the policy. Another factor relevant to the length of time before any initiative would sunset is the need for settled expectations, particularly in some realms. For example, initiatives that affect redistricting or structures of representation must be in place for at least a decade to avoid some reforms expiring before they can have any significant impact on governance. Accordingly, I would propose that constitutional initiatives sunset after ten or twelve years.

Although one could argue that constitutional initiatives passed by a landslide, say by three-fourths of those voting on the measure, should not face a sunset, Kousser and McCubbins' analysis suggests that crypto-initiatives are constructed to face little opposition and thus might be enacted by a substantial margin in an environment that undermines the ability of voters to vote competently. Therefore, no special treatment should be afforded to initiatives on the basis of their popularity on Election Day. One subset of initiatives could be made more durable, however. In the next section, I will discuss the use of commissions to draft initiatives, particularly dealing with complicated election reform.³² If a commission has been used to consider reform, then the reasons for sunsetting a constitutional initiative do not apply. There has been an opportunity for deliberation and debate, the proposal has been amended and changed throughout the process, and the involvement of a commission operates as a check much as the legislative process does in that realm. Just as constitutional measures placed before the people by the legislature would be permanent, the work of commissions should be accorded durability. Applying one default rule for popularly-generated initiatives and another for those that are vetted by the legislature or a commission would encourage groups to work through the latter routes.

For popular initiatives that expire and are not placed on the ballot for extension or permanent enactment by the legislature or a commission, fewer signatures would be required to place re-enactment on the ballot. Because part of the rationale for a sunset requirement is to allow constitutional initiatives to be modified to reflect the experience with the law, proponents should qualify for the reduced signature thresholds even if the

³² See text accompanying notes 87 through 95.

measure is slightly different from the original enactment. This may require some judgment calls by the official certifying the petitions for circulation, but the general rule should be that changes that further the purpose of the measure will be allowed without triggering higher signature thresholds.³³

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

Finally, the close association between candidates and some ballot measures supplies additional justification for aggressive campaign finance regulation in the direct democracy arena. I and others have written elsewhere about the interaction between hybrid democracy and campaign finance regulation,³⁴ so let me just touch on a few

³³ This is a standard used by Arizona in determining whether the legislature can amend a statutory initiative, see Ariz. Const. Art. 4 Pt. 1 §6(c), and is used by some initiatives in California that allow subsequent legislative involvement, *Democracy by Initiative*, supra note 29, at 119 (1992) (discussing Political Reform Act that allowed amendments that further its purpose and that pass by a two-thirds majority).

³⁴ See, e.g., Elizabeth Garrett, *Democracy in the Wake of the California Recall*, 153 U. Pa. L. Rev. 239, 247-253 (2004); Garrett, supra note 2, at ___; Richard L. Hasen, *Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns*, 78 S. Cal. L. Rev. 885 (2005).

aspects of this topic here. Because candidates use initiative campaigns to enhance their chances of winning office, the same possibilities for quid pro quo corruption and the appearance of such corruption³⁵ exist in some issue campaigns. Presumably, whatever favors are likely to flow to big contributors from candidates are also likely to flow to those underwriting ballot measure campaigns in which candidates are involved. When the Supreme Court ruled more than two decades ago that spending limitations could not be applied to issue committees,³⁶ the justices did not fully understand the implications of hybrid democracy and the crucial role that politicians play in many issue campaigns. They seemed to view direct democracy as entirely unrelated to candidates and office holders, rather than as a component of a larger hybrid system in which political actors are often integrally involved.

Limiting contributions to candidate-controlled issue committees should therefore be found constitutional using the well-established state interest of combating quid pro quo corruption.³⁷ However, even if constitutional, such limitations may not be sufficient to combat the perception of corruption. When regulations are applied only to committees formally or actually controlled by candidates and officeholders, interests wishing to curry favor with candidates can fund issue committees that remain entirely separate from candidates. If these “uncoordinated” efforts are helpful in publicizing and passing an initiative that a candidate views as important to her campaign, she will certainly know about the support and appreciate it. Such support will either elicit the sort of favorable treatment large contributors seek, such as access to policy makers,³⁸ or it will lead to the public perception that such favoritism exists.³⁹ This is the same problem that exists with

³⁵ For the articulation of the corruption rationale in candidate elections, see *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam); *McConnell v. Federal Election Commission*, 540 U.S. 93, 182-84 (2003).

³⁶ See *Citizens Against Rent Control v. Berkeley*, 454 U.S. 200 (1981).

³⁷ Thus, regulations to this effect promulgated by the California Fair Political Practices Commission (FPPC) should not be overturned on constitutional grounds, although there is some question whether the FPPC had the authority to promulgate such regulations in the context of issue committees. See Cal. Code Regs. Tit. 2, §§ 18530.9, 18530.10, 18530.5 (2004). The regulations are currently being challenged in court and are not being applied during the 2005 special election campaign. See *Citizens to Save California v. California Fair Political Practices Commission*, Superior Court of California, County of Sacramento, Case No. 05AS00555 (Mar. 25, 2005) (order granting preliminary injunction), *appeal filed* Apr. 19, 2005.

³⁸ See John M. de Figueiredo & Elizabeth Garrett, *Paying for Politics*, 78 S. Cal. L. Rev. 591, 609-11 (2005).

³⁹ For a discussion of the difficulty of using public perception to justify campaign finance regulation, see Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. Pa. L. Rev. 119, 141-44 (2004).

respect to independent expenditures in candidate elections, and it is clearly an aspect of the current hybrid system with respect to contributions to initiative campaigns. The California press has reported that large contributors to both ballot and re-election committees affiliated with Schwarzenegger are invited to participate in conference calls with key state policymakers, available only to those with special passwords.⁴⁰ It is not clear that these phone calls have resulted in changes in policy, but they concretely demonstrate to voters that wealthy interests have a very different relationship with the Governor and his staff than do ordinary voters.

Subjecting unaffiliated committees to campaign finance limitations is more problematic under current jurisprudence than applying limitations to candidate-controlled committees. The further the distance from the candidate, the more attenuated the relationship to the quid pro quo justification. The difficulty here is the same as the one that plagues campaign finance regulations generally: without very comprehensive reform, shutting off the spigot of money in one part of the system merely reroutes it to another part of the system where it can flow unimpeded.⁴¹ We are now seeing this occur even in the federal context as representatives and senators use issue committees to raise unlimited amounts of money, unregulated by the federal campaign laws. The Federal Election Commission reversed course this summer in an advisory opinion issued in response to a petition by members of Congress seeking to raise soft money for issue committees formed to defeat the redistricting initiative in California.⁴² Although it had previously ruled that the Bipartisan Campaign Reform Act regulated such activities,⁴³ it reached the opposite conclusion in the recent Advisory Opinion, in part because the initiative appeared on a special election ballot with no federal candidate races. However, the appearance of corruption is not necessarily avoided by disaggregating the initiative election from the candidate election; officeholders who value retaining the current system

⁴⁰ Robert Salladay, *Candid Talk on the Party Line*, L.A. Times, June 5, 2005, at A1. See also Gary Delsohn & Andy Furillo, *Governor Reverses Course on Donations*, Sac. Bee, Aug. 20, 2005, at A1 (reporting that Schwarzenegger changed his policy and accepted large contributions to his initiative committee from trade organizations with business before the Governor and noting that the objective of contributors' is access).

⁴¹ See Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 Tex. L. Rev. 1705 (1999).

⁴² See FEC Advisory Opinion 2005-10, available at <http://www.fec.gov/aos/2005/ao2005-10final.pdf>.

⁴³ See FEC Advisory Opinion 2003-12 (Flake), Fed. Elec. Camp. Fin. Guide (CCH) ¶6396 (July 29, 2003).

of redistricting will be grateful to those who provide them money to defeat the reform proposal.

Evenhanded and comprehensive regulation is particularly challenging in the context of issue committees because of the Supreme Court's campaign finance jurisprudence. Quid pro quo corruption would not justify contribution limits on issue committees wholly unrelated to a candidate.⁴⁴ Thus, any regulatory approach is inevitably bifurcated – with more stringent regulations applying to issue committees linked to a candidate and fewer restrictions on unrelated committees, although both types of committees are likely to operate in the same campaign. Expanding the state interests that can support regulation to include equality concerns could allow more comprehensive regulation of all issue committees, but the Court has been unwilling to explicitly embrace this rationale.⁴⁵ It may have more force in the direct democracy context because the initiative process was designed to empower ordinary people relative to well-funded special interests like railroads, but it does not seem likely that the current Court will fully embrace an egalitarian perspective with respect to campaign finance in any realm. Moreover, the value that some justices, particularly Justice Breyer, have identified in encouraging broad participatory democracy⁴⁶ has not yet been deployed as a way to assess regulation of the initiative process.

The integration of ballot measures with candidate campaigns provides an additional justification for very aggressive disclosure regulations in the realm of direct democracy. Disclosure is the primary form of state campaign finance regulation of issue committees, and it is justified on the ground that it provides information to voters about the forces behind ballot measure campaigns.⁴⁷ Citizens can make better judgments about how to

⁴⁴ See Hasen, *supra* note 34, at 907-15 (discussing constitutional issues raised by expanding regulation beyond candidate-controlled issue committees).

⁴⁵ Judges on lower courts are increasingly willing to frame the debate in equality terms. See, e.g., *Landell v. Sorrell*, 406 F.3d 159, 160-63 (2d Cir. 2005) (Calabresi, J., concurring in the denial of rehearing en banc) (also arguing that the Supreme Court jurisprudence is “impoverished” because it does not deal explicitly with egalitarian concerns which are “at least as important [as *quid pro quo* corruption], and, perhaps, at the very heart of the problem”).

⁴⁶ See, e.g., Stephen Breyer, *Our Democratic Constitution*, Harvard University Tanner Lectures on Human Values (Nov. 2004); Stephen Breyer, *Madison Lecture: Our Democratic Constitution*, 77 N.Y.U. L. Rev. 245 (2002). See also de Figueiredo & Garrett, *supra* note 38, at 627-34; Richard L. Hasen, *Buckley is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 153 U. Pa. L. Rev. 31, 57-60 (2004) (both discussing participatory democracy rationale).

⁴⁷ See Elizabeth Garrett, *McConnell v. FEC and Disclosure*, 3 Elect. L.J. 237, 237 (2004).

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

II. Hybrid Democracy and Designing Electoral Institutions

The need for some form of hybrid democracy is starkly seen in the context of electoral reform. The U.S. Constitution leaves open many of the questions relevant to the design of democratic institutions; one of its strengths is that it sets forth only minimal requirements and then allows flexibility to develop various kinds of electoral institutions compatible with different visions of democracy. State constitutions contain more details, but they too allow room for change, and they are amended and revised more frequently than the federal constitution. The key question in light of this flexibility becomes who will design the rules that govern elections, campaigns, and the shape of our democratic institutions. Often lawmakers themselves determine the rules, in which case the regulated are the regulators. Under such circumstances, there is the worry that self-

⁴⁸ Compare *American Civil Liberties Union of Nevada v. Heller*, 378 F.3d 979 (9th Cir. 2004) (striking state disclosure down, relying heavily on Court's protection of anonymous political speech in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995)), with *Majors v. Abell*, 361 F.3d 349 (7th Cir. 2004) (upholding state disclosure statute, relying on *McConnell* and distinguishing *McIntyre*).

⁴⁹ Under these circumstances, disclosure could also be supported by the anti-circumvention rationale articulated in *McConnell* as a justification for regulation of contributions to state and local parties. See *McConnell*, 540 U.S. at 159-62; see also Richard Briffault, *McConnell v. FEC and the Transformation of Campaign Finance Law*, 3 *Elect. L.J.* 147, 152-53 (2004).

interest will prevail over the public interest and that rules will be chosen to entrench the already powerful, decrease competition from the outside, and silence new voices. Given the inherent conflict of interest faced by lawmakers in designing the rules that will shape their careers, Dennis Thompson in his book *Just Elections* argues that more directly involving the people in decision making about democratic institutions is justified.⁵⁰ Thus, one advantage of hybrid democracy is that it allows the people a formalized role in institutional design decisions. However, with that role comes peril, namely, the fear that that the voters are likely to adopt “reforms” that dangerously weaken the legislature and that the binary format of American initiatives is a poor way to design complex institutions.

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

Although direct democracy was primarily a populist reaction against industrial interests like railroads and mining companies,⁵¹ its early supporters also saw it as a way to circumvent self-interested legislators who would block governance reforms supported by Populists and Progressives, such as the direct primary and laws to eliminate corrupt political practices.⁵² The initiative continues to be a tool used by reformers to push changes opposed by those with a vested interest in current institutional arrangements. Increasingly, it appears that the modern initiative process is being used to modify institutions of representative government in a particular way: to combat increasing polarization and realign institutions so that they produce outcomes more consistent with the preferences of the median voter. Samuel Issacharoff contends that the success of

⁵⁰ See Dennis F. Thompson, *Just Elections: Creating a Fair Electoral Process in the United States* 14 (2002); Dennis F. Thompson, *The Role of Theorists and Citizens in Just Elections: A Response to Professors Cain, Garrett, and Sabl*, 4 *Elect. L.J.* 153, 158-60 (2005). Although Thompson sees a role for popular involvement, he has substantial reservations about the initiative process in the United States. See, e.g., Thompson, *Just Elections*, *supra*, at 126-43.

⁵¹ See generally Steven L. Piott, *Giving Voters a Voice: The Origins of the Initiative and Referendum in America* (2003). Piott discusses the rise of the initiative process in Oklahoma, which was largely a reaction by farmers and miners to reduce the disproportionate political influence of railroads, banks and mining companies in the state. See *id.* at 60-82.

⁵² See, e.g., J.W. Sullivan, *Direct Legislation by the Citizenship through the Initiative and Referendum* 100 (1892) (taking aim at the “lawmaking monopoly”).

incumbents in protecting their jobs and eliminating competition from many federal and state elections has produced a “rebellion of the median voter.”⁵³ Because of its format – asking a question on a single subject that can be answered only with “yes” or “no” – direct democracy tends to favor the median voter, at least as long as turnout in the election is representative of the polity as a whole.⁵⁴

Empowering the median voter was the explicit objective of the initiative passed by Californians in 1996 to replace the parties’ closed primaries with a blanket primary.⁵⁵ In a closed primary, only party members can participate in the selection of the nominees for the general election, and those wanting to vote in the primary have to affiliate with the party well before the election. Closed primaries tend to result in the selection of more extreme candidates because only the most motivated partisans will take the time to vote, leaving voters with a choice between two relatively extreme candidates in the general election. A blanket primary, on the other hand, encourages cross-over voting in the primaries because there is little cost to it; the ballot allows a person to vote in the Democratic primary for one office, in the Republican primary for another, and in the Libertarian primary for a third. In a closed primary, cross-over voting for a particular office is costly; a voter has to register as a member of the party and then forego voting in her regular primary for all other races.⁵⁶

Blanket primaries are moderating devices designed to move political parties closer to the center, or, in the words of the California ballot pamphlet, to “weaken” party “hard-liners” and empower “moderate problem-solvers.”⁵⁷ Comparing the two primaries illustrates how difficult a concept “meaningful voter choice” really is.⁵⁸ There is arguably more of a choice in the general election – and stronger parties – in a world of

⁵³ Samuel Issacharoff, *Collateral Damage: The Endangered Center in American Politics*, 46 Wm. & Mary L. Rev. 415, 416 (2004).

⁵⁴ See Robert D. Cooter, *The Strategic Constitution* 145-47 (2000). See also John G. Matsusaka, *Direct Democracy Works*, 19 J. Econ. Persp. 185, 192 (2005) (describing reasons direct democracy favors median voter and when it may not tend in that policy direction).

⁵⁵ Cal. Proposition 198, Open Primary Act (1996); Cal. Elec. Code § 2001 (repealed).

⁵⁶ Crossover voting is somewhat less costly in the traditional open primary because the voter need not re-register to vote in a different primary. However, she still loses the opportunity to vote in her regular primary for other offices. In an open primary, a voter can choose which party’s primary to participate in on the day of the election, but she is limited to voting only in that primary for all offices.

⁵⁷ *California Democratic Party v. Jones*, 530 US 567, 570 (2000).

⁵⁸ For discussions of how the blanket primary in California affected cross-over voting and candidates, see *Voting at the Political Fault Line: California's Experiment with the Blanket Primary* (B.E. Cain & E.R. Gerber eds., 2002).

closed primaries, although the more extreme candidates may not closely reflect the preferences of most voters who tend to be relatively moderate. The nominees that emerge from a blanket primary more closely mirror voter preferences, but there are fewer grounds on which to choose between them because their policy positions will be much closer.

The Supreme Court struck down California's blanket primary, abruptly ending the experiment with reform, but those seeking electoral reform continue to turn to the initiative process as a way to implement change resisted by political parties and office holders. Empirical research on the differences between electoral institutions in states with robust direct democracy and those without it is growing and suggests some systematic differences, although fewer than one might expect. Caroline Tolbert has found that "[s]tates with a populist climate and frequent initiative use are more likely to adopt three governance policies: legislative term limits, state [tax and expenditure limitations], and ... supermajority tax rules."⁵⁹ Nathaniel Persily and Melissa Cully Anderson consider the enactment of various electoral reforms and present findings that undermine "strong claims that are often made about legislative capture inhibiting election reform."⁶⁰ Only enactment of legislative term limits is "unimaginable" without hybrid democracy, and the initiative has played an important, although sometimes indirect role, in the adoption of public financing for legislative campaigns and redistricting commissions.⁶¹ Their findings are only preliminary, and they urge that more empirical work be done on the relationship between the initiative process and the structure of other democratic institutions. Even if Persily and Cully Anderson are right that hybrid democracy does not inevitably lead to different types of governance institutions, it is still the case that hybrid democracy offers the promise of reform that circumvents self-interested legislators. It is that promise that has inspired groups like Common Cause and Public Interest Research Group (PIRG) to use the initiative process as part of their efforts

⁵⁹ Caroline J. Tolbert, *Changing Rules for State Legislatures: Direct Democracy and Governance Policies*, in *Citizens as Legislators* 171, 187 (S. Bowler, T. Donovan & C.J. Tolbert eds., 1998).

⁶⁰ Nathaniel Persily & Melissa Cully Anderson, *Regulating Democracy Through Direct Democracy: The Use of Direct Legislation in Election Law Reform*, 78 S. Cal. L. Rev. 997, 1034 (2005).

⁶¹ *Id.* at 1033-34. See also John Phippen, Shaun Bowler, & Todd Donovan, *Election Reform and Direct Democracy*, 30 Am. Pol. Res. 559, 573-74 (2002) (finding that initiative states were more likely to restrict campaign contributions and to increase regulation of contributions to candidates from political parties and PACs).

to establish nonpartisan redistricting commissions and public financing of legislative and other elections.⁶²

Consider how hybrid democracy has propelled efforts to move redistricting from self-interested state legislators to more nonpartisan commissions. Persily and Cully Anderson find that such commissions are more frequently used in states with hybrid democracy, although they are usually established by the legislature as a response to the threat of an initiative.⁶³ Recognizing the potency of the indirect influence of direct democracy, Governor Arnold Schwarzenegger of California demanded that the legislature create a nonpartisan commission of retired judges or he would place an initiative on the ballot to take the issue directly to the voters.⁶⁴ The progressive political reform group Common Cause joined with the Governor in supporting the change, and it is mounting similar efforts using the tool of direct democracy in other states.⁶⁵ In 2005 and 2006, voters in the three of our most populous states – California, Ohio, and Florida – are likely to be able to adopt nonpartisan redistricting commissions.⁶⁶ Interestingly, the attention focused on redistricting commissions as a result of Schwarzenegger’s advocacy has put the reform on the national policy agenda. Not only is it more actively being considered in other states, particularly those with the initiative process, but Representative John Tanner (D-TN) has also introduced a bill in Congress that would require all states to use nonpartisan commissions for federal redistricting.⁶⁷ If the

⁶² See Common Cause, “Redistricting”, at <http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=196481>; PIRG at <http://www.pirg.org>. See, e.g., Raphael Lewis, *Groups to Push Redistricting Plan*, Boston Globe, Aug. 2, 2005 (petition drive in Massachusetts led by Common Cause Massachusetts). See also Thomas E. Mann, *Redistricting Reform*, Nat’l Voter, June 2005, at 4, 6 (2005) (discussing involvement of the League of Women Voters).

⁶³ Persily & Cully Anderson, *supra* note 60, at 1009-10.

⁶⁴ Peter Nicholas, *Gov. to Call for Special Session*, L.A. Times, Jan. 1, 2005, at A1. See also Nick D. Mosich, *Evaluating California’s Redistricting Reform*, __ S. Cal. L. Rev. __ (forthcoming 2005) (comparing Schwarzenegger’s proposal to other commissions and evaluating).

⁶⁵ See Common Cause, *Independent Redistricting Commissions Give Voters the True Power to Choose – California Common Cause announces support of reform legislation* (Feb. 17, 2005), at <http://www.commoncause.org/site/apps/nl/content2.asp?c=dkLNK1MQIwG&b=194883&ct=429369>.

⁶⁶ California and Ohio will vote in 2005, and a measure is likely to make the Florida ballot in 2006. In addition, a serious petition effort led by Common Cause is underway in Massachusetts.

⁶⁷ H.R. 2642, 109th Cong. (2005). See also *Ending the Gerrymander Wars*, N.Y. Times, May 30, 2005. The bill would also restrict states from redistricting for federal legislative office more than once a decade. Congress has the option to make rules concerning federal elections under the Constitution’s elections clause, which leaves the rules up to the states absent congressional mandate. See U.S. Const., Art. I, § 4. If nonpartisan commissions are used for federal offices, presumably a state is more likely also to adopt this method of redistricting for state legislative offices. See Michael P. McDonald, *A Comparative Analysis of*

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

Although the association of the high-profile former Hollywood star Schwarzenegger has played a large role in the increased interest in redistricting commissions, other factors are at play. The Supreme Court signaled that courts would remain largely, and perhaps entirely, uninvolved in partisan gerrymandering cases in *Vieth v. Jubelirer*,⁶⁸ at around the same time that the public became more aware of the pernicious effects of gerrymandering because of dramatic political battles in Colorado and Texas. Indeed, Oklahoma became a player in the Texas saga as Democrats fled across the Red River to deny the state legislature a quorum and delay adopting a redistricting proposal that heavily favored Republicans.⁶⁹ In addition, political commentators have also focused on the lack of competitiveness in most state legislative and House elections.⁷⁰ In 2004, fewer than 36 races for the House of Representatives were real contests.⁷¹ In California in 2004, not a single seat in the Assembly or Senate changed parties,⁷² and one strongly suspects that the same 153 state lawmakers would have returned to Sacramento but for term limits. The experience with redistricting commissions in the handful of states that uses them does not suggest that commissions usher in radical alterations of elections or single-handedly bring back vibrant

Redistricting Institutions in the United States, 2001-02, 4 State Pol. & Pol'y Q. 371, 378 (2004) (showing that Indiana is the only state to use commission for House seats and not also for state legislative offices).

⁶⁸ 541 U.S. 267 (2004).

⁶⁹ Texas' attempt to pass a redistricting proposal in 2003 was an almost year-long battle between Republicans and Democrats. See April Castro, *Judges Back GOP in Texas Redistricting*, The Daily Oklahoman, Jan. 7, 2004, at A8. Democrats made multiple attempts to deny the legislature a quorum, from fleeing to Ardmore, OK to "vacationing" in New Mexico. See David Zizzo, *Texas Lawmakers Enjoy Ardmore Hospitality*, The Daily Oklahoman, May 14, 2003, at A1; Kelley Shannon, *Congressional Redistricting Flap Rages in Texas*, The Daily Oklahoman, Oct. 12, 2003, at A17.

⁷⁰ See, e.g., David S. Broder, *No Vote Necessary*, Wash. Post, Nov. 11, 2004, at A37; Nicholas D. Kristof, *No More Shame Elections*, N.Y. Times, Nov. 20, 2004, at A19. See Richard H. Pildes, *Foreword – The Constitutionalization of Democratic Politics*, 118 Harv. L. Rev. 28, 63-64 (2004); Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 Elect. L.J. 179, 183 (2003). See also Bruce I. Oppenheimer, *Deep Red and Blue Congressional Districts: The Causes and Consequences of Declining Party Competitiveness*, in Congress Reconsidered 135, 143 (L.C. Dodd & B.I. Oppenheimer, eds., 8th ed. 2005) (making similar point with respect to 2000 elections).

⁷¹ See Mann, *supra* note 65, at 4.

⁷² See *Serving the Pols, Not the People*, L.A. Times, Nov. 10, 2004, at B10.

competition.⁷³ But it is a reform that promises some change in political dynamics, and it is much less likely to be considered absent hybrid democracy. A hybrid system allows the reform to be adopted by some states, through the initiative process or threat of initiative, and the resulting attention then can place the topic on the national agenda to cause change in states without the initiative process.

It is important not to overstate the value of hybrid democracy in allowing consideration and adoption of electoral reforms. After all, nonpartisan redistricting and election commissions are common in Europe, which does not have a robust hybrid system.⁷⁴ The Persily and Cully Anderson study suggests that differences in state electoral systems may be more a product of political culture than of the initiative process,⁷⁵ although surely those two things – political culture and hybrid democracy – are inherently related and their effects are hard to separate. It is equally important to understand the limitations of hybrid democracy as a method to improve electoral institutions and to circumvent legislator self-interest.

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

Any policy making process that applies generally and is formulated well in advance of particular decisions can usually be used to adopt reforms that one believes are good for democracy and reforms that one believes harm democratic institutions. The initiative process has been used by groups to enact changes in democratic institutions that I believe have been unwise, such as term limits and limitations on the ability of legislatures to raise taxes, as well as reforms I view as positive, such as redistricting

⁷³ See McDonald, *supra* note 67; Jamie Carson & Michael H. Crespin, *Comparing the Effects of Legislative, Commission, and Judicial Redistricting Plans on U.S. House Elections, 1972-2002*, unpublished paper presented at the Western Political Science Association Annual Meeting, Mar. 11-13, 2004. See also Gene R. Nichol, Jr., *The Practice of Redistricting*, 72 U. Colo. L. Rev. 1029, 1030 (2001) (observing “intensely political” process with respect to appointment of politicians, but less for appointments of judges).

⁷⁴ See Pildes, *supra* note 70, at 78-80; Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 Tex. L. Rev. 1643, 1694 (1992). See also Christopher Elmendorf, *Representation Reinforcement Through Advisory Commissions: The Case of Election Law*, 80 N.Y.U. L. Rev. ____ (forthcoming 2005) (drawing on European and other international experience to advocate consideration of a permanent advisory commission on electoral reform).

⁷⁵ See Persily & Cully Anderson, *supra* note 60, at 1001, 1033.

commissions and ethics reform. In some cases, the experiments adopted by initiative have worked well, and in other cases, they have failed. Often it is not entirely clear when a reform is adopted whether its consequences will be a net gain; however, one of the strengths of a federal system is the ability of states to try new approaches and to learn from their experiences and those of other states. The costs of reforms that prove unwise can be reduced through the proposals described above to allow legislative modification of statutory initiatives and to sunset constitutional initiatives. Of course, sunset provisions also reduce the possible advantages of beneficial initiatives because they limit their durability, but presumably reforms that are widely perceived to be successful will be easier to re-enact.

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

The reasoning of these critics is that people turn to initiatives because they are frustrated with their representatives; thus, they will mostly enact legislation that reduces the power of elected officials. Even initiatives that are heralded in the reform community as beneficial changes to democratic structures – such as redistricting reform and campaign finance reform – operate to limit the discretion of legislators to act in self-interested ways. The argument made by opponents of direct democracy cannot simply be that initiatives limit legislative discretion – often they do. The argument must be that initiatives more often limit discretion needed for effective representative government than they limit discretion to act in the interests of legislators themselves or special interests at cost to the public interest. In short, the case must be made that the costs of initiatives to the vitality and strength of representative democracy outweighs the benefits.

For example, critics of direct democracy claim that policies enacted by initiative have exacerbated the budget difficulties of states like California. More generally, the concern is that initiatives will tend to reduce the flexibility of lawmakers to modify budgets in response to economic changes and to reorder government priorities. When lawmakers begin to work on the state's annual budget, they find that a substantial amount of revenue has already been committed to particular projects by initiatives. Laura Tyson has stated, without any empirical support, that 70% of California's budget has been earmarked by initiatives,⁷⁶ and lawmakers in other states say they are worried about a similar "Californi-fication" of their budgets.⁷⁷ Other critics point to term limits, which are almost entirely a product of initiative, as responsible for a substantial reduction in the ability of legislators to reach compromises and govern competently.⁷⁸

Certainly, there is reason to be concerned that one inevitable effect of hybrid democracy is a significant weakening of the representative component. However, elected officials bear some responsibility for this feature of modern hybrid democracy: the resurgence of direct democracy in the 1970s partially resulted from public disgust with and distrust of representative institutions because of the perceived (and actual) failure of elected officials to respond to voter preferences. Voter frustration with representative institutions continues to drive election reform by initiative. For example, recent efforts to change the primary system in California, including the adoption of the short-lived blanket primary, are reactions to the unwillingness of the two major parties to adopt internal reforms that would present voters with different choices in the general election. A recent election concretely demonstrated the effect of the major parties' failure to nominate candidates that can energize voters. The prospect of choosing between Gray Davis and Bill Simon in the 2002 election led to voter alienation and very low turnout. This low turnout ironically made it easier for those supporting a recall of Davis to collect enough signatures to place the question of retaining him before the voters less than a year after his reelection because the number of signatures required is a percentage of the total

⁷⁶ Laura D'Andrea Tyson, *A New Governor Won't Fix What Ails California*, Bus. Wk., Sept. 22, 2003, at 24.

⁷⁷ See, e.g., Bill Cotterell, *Petition Process Going Awry?*, Tallahassee Democrat, Dec. 9, 2003 (quoting Florida lawmakers in hearings to consider changes in initiative process that would make initiatives more difficult to qualify for the ballot and to pass).

⁷⁸ For an exhaustive examination of the effect of term limits in California, see Bruce E. Cain & Thad Kousser, *Adapting to Term Limits: Recent Experiences and New Directions* (2004).

voting in the last gubernatorial election.⁷⁹ Opponents of the recall attacked it as undermining representative institutions; blame should have been shared by the entrenched political players who refuse to adopt reforms that respond to voters' legitimate concerns about the quality of candidates. The two parts of hybrid democracy are related; each reacts to the other. When the behavior of elected officials leads to disengagement from representative institutions, the public may be more likely to support initiatives aimed at elected officials.

Moreover, criticism of the effect of initiatives on the performance of representative institutions is typically overstated. For example, Tyson's claim that 70% of the California budget is earmarked by initiatives is certainly exaggerated.⁸⁰ The most comprehensive study of the California budget puts the figure well below this level, revealing that only 32% of the state's 2003-04 Budget was constrained by popular initiatives. Furthermore, the mandated spending is largely the product of one initiative, Proposition 98, that requires the money be spent for grades K-12 and community college education.⁸¹ To be sure, even this amount of earmarking can be problematic in difficult budgetary times and deny lawmakers necessary flexibility. Indeed, one of the initiatives that Governor Schwarzenegger placed on the ballot in 2005 is a budget reform proposal that weakens the requirements of Proposition 98.⁸² But it is not accurate to claim that nearly three-fourths of the state's budget is on automatic pilot purely as a result of direct democracy. Of course, looking only at the amount of earmarked money does not provide the full story of the effect of initiatives on the legislature's ability to budget. Other initiatives limit the ability of the legislature to raise money to fund new programs, and term-limited legislators are less able to reach the compromises to enact a budget in a timely fashion than legislators with more experience. In short, the effect of initiatives on

⁷⁹ See Garrett, *supra* note 34, at 243.

⁸⁰ Others have used similar figures but with regard to the amount of the budget determined by initiatives and federal mandates. See, e.g., John W. Ellwood & Mary Sprague, *Options for Reforming the California State Budget Process*, in *Constitutional Reform in California: Making State Government More Effective and Responsive* 329, 337, 348 (B.E. Cain & R.G. Noll, eds., 1995) (stating that 88% of the state's budget is earmarked by some source, including federal mandates and initiatives, and that 60% of the General Fund expenditures are earmarked by Proposition 98 and the three-strikes initiative).

⁸¹ John G. Matsusaka, *Direct Democracy and Fiscal Gridlock: Have Voter Initiatives Paralyzed the California Budget?*, __ State Pol. & Pol'y Q. __ (forthcoming 2005).

⁸² Cal. Proposition 76, "Live Within Our Means Act" (2005).

budgeting is complicated – and the experience of the federal government suggests that budget policy can become inflexible and poorly run without the influence of initiatives.

No easy solution exists to reduce the threat that direct democracy poses to the health of representative institutions. If one thought the costs to representative government substantially outweighed the benefits of hybrid democracy, eliminating direct elements of our system might be justified. It does not seem to me that case has been made – critics give short shrift to the power of initiatives to reform representative institutions in ways that improve their performance and responsiveness. Moreover, even if critics persuade scholars and policy elites that direct democracy reduces welfare overall, eliminating the initiative process is very unlikely to be accepted by the people. Polls consistently demonstrate that citizens like the initiative process and trust its outcomes more than they trust legislation enacted by their representatives.⁸³ Moreover, in the United States and around the world, the trend is toward increasing that influence on governance exerted by the initiative and referendum. The vast majority of new constitutions in Europe have some element of direct democracy,⁸⁴ and efforts to substantially erode the process in U.S. states and cities that allow popular involvement in lawmaking rarely succeed. Throwing out all direct elements of our hybrid system is an extreme reaction that denies voters an ability to play a role in shaping institutions of governance within our democratic framework. The better response is to work toward thoughtful reform, and to understand that any process of government can be used to enact legislation that we like and legislation that we don't.

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

Decisions about the design of democratic institutions can be complex. Not only is each particular reform proposal complicated and likely to interact in multifaceted and

⁸³ See, e.g., Mark Baldassare, *Californians and Their Government: PPIC Statewide Survey 17 (2004)* (74% think initiative process is a “good thing” and 59% think that policy made through initiatives is better than policy made by elected officials); Jack Citrin & Jonathan Cohen, *Viewing the Recall from Above and Below*, in *Essays on the California Recall* 68, 74-82 (S. Bowler & B.E. Cain, eds., 2006).

⁸⁴ Bruno Kaufmann, *A Comparative Evaluation of Initiative & Referendum in 32 European States*, in *Direct Democracy in Europe* 3 (B. Kaufmann & M.D. Waters, eds., 2004).

sometimes unexpected ways with other parts of the political system, but design decisions may also require that one choose among several options simultaneously. The format of decision making in the initiative process in the United States is not conducive to this type of multi-factored analysis. Instead, voters are asked to vote “yes” or “no” on one option that is compared to the status quo in most cases; only in a few instances will there be more than one question on the ballot relating to the same issue. Even in those cases, the choice must be made in a binary way on each proposal compared only to the status quo without any way for voters to signal how they might make trade-offs among the alternatives. Rather than empowering voters, the presence of multiple questions on the same ballot about the same topic often means that the status quo is retained because confused voters vote “no” on all the questions. Indeed, opponents of reforms proposed through direct democracy often qualify competing initiatives merely to ensure the defeat of the first reform; they are largely indifferent about whether their proposal passes because they are relatively happy with the status quo.⁸⁵ Furthermore, single subject rules usually apply to initiatives; they are intended to reduce voter confusion and to avoid forcing voters to accept a policy they oppose in order to get a change that they strongly favor.⁸⁶ But single-subject requirements also limit the scope of any particular reform proposed by initiative even if it is more sensible to consider it as part of a comprehensive reform.

Others have indicted direct democracy because it forces voters to make difficult decisions in this binary fashion without considering the trade-offs inherent in governance.⁸⁷ The current design of hybrid democracy is not inevitable, however; it is endogenous and could be changed to allow more complex decision making. Careful thought is required before adopting any design change; most voters will never spend the time required to become experts on policy choices, and the political environment must be shaped so that it allows them to decide competently on the basis of a few voting cues. Reform is nonetheless still possible, for example, by combining an independent commission with an initiative much as New Zealand did when it adopted a proportional

⁸⁵ See Elizabeth Garrett, *Who Chooses the Rules?*, 4 *Elect. L.J.* 139, 144 (2005).

⁸⁶ See Daniel H. Lowenstein, *Initiatives and the New Single Subject Rule*, 1 *Elect. L.J.* 35 (2002) (discussing courts greater use of single subject rules to invalidate laws enacted by initiative).

⁸⁷ See Thompson, *Just Elections*, *supra* note 50, at 139; Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 *Harv. L. Rev.* 434 (1998).

election system for its Parliament.⁸⁸ First, in 1986, the Royal Commission on the Electoral System analyzed the existing first-past-the-post (FPTP) system and alternatives, and it recommended changing to a mixed member proportional (MMP) system based on the German approach.⁸⁹ It was not clear at this point, whether the Commission's recommendations were necessarily the prelude to a popular referendum, or whether any such referendum would be binding.⁹⁰ The report, however, served as a focal point for reform and placed the issue of electoral reform saliently on the policy agenda, making it impossible for politicians to avoid a popular vote on reform. Thus, in 1992, voters were first asked in a non-binding referendum whether they wanted to keep the status quo, and then which of four other electoral systems they would prefer instead. In this advisory vote, they clearly signaled a desire to get rid of FPTP and to adopt MMP. After a year of further discussion and campaigning, voters were presented the binding binary choice between FPTP and MMP, and 54% of them choose MMP in an election in which 85% of eligible voters participated.⁹¹

A different sort of entity has been combined with direct democracy in British Columbia to consider sweeping electoral reform of its FPTP system. In April 2003, the government created a Citizens' Assembly on Electoral Reform, consisting of 160 members, one man and one woman from each electoral district and two aboriginal members.⁹² The Assembly, which was provided a staff and budget and held public hearings, assessed the electoral system of British Columbia and compared it to approaches in other countries. In December 2004, the Assembly adopted a proposal to

⁸⁸ See Garrett, *supra* note 85, at 145.

⁸⁹ Geoffrey Palmer & Matthew Palmer, *Bridled Power: New Zealand's Constitution and Government* 13 (4th ed. 2004).

⁹⁰ See Keith Jackson & Alan McRobie, *New Zealand Adopts Proportional Representation* 46-49 (1998) (describing how issue of popular referendum was raised, perhaps mistakenly, by the Prime Minister in a debate); *id.* at 125-34 (describing political process that resulted in the two-referendum format).

⁹¹ Palmer & Palmer, *supra* note 89, at 13. Findings from the California recall, with its two-part, relatively complicated ballot, suggest that voters can handle more complexity than the current binary format for initiatives in the states. See R. Michael Alvarez, D. Roderick Kiewiet & Betsy Sinclair, *Rational Voters and the Recall Election*, in *Essays on the California Recall*, *supra* note 83, at 87.

⁹² See Keith Archer, *Redefining Electoral Democracy in Canada*, 3 *Elect. L.J.* 545 (2004). The website of the Citizens' Assembly is <http://www.citizensassembly.bc.ca/public>. A similar assembly is under consideration in Ontario. See News Release, *Ontarians To Have a Say on Electoral Reform*, Nov. 18, 2004, available at <http://www.premier.gov.on.ca/english/news/ElectoralReform111804.asp>. See also Ethan Lieb, *Deliberative Democracy in America: A Proposal For A Popular Branch of Government* (2004) (proposing an institution like a citizens' assembly in a creative proposal to make direct democracy more deliberative).

change the system to a single transferable vote system that would allow voters to rank candidates and would move any vote not necessary to elect a candidate to the voter's next preferred candidate.⁹³ The question of whether to adopt the Citizens' Assembly's recommendation was submitted to the voters in a referendum in May 2005. To pass, the referendum had to receive both a supermajority of 60% of all those voting and a simple majority in 60% of the 79 electoral districts. The referendum failed, but it only barely missed the threshold when it received over 57% support and achieved a simple majority in all but two districts.⁹⁴ As often occurs when a referendum receives majority support but fails because of supermajority requirements,⁹⁵ the discussion about reforming the FPTP system in British Columbia is continuing.

I do not want to suggest that this combination of commission or citizens' assembly and popular votes, perhaps on questions phrased in non-binary ways, is required for every decision presented to the people. For example, when the legislature puts a proposal on the ballot, lawmakers have engaged in the process of deliberation, and they have winnowed down the alternatives and thought about the relevant trade-offs. But in the area of electoral reform, use of commissions seems particularly appropriate. Lawmakers have a conflict of interest when it comes to designing the institutions through which they seek and retain office, so they should not be the primary decision makers about larger structural issues. Leaving such decisions entirely to the people without some guidance from experts, however, is problematic because comprehensive electoral and governance reforms can be too complex for the traditional initiative process in the United States. An awareness that we operate in a hybrid democracy – with representative institutions, direct elements, and the potential for special commissions and assemblies – should allow more creative solutions to the perils of the initiative process, while retaining its promise as a means to consider and enact reforms opposed by entrenched political players with a stake in the status quo.

⁹³ See British Columbia's Citizens' Assembly on Electoral Reform, *Final Report: Making Every Vote Count* (Dec. 2004).

⁹⁴ See Final Referendum Results: Referendum on Electoral Reform, available at <http://www.elections.bc.ca/elections/ge2005/finalrefresults.htm> (2005).

⁹⁵ See Elizabeth Garrett, *Issues in Implementing Referendums in Israel: A Comparative Study in Direct Democracy*, 2 Chi. J. of Int'l Law 159, 165 (2001) (discussing situation with regard to Scottish devolution, which passed in a second referendum).

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

Political scientists studying the influence of direct democracy have found that under certain conditions the presence of a robust initiative process can influence the traditional legislative process so that more legislation reflects the preferences of the median voter, rather than interest groups with intense and often outlying preferences.⁹⁶ Elisabeth Gerber terms this the indirect effect of direct democracy.⁹⁷ Accordingly, groups who find they are stymied in the legislature and who are advocating a position that is likely to gain majority support if presented to the people on the ballot can threaten to qualify an initiative. This threat can change the bargaining dynamics in the legislature and allow a compromise to be enacted through the representative branches. For example, in 1996, Reed Hastings, a wealthy Silicon Valley entrepreneur, led a group in an effort to establish charter schools and found they were blocked by powerful teacher unions in the California legislature. So they spent \$3.5 million to fill petitions with 1.2 million signatures and raised an additional \$12 million for a campaign war chest. Their success in signature gathering and fundraising provided them credibility when they began to again bargain with lawmakers. Because legislators understood that the initiative would likely pass if presented to the people, they were willing to work with Hastings' group to reach a compromise. A charter schools bill was enacted, an indirect consequence of the initiative process.⁹⁸

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

⁹⁶ See Elisabeth R. Gerber, *Legislative Response to the Threat of Popular Initiatives*, 40 Am. J. Pol. Sci. 99 (1996); Matsusaka, *supra* note 54, at 192-93.

⁹⁷ See Gerber, *supra* note 3, at 121-36.

⁹⁸ See Elizabeth Garrett, *Money, Agenda Setting, and Direct Democracy*, 77 Tex. L. Rev. 1845, 1860 (1999) (detailing this story).

and one that favors majoritarian outcomes (direct democracy). There are two problems with this rosy view, however.

The first problem is one I will mention but not deal with thoroughly in this Lecture. It is not clear that Hybrid Democracy is sufficiently balanced to appropriately protect the rights of all minority groups in a democracy. The majoritarian aspect of direct democracy was seen as a serious weakness by Madison, for example, who argued for purely representative institutions to guard against the passions of majoritarian factions. Well-organized and well-funded minorities can probably use their funds to defeat initiatives that threaten their interests;⁹⁹ the real worry is that minorities that lack money and power may be systematically harmed by the initiative process. In recent years, initiatives that target immigrants, felons, and gays and lesbians have been passed by substantial margins because they appeal to the prejudices of the majority and are enacted in a process with little protection for those who lack power and resources. Of course, these groups do not necessarily fare much better in the representative process, which has also passed laws hostile to them and others without much electoral clout. However, the representative process has safeguards that slow enactment of policies and that empower representatives of a determined minority, especially in blocking legislation. These safeguards, such as the vetogates of committees, requirements of bicameralism and presentment, supermajority voting requirements in some circumstances, are unavailable in direct democracy. The safeguard for minority interests burdened by oppressive initiatives is the courts, which have been willing to strike down some of the ballot measures, such as those denying undocumented workers access to government services or some aimed at restricting the rights of gays and lesbians. It is not clear, however, that the representative process combined with judicial protection is substantial enough to balance the majoritarian aspects of the initiative process, particularly when harnessed by populist demagogues who appeal to the worst instincts in voters.

There is another, related way to look at the “cost” of majoritarianism that results from direct democracy. Direct democracy generally empowers the median voter, while

⁹⁹ 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, 79-80 (2001) (surveying literature that demonstrates heavy one-sided spending to defeat an initiative is disproportionately successful).

representative democracy allows groups with intense preferences a larger role in policy making.¹⁰⁰ Depending on the intensity of the preferences held by the minority and majority, privileging the median voter may reduce overall welfare. Hybrid democracy, and the bargaining in the legislative process that occurs in the shadow of the initiative process, might allow a healthy balance between the preferences of the median voter and strongly held preferences by a minority. More theoretical and empirical work is needed to determine whether the balance is indeed healthy – that is, that hybrid systems allow minorities to prevail when such a result maximizes overall welfare but blocks their success when the policy they seek results in larger societal costs than the benefits they obtain. The concern with respect to unorganized minorities or groups that lack resources to meaningfully influence the representative process and without the numbers to prevail in initiatives is that their preferences will be systematically ignored and undervalued. Thus, the majority will always prevail even when society on the whole is better off with the policy favored strongly by the minority.

The second flaw in the ideal version of a balanced Hybrid Democracy lies in realities the first condition: the process of qualifying measures for the ballot. Although grassroots groups may be able to qualify initiatives with armies of volunteers, the sure route to ballot access is money. A group that can pay between 50 cents to \$4 per signature is guaranteed access to the ballot.¹⁰¹ The reality that money is a sufficient condition for ballot access means that the agenda of the initiative process is set by wealthy groups and individuals. Although Hastings could not have successfully threatened lawmakers unless charter schools was an issue with majority support, we cannot be certain that a majority of Californians would have agreed with him that charter schools was the most pressing educational reform. If the people had been allowed more say in setting the agenda, one suspects that issues like class size, the condition of facilities, per-pupil spending, and teacher accountability would have ranked ahead of

¹⁰⁰ Arthur Lupia & John G. Matsusaka, *Direct Democracy: New Approaches to Old Questions*, 7 *Annu. Rev. Pol. Sci.* 463, 476-77 (2004). See also Thomas Stratmann, *Logrolling*, in *Perspectives on Public Choice* 322, 325 (D.C. Mueller ed., 1997) (describing how logrolling in legislatures allows those with intense preferences to obtain policy outcomes).

¹⁰¹ Dan Morain & Tom Gorman, *Campaign 2000: Propositions*, *Los Angeles Times*, March 8, 2000, at A1.

charter schools.¹⁰² In other words, the initiative process may favor majoritarian outcomes but only on the questions that well-funded interests want to ask the public.

This dynamic may be different, however, when elected officials are wielding the initiative threat. Unlike a wealthy entrepreneur or a leader of a well-funded group, an elected official is accountable to the voters and thus may be more likely to elevate issues to the policy agenda that concern most of his constituents. A politician who uses the threat of initiative to change bargaining dynamics among the branches of government not only deploys a tool that favors majoritarian outcomes but he may also use it on issues that matter to his constituents. Of course, governors and other elected officials can also be susceptible to the entreaties of well-funded and well-organized groups when choosing which issues to champion. Arnold Schwarzenegger has raised most of his campaign money from business interests such as financial institutions, information technology firms, real estate developers, oil and gas companies, health care and drug companies, auto dealers, and retailers;¹⁰³ presumably, they exercise some influence over his decisions about agenda-setting. However, a governor's statewide constituency and progressive ambition may lead him to be more concerned with majoritarian preferences than legislators who represent smaller geographic areas, and certainly he is more accountable than policy entrepreneurs like Reed Hastings. At the least, the dynamics of initiative threats used to govern are significantly different when the person making the threat faces re-election, rather than when the tool is used by the leader of an interest group or a rich person whose hobby is politics.

Politicians have used the threat of initiative, as well as the initiative process, to enact policies in the past,¹⁰⁴ but never to the extent that it is being used now in California. The modern politician who embodies hybrid democracy – with its promise and its perils – is

¹⁰² A study by the Public Policy Institute of California in 2005, for example, found that class size, curriculum, and teacher quality were the most important issues to adults in the state. See Mark Baldassare, PPIC Statewide Survey April 2005: Special Survey on Education 10, *available at* http://www.ppic.org/content/pubs/S_405MBS.pdf.

¹⁰³ See Hasen, *supra* note 34, at 901; Garrett, *supra* note 2, at ___.

¹⁰⁴ See, e.g., Keynote Address of Senator Bob Graham, Conference on the 2004 Election: What Does it Mean for Campaigns and Governance?, held at the University of Southern California Law School by the USC-Caltech Center for the Study of Law and Politics (Oct. 2004) (discussing how Graham and others enacted higher education reform through the initiative even though the sitting Governor and Republicans opposed it). Of course, executives have long used populist rhetoric and threats to go over the heads of the legislators to the people to increase their bargaining position. The initiative makes the threat more potent because if the tool is used successfully, the governor can actually enact the law he supports.

Arnold Schwarzenegger. His systematic use of direct democracy to govern is qualitatively different from anything seen before in California or elsewhere. After a brief review of Schwarzenegger's use of hybrid democracy since he took office, I will turn to the perils of this approach. As we are beginning to learn in California, even a politician with all the advantages of Schwarzenegger may not be able to use this tactic over the long term to enact major and controversial policies. It is simply not a sustainable method of governing. When the threat fails and the executive must turn to the people, he faces the risk of loss at the polls, thereby decreasing the credibility of future threats. Even when he succeeds, the policy enacted suffers from the problems of initiatives generally. That is, it is enacted in an extremely durable form that cannot easily be changed over time to deal with unforeseen consequences or to correct mistakes in the original drafting. Moreover, if the strategy is used as a primary method of governing, voters and politicians find themselves in a perpetual campaign which diverts energy from the task of day-to-day governance.

A. Arnold Schwarzenegger and Hybrid Democracy: A Promising Start?¹⁰⁵

Schwarzenegger's first foray into the political realm, largely to test the waters for a gubernatorial candidacy, was his support in 2002 of Proposition 49, requiring funds be spent on after school programs.¹⁰⁶ Not only did he lend his name to the campaign, but he also spent \$1.1 million of his own money to pass the measure. This initiative, which passed easily, is the kind of crypto-initiative Kousser and McCubbins indict: it was designed primarily for Schwarzenegger's political gain rather than to effect policy change. The initiative provides no funding to after-school programs unless there is a surplus available after other education funds have been disbursed; indeed, experts believe that funds will not be available for these programs until 2007.¹⁰⁷ There was virtually no opposition to this proposal, which was structured both to resonate positively with voters

¹⁰⁵ Much of this discussion is drawn from a longer analysis in Garrett, *supra* note 2.

¹⁰⁶ See David L. Schechter, *Rights of Removal: Recall Politics in the Modern Era* 22 (paper presented at the American Political Science Association Meeting in Chicago, IL, Sept. 2-5, 2004).

¹⁰⁷ Carla Rivera, *Schwarzenegger's Initiative Unfunded*, L.A. Times, Aug. 28, 2003, at B1.

and to demonstrate to an important interest group – the educational community – that Schwarzenegger would support their interests.

After his first success in hybrid democracy, Schwarzenegger began to watch for an opportunity to run for governor, a tricky proposition despite his popularity because his relatively liberal social views would hurt him in a closed Republican primary. The right wing of his Party distrusted him on several grounds: his support of gay rights, women's reproductive freedom and environmental issues; his marriage to a member of the Kennedy family; and his inability to prove that he was a fiscal conservative who would oppose tax increases. The recall was the perfect opportunity for Schwarzenegger to run for office.¹⁰⁸ He was able to bypass the primary system and go straight to a general election. He could run against an extremely unpopular and uncharismatic governor who had barely managed to defeat an even more uncharismatic Republican opponent in the 2002 election.

Schwarzenegger's celebrity status and personal wealth gave him substantial advantages in the truncated recall campaign and allowed him to rise to the top of a crowded field of 135 candidates. Schwarzenegger spent about \$10.5 million of his own money,¹⁰⁹ a figure that his closest competitor, Cruz Bustamante, had to try to match by rapidly raising money from individuals through contributions limited to \$21,200. Although Bustamante attempted to evade contribution limitations through his own use of hybrid democracy – raising money to defeat an initiative on the recall ballot and spending it on advertisements featuring Bustamante – he was never able to generate the kind of money that Schwarzenegger had in his personal bank account.¹¹⁰ In addition, the brief campaign period made it less likely that allegations of past inappropriate behavior toward women would affect the viability of Schwarzenegger's campaign.¹¹¹ Thus, hybrid democracy – the California statewide recall system – propelled Schwarzenegger into the governor's office and allowed him to avoid many of the pitfalls of a traditional campaign and election.

¹⁰⁸ For a discussion of the recall and its advantages for Schwarzenegger, see Garrett, *supra* note 34, at 254-65.

¹⁰⁹ See *id.* at 247.

¹¹⁰ *Id.* at 248-49.

¹¹¹ See Gary Cohn, Carla Hall & Robert W. Welkos, *Women Say Schwarzenegger Groped, Humiliated Them*, L.A. Times, Oct. 2, 2003, at A1 (a story that broke only days before Election Day and after many absentee ballots had been cast).

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

In Schwarzenegger's first State of the State Address, he warned legislators that he would take workers' compensation reform to the voters unless he received a bill that he could accept by March 1, a deadline that was relaxed.¹¹² His victory in the recall election gave the threat some credibility, and his hand was substantially strengthened after a March special election in which voters passed a \$15 billion bond that the Governor needed to survive an immediate budget crisis. This victory was impressive because the bond proposal, which was linked to a second proposal requiring a balanced budget, had initially received support from only about one-third of the voters.¹¹³ After an aggressive campaign led by the Governor, the bond was passed by a decisive margin; 63 percent of those voting supported it.¹¹⁴ Although this reversal in public opinion is noteworthy, victory was always likely because Schwarzenegger faced no real opposition. Instead, he had the support of virtually all political leaders in the state including Democratic Senator Dianne Feinstein and Steve Westly, the state Controller and now an opponent in the 2006 race for governor. Soon after the victory, the California legislature sent workers' compensation reform to the Governor's desk for his signature. The threat of initiative backed up by success at the polls had succeeded in breaking the legislative logjam that had blocked workers' compensation reform previously.

Schwarzenegger continued to govern during his first year by threat of initiative. During budget negotiations in spring 2004, he had convinced Indian tribes to contribute

¹¹² Governor Arnold Schwarzenegger, State of the State Address (Jan. 6, 2004).

¹¹³ See Rene Sanchez, *Political Muscle: Schwarzenegger Demonstrates Strength with Ballot Triumph*, Wash. Post, Mar. 4, 2004, at A1.

¹¹⁴ California Secretary of State, California Primary Election, March 2, 2004, *State Ballot Measures, Statewide Returns* (showing Proposition 57 (bond) winning with over 63% support and Proposition 58 (balanced budget) winning with 71% support), available at <http://primary2004.ss.ca.gov>Returns/prop/00.htm> (Mar. 29, 2004).

more money to the state in part because he threatened to support initiatives circulated by gambling interests to take away the tribes' monopoly. Part of the agreement with the tribes was that Schwarzenegger would oppose the initiatives; he was so successful that the supporters of Proposition 68, which would have eliminated the tribal monopoly unless tribes agreed to pay 25% of their revenues to the state, pulled out of the campaign several weeks before the election after having spent \$25 million.¹¹⁵

Schwarzenegger was active in more than just the campaigns concerning the gambling initiatives; he took positions on twelve of the sixteen ballot measures on the November 2004 ballot.¹¹⁶ His position prevailed in all but two of the races, and those losses should not have significantly tarnished his reputation because he did not take a particularly public position on either. He supported the nonpartisan primary proposal late in the campaign and did not include it in the slate mailer that the Republican Party mailed out listing his positions; this ballot measure lost. Voters enacted Proposition 63, which he had opposed on his slate mailer; this initiative funds mental health services with the proceeds from a tax on millionaires. Schwarzenegger was not very visible in the campaign opposing this initiative, perhaps sensing that voters were likely to support both the program and the source of funding. His opposition was mostly intended to signal to fiscal conservatives in his Party that he would remain true to his "no taxes" pledge. He was less successful in the state legislative races he chose to become involved in, a development that led to his enthusiastic embrace of a nonpartisan redistricting commission. His failure to translate his personal popularity into influential endorsements of candidates was a chink in his armor, but he seemed nearly invincible when he took an issue directly to the people. Presumably, the results of the 2004 general election made his governing strategy of using initiatives more likely to change bargaining dynamics in Sacramento.

After his victories in November, the Governor was emboldened to make four specific threats in his State of the State Address in 2005. He demanded that the legislature

¹¹⁵ See Robert Salladay & Dan Morain, *Prop. 68 Backers Fold 'Em*, L.A. Times, Oct. 7, 2004, at B1. See also See California Secretary of State, Campaign Finance Activity for Yes on 68 Issue Committee, available at <http://cal-access.ss.ca.gov/Campaign/Committees/Detail.aspx?id=1260733&session=2003> (for record of fundraising).

¹¹⁶ See Governor Arnold Schwarzenegger's Ballot Proposition Voter Guide (2004), on file with author. In addition to the positions listed there, he also took positions on Proposition 71, supporting a bond for stem cell research, and Proposition 62, supporting a nonpartisan primary to replace the closed primaries.

establish a nonpartisan redistricting commission of retired judges; that it enact budget reform designed to reduce the amount of the budget earmarked by initiatives, particularly Proposition 98, and to enforce a hard cap on spending; that it change the public employees' pension system from a defined benefit to a defined contribution plan; and that it use a merit pay system for public school teachers and change their tenure system so that they could be more easily fired if their performance was unsatisfactory.¹¹⁷ His campaign organization began raising record amounts of campaign funds and circulating petitions to put the policies on the ballot in a special election in the fall, but it was clear that he hoped to use the threats to force legislative action. Although in some cases the reforms required constitutional change, and thus a popular vote, victory would be more certain if the voters were asked by both the Governor and the legislature to support a change.

Schwarzenegger prefers compromise, on terms acceptable to him, to continued interbranch disagreement and a contested and lengthy initiative campaign. Even after he called in June for a special election on his reform proposals, his staff continued to try to work out a deal with Democratic legislators so that they could put consensus measures on the ballot.¹¹⁸

It seems that Schwarzenegger was surprised when the legislature called his bluff and refused to negotiate seriously. Moreover, the Governor had to quickly back down from one proposal that he touted in his State of the State; he is taking only three measures to the people in a few weeks. Organized and effective opposition by teachers, nurses, and law enforcement officers to the pension proposal resulted in the Governor's decision not to put this question on the ballot.¹¹⁹ Instead, he had to be content with a vague promise (or mild threat) to pursue pension reform in the future. Moreover, his sweeping public school reform is less ambitious: the merit pay provisions are not part of the initiative that will appear on the ballot. For the first time in his term, the Governor no longer looks invincible at the polls, a development which draws into question his continuing ability to

¹¹⁷ Governor Arnold Schwarzenegger, State of the State Address (Jan. 5, 2005).

¹¹⁸ See Robert Salladay & Evan Halper, *As Popularity Ebbs, Governor Reaches Out*, L.A. Times, June 22, 2005, at A1, A16; Gary Delsohn, *Democrats, Governor's Staff Say They're Trying to Work Out Compromises on Initiatives*, Sac. Bee, June 17, 2005, at A1.

¹¹⁹ Jordan Rau, *Governor Puts Agenda on the Ballot*, L.A. Times, June 14, 2005, at A1, A12; Jill Stewart, *Rise of the Political Machine*, N.Y. Times, June 20, 2005, at A15 ("Night after night the local news featured state workers clasping their hands to chests in grief, claiming their pensions were going to be privatized").

use the threat of the initiative to govern. The larger issue this story raises is whether governing by threat of initiative is ever a sustainable strategy in the long run, even for a politician who looked as strong as Schwarzenegger following the November victories.

B. Governance by Threat of Initiative is Unsustainable

For over a year, it appeared that Schwarzenegger would succeed in creating an entirely new method of governing. He could threaten to take policies to the people, negotiate a compromise with intimidated legislators, and then avoid actually going to the voters in many cases. At first, his threat was credible and appeared to change bargaining dynamics sufficiently to suggest that politics-as-usual in Sacramento would be disrupted. In 2005, however, the limitations of governance that frequently uses hybrid democracy have become apparent. Even a wealthy celebrity with access to unprecedented amounts of campaign money like Arnold Schwarzenegger cannot effectively govern entirely – or even largely – using this strategy. There are several reasons why this is a perilous path.

First, initiatives necessary to govern, as opposed to those used purely for political advantage, are very likely to be initiatives that are difficult to pass. Unlike crypto-initiatives, ballot measures proposed as a way to implement real change in policy and governance are quite likely to engender effective opposition; after all, the reason the governor is resorting to the threat is his inability to pass his reforms through the legislature. To enact meaningful, long-term budget reform, the Governor had to propose change that elicited strong negative reaction from well-funded and organized interest groups. To govern by initiative requires that the Governor propose several, relatively complicated measures that may expand the number of opposing groups and dilute his focus. The effective opposition to the pension reform proposal mounted by teachers, nurses and law enforcement officers not only caused the governor to back away from this proposal, but it also hurt him in all his other battles.¹²⁰

In part because of their sustained attacks in rallies and through broadcast advertisements, the Governor's popularity took a precipitous drop in spring and summer

¹²⁰ See David S. Broder, *Has the Terminator Lost Touch?*, Wash. Post, Oct. 2, 2005, at B7 (noting that public service unions spent \$25 million on ads attaching Schwarzenegger before his committee broadcast its first advertisement in late September).

of 2005, falling to under 40% in some polls.¹²¹ In the first year of his term, his popularity was consistently in the 60% range, and polls showed that he had support from Democrats and independents as well as Republicans.¹²² Thus, the damage inflicted by the pension reform battle was more serious than just losing on one item in his policy agenda; the Governor now goes into the battle on his remaining policies in a weakened position. Moreover, many of these same groups oppose his budget reform, which includes changing the preferential funding formula for education mandated by Proposition 98, and his education reform, which involves modifying tenure rules for public school teachers. They are now energized because of their victory on pension reform.

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

Schwarzenegger learned of this kind of peril several times during the course of the campaign for the special election. First, he had to withdraw his pension reform initiative because the Attorney General interpreted his proposal not only as changing the structure of state pensions but also as abolishing death benefits for survivors of police officers and firefighters killed in the line of duty.¹²³ Although the Governor contested this

¹²¹ See Salladay & Halper, *supra* note 118, at A1 & A16.

¹²² See *id.* (approval rating has dropped in six months from 60% to 40%). See also Mark Baldassare, *PPIC Statewide Survey October 2004: Californians and Their Government* 13, available at http://www.ppic.org/content/pubs/S_1004MBS.pdf (finding Schwarzenegger's approval rating around 60% for all of 2004 among all adults, 51% approval from Democrats and 62% approval from Independents in October).

¹²³ See Prohibition Against Defined Benefit Public Pensions, Exception for University of California, Initiative Constitutional Amendment and Statute, available at http://ss.ca.gov/elections/elections_j.htm#1134 (providing title and summary analysis from Attorney General).

interpretation as one adopted by a Democratic official seeking to undermine his agenda,¹²⁴ the structure of direct democracy denied him the easy response of just changing the language to clarify that death benefits were protected. The airwaves soon were full of testimonials of widows of police and firefighters that their families could not have survived without the benefits, and this campaign forced the Governor to postpone (and perhaps abandon) pension reform.¹²⁵ The effort was not entirely in vain because of a spillover effect: the Governor's championing of pension reform has made it salient and there are now several pension overhaul bills pending in the state legislature.¹²⁶

A similar drafting error forced the Governor to back away from broad educational reform that would have included a merit pay provision. According to the Attorney General's analysis of the initiative that he backed at the outset of the bargaining game, it would also have repealed the portion of the education code that allows school districts to fire teachers for alcoholism, immorality, or unprofessional conduct.¹²⁷ The measure on the ballot in November is a less ambitious reform aimed only at teacher tenure rules.

Perhaps the sloppiest error, however, occurred with respect to Schwarzenegger's redistricting proposal. California law requires that same version of an initiative that is submitted to the Attorney General be circulated by signature gatherers. The group in charge of the petition process, Peoples' Advocate led by a veteran of the initiative process Ted Costa, apparently circulated a slightly different version from the one submitted to the state. Although supporters argued that the differences are minor and technical, Attorney General Bill Lockyer went to court to remove the measure from the special election ballot. He succeeded in the lower courts; the superior court judge declined to determine whether the alternative versions were close enough to accurately inform voters asked to sign the petition. Instead, she wrote, "[t]here is no good reason to put the courts in the position of having to decide what is good enough for qualifying an

¹²⁴ Lockyer has been criticized for using his power as Attorney General to undermine the Governor's initiative agenda. See Salladay, *supra* note 30, at A1, A13.

¹²⁵ See Lynda Gledhill & John Wildermuth, *Governor Defends About-Face, Foes Gleeful That He Dropped Measure On Public Pensions*, S.F. Chron., April 9, 2005, at B7.

¹²⁶ See Mark Martin, *Results can Pale Next to Splashy Pledges, But Governor's Bold Pronouncements Have Had Influence*, S.F. Chron., June 27, 2005.

¹²⁷ See Bill Ainsworth, *Flaws Dooming Initiative Plans, Critics Contend*, San Diego Union-Trib., July 21, 2005.

initiative measure for the ballot when actual compliance is easily attainable.”¹²⁸ The Court of Appeals sustained the ruling, observing that the “proponents caused the problem in this case by their own negligence in circulating a different version of the initiative measure than that submitted to the Attorney General.”¹²⁹ Ultimately, the California Supreme Court allowed the initiative to remain on the ballot, ruling tersely that there had been no showing that the people who signed the initiative had been misled.¹³⁰ Nonetheless, the episode was a close call for the ballot measure and drew the competence of the Governor and his initiative team into question.

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

Third, the politician seeking to govern by initiative has only limited control over the process once it is triggered. Of course, the legislative process is also susceptible to unanticipated events, but the majority party has a great deal of control over the legislative agenda, including the order in which topics will be considered. Wresting that control away from the Democratic Party in California has been one of the objectives of Republican Schwarzenegger, but he has moved policy making into an arena that is significantly influenced by even more players, many that he cannot influence. For example, members of the legislature also work to put initiatives on the ballot, thereby affecting the fate of the Governor’s proposals or enacting policies he opposes without giving him an opportunity to exercise his veto.¹³¹ In his first year, Schwarzenegger vetoed bills passed by the state legislature to lower the cost of prescription drugs,¹³² so lawmakers and others have responded by resorting to his tactics of taking a popular issue

¹²⁸ Lockyer v. McPherson, 2005 WL 1719252 (Cal. Super. Ct. July 21, 2005).

¹²⁹ Costa v. Superior Court, 32 Cal. Rptr. 3d 562, 581 (Cal. App. 2005).

¹³⁰ Costa v. Superior Court, Case No. S136296 (Cal. Aug. 12, 2005).

¹³¹ No state allows the governor the right to veto statutory initiatives. See Waters, *supra* note 1, at 27.

¹³² Schwarzenegger vetoed bills that would make it easier to buy prescription drugs from Canada and to make bulk purchases of prescription drugs at lower prices. See Jordan Rau, *Ballot Items Aimed at Gov.*, L.A. Times, Dec. 25, 2004, at A1.

directly to the people.¹³³ In the special election, Californians will vote on a program to provide discounts on prescription drugs to low-income citizens. The cost of the new program would be funded by rebates provided by drug companies, and companies refusing to participate would be denied Medi-Cal contracts. Matters are further complicated because opponents of the health access proposal, supported by the Governor, qualified a competing initiative backed by the pharmaceutical industry. This process seems a very unlikely one to result in enactment of a well-functioning program in an area – escalating prescription drug prices – that desperately needs reform.

Other initiatives that qualify for the ballot in an election being used by a governor to implement his agenda can have spillover effects for his initiatives. Again, consider the upcoming election in California. A group apparently unrelated to the Governor or his opponents qualified a constitutional initiative to require parental notification before a minor can receive an abortion.¹³⁴ The presence of this measure on the ballot will bring to the polls voters who might not have been interested enough in the other initiatives to turn out. Because this is a special election, turnout is particularly important. People do not have the lure of candidate elections to get them to take the time to vote, so they have to feel strongly about one or more of the ballot measures. An issue like abortion motivates an element of the religious right, and it may energize voters on the left as well, particularly in California. The initiative is a wild card in this election, complicating strategies for the Governor and his opponents.

Other initiatives are not wild cards in the same way because they were strategically placed on the ballot for the purpose of producing spillover effects related to the Governor's reform package. The so-called "paycheck protection" measure, which prohibits union dues from being used for political purposes without annual written consent from union members, is supported by business interests. In part, this measure is being used to turn out anti-union groups and voters who will also presumably support the Governor's position on budget and education reform. It is also a hot-button issue for

¹³³ See *id.* See also Cal. Propositions 78 and 79 (2005); Robert Salladay, *Scene Set for Ballot Battles*, L.A. Times, Jan. 8, 2005, at A1.

¹³⁴ Cal. Proposition 73 (2005).

unions, who spent over \$23 million in 1998 to defeat a similar issue¹³⁵ and had raised over \$55 million by September 2005 for the special election campaign.¹³⁶

Fourth, governance by initiative, as is currently being used by the Governor, has resulted in a continuous campaign in California since the recall election in fall 2003. This year's special election is already characterized as merely the prelude to the 2006 gubernatorial election.¹³⁷ If the threat game worked perfectly, then we would see no initiative campaigns or special elections because the Governor would threaten only when he was sure of victory and the legislature would always be willing to compromise rather than lose on a more extreme proposal at the polls. But the players in this game do not have full and accurate information, and the outcomes of elections are uncertain enough that miscalculation is inevitable. A virtually perpetual campaign, with frequent elections, is not a sign of a healthy democracy.¹³⁸ Nor does it lead to a well-run government; instead, it diverts the attention of elected officials from the day-to-day operations of government to winning in a campaign.¹³⁹

Furthermore, substantial amounts of money are spent both in the campaigns and for any special election. By mid-summer 2005, more than \$116 million had been raised primarily to fund campaigns related to the initiatives on the special election ballot.¹⁴⁰ A special election will cost around \$50 million,¹⁴¹ and increase the financial pressures on local governments already strapped for cash. The strategy of governing by threat of initiative, which means that the state is in the midst a perpetual campaign and voters are frequently asked to cast ballots, may cause people to feel more alienated from government and more frustrated with politicians. Frequency of elections may be one

¹³⁵ See Smith & Tolbert, *supra* note 4, at 108.

¹³⁶ Robert Salladay, *Gov. All but Vows to Run*, L.A. Times, Sept. 15, 2005, at A1.

¹³⁷ See Robert Salladay, *Initiative Drive Puts '06 Governor's Race in Gear*, L.A. Times, Sept. 22, 2005, at B1.

¹³⁸ For a more optimistic view of governance by initiative, see John G. Matsusaka, *A Rolling Snowball of Direct Democracy*, L.A. Times, June 15, 2005, at B13.

¹³⁹ See Stewart, *supra* note 119 (arguing that Schwarzenegger "should be spending his time fixing nuts-and-bolts problems, not gearing up for a messy political campaign").

¹⁴⁰ See Dan Morain & Nancy Vogel, *2005 Political Fundraising at \$116 Million*, L.A. Times, Aug. 2, 2005, at B1 (some of the money raised is for the gubernatorial race in 2007, but the majority has been raised in connection with ballot initiatives).

¹⁴¹ See Jordan Rau, *Governor Puts Agenda on the Ballot*, L.A. Times, June 14, 2005, at A1, A9.

reason for the relatively low turnout in the United States,¹⁴² so even if turnout is high in November, this election may depress turnout in other elections. An occasional threat to go around legislators to the people may inject a healthy dose of majoritarian influence into policy making – constant threats which result in frequent votes lead to a disarray in governance institutions.

This pessimistic portrayal of Schwarzenegger's strategy should not be understood as an argument to rule out any use of the initiative threat by elected officials. The tactic injects into legislative bargaining a mechanism that favors the preferences of the median voter and thus provides a counterweight to powerful minorities with intense preferences. Used sparingly, it changes the dynamic in a normatively attractive way because it is ultimately tied to the ability of the proposer – here the Governor – to convince a majority of people to support him. The traditional legislative process is disproportionately influenced by well-organized and well-funded interests with intense preferences, with a majoritarian influence injected through the electoral tie. Hybrid democracy adds more weapons to the arsenal of those advocating reforms that resonate with the median voter. Moreover, even though the legislature has called Schwarzenegger's bluff, his threats have still shaped the legislative agenda. For example, pension reform bills are receiving more serious consideration in the legislature than they have before, even though the Governor is no longer taking that issue to the ballot. His budget initiative is affecting not just California politics, but has become part of a larger national strategy by anti-tax groups and fiscal conservatives to use the initiative process to impose hard spending caps on state legislatures.¹⁴³

Perhaps the concerns about initiative threats as a governance strategy are not, in the long run, especially significant. Schwarzenegger is a unique politician, combining celebrity status, the ability to raise substantial money, and, at least for a time, tremendous popularity. In the 2005 special election, he may find that his threat to resort to direct democracy is no longer credible, and he will be faced with governing through traditional

¹⁴² See, e.g., Richard W. Boyd, *Decline of U.S. Voter Turnout: Structural Explanations*, 9 Am. Pol. Q. 133, 140-46 (1981); Ruy A. Teixeira, *The Disappearing American Voter* 54-57 (1992). But see Mark N. Franklin, *Voter Turnout and the Dynamics of Electoral Competition in Established Democracies Since 1945*, 98-99 (2004) (disagreeing with theory that frequency of elections causes low turnout).

¹⁴³ See Evan Halper, *Spending Cap Called Key to National Plan*, L.A. Times, July 25, 2005, at A1; Daniel B. Wood, *Cap State Spending: The Next New Wave?*, Christian Science Mon., Aug. 2, 2005..

methods in an environment of divided government. The fact that he apparently seriously considered calling off the special election¹⁴⁴ after various setbacks for his initiatives demonstrated how quickly his fortunes had changed in just one year. But now that he has made the possibility of governance by initiative salient, we may well see more elected officials resorting to initiative to overcome legislative gridlock, a bargaining strategy available only through hybrid democracy. Schwarzenegger's experience may convince politicians to use the threat carefully, although the story of hybrid democracy and California's governor is far from over. No reform of the initiative process aimed at this peril is required; in the end, the political system will reach an equilibrium as ordinary politicians and others occasionally threaten the legislature with a ballot measure that is likely to resonate with voters, while most bargaining still takes place within the traditional legislative arena.

IV. Conclusion

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

¹⁴⁴ See Letter from Office of Legislative Counsel, Special Elections: Rescission of Proclamation #0517995 (Aug. 2, 2005), available at <http://electionlawblog.org/archives/legcoun.pdf> (providing opinion that Governor could rescind his proclamation calling for a statewide special election until the date of the election).