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Santa Clara Law Review  
2001

Symposium

Article

**\*1037 CONSTRAINING POPULISM: THE REAL CHALLENGE OF INITIATIVE REFORM**

Kenneth P. Miller [FN1]

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I. Introduction

At a recent meeting of the California Assembly Speaker's Commission on the Initiative Process, a group whose mission was to study and propose initiative reforms, Commissioner William Hauck asked his fellow commissioners to step back and focus on some bottom-line questions:

What are we trying to do here? What are the basic objectives we're trying to get at? Are we trying to reduce the number of ballot measures we see every two years, or to increase the number of ballot measures? Are we trying to bring lawmaking more back into the legislative process or do we want to permit it to be expanded on the ballot? [FN1] The Commission could never fully resolve these questions, because the commissioners held deeply conflicting views. The Commission included current and former legislators, agency officials and "good government" types who support reforms that would constrain California's state-wide initiative process, but it also included initiative entrepreneurs who seek to protect the process or even expand it. As the Commission completes its work, the reform debate--and these basic underlying disagreements--will continue.

This article argues that, in California, the goal of initiative reform should be to make it harder to enact \*1038 sweeping policy change through the state direct initiative process. [FN2] More specifically, reforms should seek to constrain what I call "Populist-oriented" initiative lawmaking, and reclaim a more "Progressive-oriented" vision of direct democracy.

To understand why I frame this discussion of initiative reform in these terms, it is important to recognize that there are two distinct, competing views of the initiative process, the "Progressive" conception and the "Populist" conception. [FN3] These competing conceptions date back over a century to the origins of California's initiative process. The initiative is often characterized as Progressive reform. In California and many other states during the Progressive Era of the early twentieth century, Populists, not the Progressives, were the first ones to agitate for direct democracy. [FN5] Although both Populists and Progressives supported direct democracy, they had very different reasons for doing so and different conceptions of how it should be used. [FN6] These historical distinctions matter because the two conceptions they underlie the current debate over whether the initiative process needs to be reformed.

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Case number: 3:09-cv-02292-VRW	
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Date admitted: _____	
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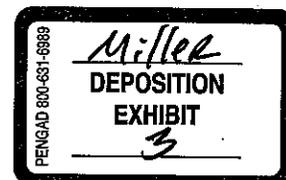
## I. Introduction

At a recent meeting of the California Assembly Speaker's Commission on the Initiative Process, a group whose mission was to study and propose initiative reforms, Commissioner William Hauck asked his fellow commissioners to step back and focus on some bottom-line questions:

What are we trying to do here? What are the basic objectives we're trying to get at? Are we trying to reduce the number of ballot measures we see every two years, or to increase the number of ballot measures? Are we trying to bring lawmaking more back into the legislative process or do we want to permit it to be expanded on the ballot? [FN1] The Commission could never fully resolve these questions, because the commissioners held deeply conflicting views. The Commission included current and former legislators, agency officials and "good government" types who support reforms that would constrain California's state-wide initiative process, but it also included initiative entrepreneurs who seek to protect the process or even expand it. As the Commission completes its work, the reform debate--and these basic underlying disagreements--will continue.

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To understand why I frame this discussion of initiative reform in these terms, it is important to recognize that there are two distinct, competing views of the initiative process, the "Progressive" conception and the "Populist" conception. [FN3] These competing conceptions date back over a century, to the origins of California's initiative process. The initiative is often characterized as Progressive reform because it was introduced in California and many other states during the Progressive Era of the early twentieth century. [FN4] However, the Populists, not the Progressives, were the first ones to agitate for direct democracy at the end of the nineteenth century in California and elsewhere. [FN5] Although both Populists and Progressives wanted to introduce direct democracy, they had very different reasons for doing so and different conceptions of how these mechanisms should be used. [FN6] These historical distinctions matter because the two conceptions continue to exist, and they underlie the current debate over whether the initiative process needs to be reformed, and if so, in what man-



ner.

This article distinguishes between the two competing conceptions of the initiative process and argues that the \*1039 Populist conception has prevailed--with respect to both process and substance. As a result, the process bypasses and undermines representative government, rather than supplementing and improving it. Many modern-day Progressives are disenchanted with the initiative process and seek through reforms to constrain its Populist characteristics. [FN7] Indeed, many ideas for reforming California's initiative process have “constraining” effects. Such reforms face an uphill fight, however, given the broad popular support for the initiative process and the continuing public distrust of representative government. In light of these difficulties, it may fall to the California Supreme Court to place constraints on Populist-oriented initiative lawmaking, through stricter application of the California Constitution's rules governing the initiative process, such as the single subject rule and the no-revision rule. [FN8] However, since the burden on courts to check the initiative process is already heavy, reformers should continue to do what they can to constrain the process by other, non-judicial, means. In sum, reforms to constrain the Populist-orientation of the California initiative, though hard to achieve, are necessary and worth fighting for.

## II. Dueling Conceptions of Direct Democracy: Populist v. Progressive

Both of the terms, “Populist” and “Progressive,” refer to political movements in specific historical moments just before and just after the turn of the last century, respectively, but they also describe longer-term, often competing, impulses within American political culture.

The historical political movement called “Populism” emerged in the latter decades of the nineteenth century. [FN9] It was a protest movement by political outsiders, composed mostly of distressed farmers, but also laborers, ranchers, and \*1040 debtors of all types. Populists [FN10] were a factious coalition but agreed on three fundamental points: 1) the government needs to combat private economic power, which profits at the expense of the common person, but 2) it cannot be trusted to do so, and thus, 3) the “people” must gain control of the government. That last principle led them to advocate, almost obsessively, direct legislation. For many Populists, adoption of the mechanisms of direct democracy overshadowed nearly every other issue. [FN11]

For a time, Populists sought to organize advocacy organizations (such as the non-partisan Farmers' Alliance) and work for change within existing political structures. Largely frustrated in these efforts, however, Populists lashed out at the government, founded a third party, the “People's party,” drafted a series of platforms, fielded candidates for office, and agitated for direct democracy. [FN12] The “Populist Era” made an especially large impact in the western states. In California, Populist distrust of government at all levels, especially the legislature, influenced the drafting of the state's 1879 Constitution. [FN13] Drafters incorporated into the document many specific provisions that would normally be considered “ordinary policy,” thus restricting the legislature's discretion. [FN14] In addition, it was during the Populist Era that \*1041 demand for direct democracy first emerged in California. In the 1890s, Dr. John Randolph Haynes, leader of the Direct Legislation League of California (which had ties to the Populist Party) was agitating for the adoption of the initiative, referendum, and recall in California. [FN15] By the turn of the century, Populism dissipated as an organized party and political movement, but by then it had already influenced the future direction of California politics and government.

The Progressive movement followed closely thereafter, and flourished during the first two decades of the twentieth century. Progressivism was a reform movement that brought together a coalition of earnest reformers including liberal urban clergy, social workers, suffragettes, academics, “muckraking” journalists, and civic-

minded professionals, who wanted to address social problems created by industrialization, urbanization, immigration, and other dislocating forces. [FN16] In their view, an enlightened, professionalized government was indispensable, but government needed to be reformed to carry out its role. Progressives believed that corrupt party bosses, allied with increasingly powerful and selfish corporate interests, had seized control of representative government, especially legislatures, and were using government to retard social progress. It was imperative, they believed, to liberate representative government from these corrupt forces so that it might become an effective instrument for social reform. The Progressive strategy for restructuring and reforming representative government was several-fold. On the one hand, Progressives sought to make government more responsive and accountable to the electorate through \*1042 expanded suffrage, direct primaries, and direct election of senators, as well as through the new mechanisms of initiative, referendum, and recall, but they also sought to strengthen and professionalize government by establishing professional bureaucracies, non-partisan commissions, strong city managers, and the like. In California, a leading Progressive, Hiram Johnson, was elected governor in 1910 on a platform to break the Southern Pacific Railroad's stranglehold on the state legislature. As part of his program, he persuaded Californians in a special election in 1911 to adopt the initiative, referendum, and recall. [FN17] The mechanisms of direct democracy were part of the California Progressives' comprehensive package of twenty-three constitutional amendments designed to strengthen and improve representative government. Other provisions established women's suffrage, expanded the state court system, created an independent railroad commission, increased the state's power to regulate public utilities, and improved the state's capacity to inspect and ensure the quality of food and merchandise. [FN18] Unlike the Populists, the Progressives respected representative government and sought to use the initiative in coordination with other reforms to enhance government's responsiveness, administrative competence, and expertise.

The Populist and Progressive movements continue to operate in new guises in California and elsewhere. Their enduring characteristics can be summarized as follows. The Populist impulse, first of all, is essentially individualistic: it is driven by individual self-interest, by the common person's aspiration for political equality and social and economic \*1043 opportunity. **Populism** is also democratic, in that it assumes that common people are trustworthy and competent--given a chance, they will make wise choices. Most importantly, **Populism** is anti-establishment: it distrusts concentration of power in the hands of elites, either in the private sector or in government. By contrast, the Progressive impulse is moralistic, in that Progressives want to reform government and society. It is also optimistic, holding great faith that well-run institutions can effect social progress. Finally, Progressivism is elitist, in that it wants to invest power in well-trained professional experts.

Populists distrust representative government and seek to constrain it by, among other things, cutting taxes, capping spending, imposing term limits on elected officials, and locking in constitutional limits on policy choices. Moreover, Populists embrace an unconstrained initiative process, seeking (to the extent possible) to substitute direct popular control for representative government. Examples of today's Populists include U.S. Term Limits and various tax-limitation organizations.

Progressives, by contrast, like government, so long as it is "clean," efficient, and focused on achieving public goods. They believe the mechanisms of direct democracy are useful only insofar as they "redeem" representative government. While Progressives sometimes disapprove of the mediating role parties and corporate interests play in government, as a rule they do not believe that the public can govern without mediation. Instead, they believe in the importance of expertise and administrative competence. Contemporary Progressives include "good government" groups like Common Cause and the League of Women Voters.

The historical record is clear that both Populists and Progressives sought introduction of the initiative pro-

cess but had different motivations for doing so. Progressives wanted the initiative, referendum, and recall to serve as an additional check on representative government, one tool among many to improve the government's quality and effectiveness. Populists, however, had a more radical vision. They sought to use the initiative power to undermine representative government and shift power to the people themselves.

Populists and Progressives provided two approaches to \*1044 direct democracy. Under the Progressives, direct democracy would not constitute a "fourth branch" of government with co-equal or even greater power than the other three branches but rather a supplementary and corrective check on the tripartite Madisonian scheme. Perhaps the closest approximation to the Progressive vision of direct democracy can be found in the state of Washington. The Washington State Constitution permits initiative lawmaking, but in a more constrained way that does not undermine the legislature to the same degree that California's Populist-based initiative process allows. Citizens in Washington can initiate statutes either by an "initiative to the legislature" or by an "initiative to the people." [FN19] "Initiative to the legislature" is another name for the indirect initiative. It is a mechanism whereby citizens draft a proposed law, and if they gather enough petitions, the proposal is formally presented to the legislature. At that point, the legislature holds hearings on the measure and has the opportunity to adopt it. If it chooses to do so, the measure becomes law. [FN20] If the legislature fails to adopt the measure, it then goes on the ballot, but the legislature may also submit an alternative. The voters are then able to adopt one of the alternatives, or reject both. [FN21]

Citizens in Washington also have the option of proposing an initiative directly to the voters, without first going to the legislature. Importantly, all voter-approved initiatives in Washington State, direct or indirect, are subject to legislative amendment or repeal. If the legislature seeks to amend an initiative within two years of passage, it must muster a two-thirds vote in both houses. After two years, the initiative may be amended or repealed by majority vote, just like any other law. [FN22] In addition, Washington State does not allow \*1045 citizen initiated constitutional amendments. [FN23] All constitutional amendments must originate in the legislature. As a result of these features, initiative proponents in Washington cannot lock in policies either through constitutional amendments or unamendable statutes. This model supplements Madisonian republican structures by allowing for additional popular input, but constrains the ability of Populist forces to undermine representative government. [FN24]

California, however, has adopted a different approach.

### III. The Populist Victory and the Problems It Causes

In California, the Populist conception of direct democracy has prevailed. The roots of that triumph can be found in the original structures of California's initiative process, as amended into the state constitution in 1911, but the magnitude of the victory has become fully apparent only in the last three decades.

#### A. Structural Factors

Unlike Washington, but similar to many other initiative states, California's initiative process allows citizens to amend \*1046 the state constitution directly with virtually no input from representative government. Through initiative constitutional amendments, citizens can completely bypass the legislature and--by a simple majority vote--enshrine temporary policy preferences into the state's fundamental charter. [FN25] As noted above, the state's current constitution, ratified during the Populist Era, originally contained many provisions that normally

would be considered “statutory” rather than “constitutional” in nature. [FN26] This ploy was motivated by distrust for representative government and was designed to remove certain policy matters from the legislature's control. California's initiative constitutional amendment process allows the electorate to amend the constitution at will [FN27]--and to “constitutionalize” policy choices so that they remain off-limits to legislative change, absent subsequent voter approval.

California's initiative process goes a step further than all other initiative states, however, by preventing post-enactment legislative amendment of statutory initiatives. [FN28] Unlike Washington State, which allows the legislature to \*1047 amend or repeal an initiative by a two-thirds vote in the two years after the initiative is approved and by a simple majority vote thereafter, California permits no legislative amendment of statutory initiatives without voter approval, unless the initiative itself makes provision for it. [FN29] This rule is clearly motivated by distrust of the legislature, and it in fact ties the legislature's hands in much the same way that constitutionalizing policy choices does. Thus, in California, both initiative constitutional amendments and initiative statutes undermine the authority and flexibility of representative government.

Unlike Washington and nine other initiative states, California currently does not offer proponents the option to pursue an indirect initiative. [FN30] At the time the state adopted the initiative process, it included the indirect initiative. The indirect option was little-used, however. The Constitution Revision Commission of the 1960s unfortunately decided to abolish the indirect initiative, and it was removed from the constitution as part of the revisions adopted in 1966. [FN31] Structurally, then, the California initiative process is weighted toward the Populist conception of direct democracy. The rules bypass the legislature altogether in the enactment of initiatives and prevent the legislature from amending initiatives after they are adopted. The process clearly can be a powerful weapon in Populists' hands.

For many years, however, Populists made little use of the initiative device. A review of history shows that use of the direct initiative in California forms a V-shaped curve. There was a flurry of initiative activity during the early years of the \*1048 process from 1912 to 1934. [FN32] Most of these early initiatives were Progressive-oriented in substance, in keeping with the mood of the times. By mid-century, initiative use declined in California, perhaps in part due to increased public confidence in representative government. In 1966, for example, Californians overwhelmingly approved a recommendation of a blue-ribbon Constitutional Revision Commission to change the constitution to create a full-time, professional legislature. [FN33] The constitutional revisions and accompanying reforms provided for regular annual sessions; removed the 120 days-per-session limit; increased the budget for legislative staff; provided for staff specifically assigned to the legislative leadership and the party caucuses; and provided for non-partisan research staff (which led to the formation of \*1049 the highly-regarded Senate and Assembly Offices of Research). [FN34] Adoption of the professional legislature was a high-water mark of Californians' Progressive-oriented support for expert representative government. [FN35] Significantly, during this period, the state's citizens showed little interest in initiative lawmaking; they approved only five initiatives during the entire 1950s and 1960s. [FN36]

During the 1970s, however, Californians grew increasingly distrustful of representative government. [FN37] This shift in the public's attitude toward government created conditions necessary for the great Populist achievement, Proposition 13 of 1978, the initiative that slashed property taxes and required voter approval for future tax increases. The campaign for Proposition 13 played on Populist resentments, not only about taxes, but also about representative government. The Yes-on-13 ballot argument proclaimed: “More than 15 percent of all government spending is wasted! Wasted on huge pensions for politicians which sometimes approach \$80,000 per year! Wasted on limousines for elected officials or taxpayer paid junkets. Now we have the opportunity to trade waste

for property tax relief!" [FN38] The success of Proposition 13, in turn, displayed the awesome power of the initiative to make immediate, wholesale, and lasting change. [FN39] The possibilities did not go \*1050 unnoticed, and initiative lawmaking exploded. A simple graph demonstrates the sharp increase in initiative lawmaking over the past four decades. [FN40]

Figure 1: California Initiative Lawmaking, 1960-1999

\*1051 One might reasonably ask: Isn't this a good thing? Doesn't the sharp increase in initiative lawmaking demonstrate that over the past couple of decades Californians have enjoyed a unique opportunity to participate in the democratic process? And isn't this system certainly "more democratic" than the representative system--and therefore an improvement? Although this perspective seems appealing at first glance, since who wants to argue against the people's right to decide, a closer examination suggests that initiative lawmaking--at least in its current Populist-oriented form--gives cause for concern. First, the process of Populist-oriented initiative lawmaking is not necessarily "more democratic" than the representative system, if one conceives of "democracy" as not just "majority rule" but instead a process that includes a range of democratic norms. Second, the substance of Populist-oriented initiative lawmaking tends to undermine representative government and impose majoritarian values at the expense of minority rights. In our constitutional system, these substantive outcomes often give rise to post-election legal challenges, which frequently result in judicial invalidation of voter-approved initiatives--a chain of events that is hardly optimal. [FN41]

#### B. Process Concerns

A well-functioning democratic system not only aggregates preferences, it also provides opportunities for refinement of proposals, informed deliberation, consensus-building, and compromise. A reasonably functional legislature tends to maximize these opportunities, but the initiative process does not. [FN42]

In contrast to the often slow, careful, iterative, and compromise-oriented nature of legislative action, the initiative process is what political scientists V.O. Key, Jr. and Winston W. Crouch called a "battering ram." [FN43] In order to make major changes quickly, the initiative process substitutes the legislature's elaborate system of checks and balances with much more direct lawmaking. Bypassing checks and balances can in fact help produce major policy breakthroughs in an expedited way, but these benefits come at a cost.

At the "front end" of the policy process, the initiative system has two primary features that undermine democratic values: 1) proponents have absolute control of the framing and drafting of the measure; and 2) measures are fixed and unamendable at an early stage of the process. [FN44] Initiative \*1052 proponents are accountable to no one, [FN45] and routinely exclude the measure's opponents and other interested parties from their decisions on how to draft the measure's language. [FN46] There are no open meeting laws, public notice requirements, hearings to solicit public input, or other guarantees to give the press and public access to the drafting and editing stages of the initiative policy-making process. Instead, measures simply "appear" in final form at the titling and circulation stage. After they have finished drafting, proponents file the measure with the attorney general's office, which prepares a title and summary, but again no one involved in that process has the power to amend the proposal. Proponents then circulate the measure to gather sufficient signatures to place it on the ballot. At that point, the measure cannot be amended again, even by the proponents, even if it becomes apparent that the measure contains a flaw that should be corrected.

These characteristics of the initiative process shortchange deliberation and refinement. By permitting opponents and other interested parties to be excluded from the drafting process, the initiative system limits input regarding the proposed measure's legality and practical implications. The closed process also limits consideration of other, perhaps more optimal, alternatives. In addition, the restrictions on amendment after circulation prevent opportunities to address flaws and refine the measure. As a result, the nature of the initiative lawmaking makes it more likely that the end-product will be seriously flawed. [FN47]

\*1053 Moreover, by limiting the opportunities for opponents and other interested parties to participate in the process, the initiative system makes compromise and consensus-building less necessary than in the legislature. In the initiative process, opponents have no leverage to force amendments or compromise. If the proponents are confident that their proposal can win a simple majority of the electorate, they can ignore their opponents' interests with impunity and instead draft the initiative in a way that most directly serves their own interests. There is no need to build a large consensus in order to win approval of an initiative--50 percent-plus-one will do--even if the majority is relatively apathetic and the minority intense. In allowing proponents to eschew compromise and accommodation of competing interests, the initiative process fosters polarization rather than consensus-building. [FN48]

In addition, during the "public" stage of the process, there is serious doubt whether voters are capable of making informed decisions regarding initiatives, especially complex ones that have wide-ranging impact. Polling data indicate that voters are grossly ignorant of the content of initiative measures. [FN49] Studies by political scientists Arthur Lupia [FN50] and Shaun Bowler and Todd Donovan [FN51] show that to some extent voters are able to compensate for their lack of information in initiative campaigns by relying on elite endorsements and other "cues." Even if voters can rely on such shortcuts, however, the process by its nature limits their deliberative options. Voters cannot vote on alternative bills nor attempt to amend the proposed legislation to make it more acceptable; \*1054 they can only vote "yes," "no," or abstain. As political scientist David Magleby notes, "For many voters, direct legislation can be a most inaccurate barometer of their opinions." [FN52]

In sum, it is ironic that initiatives have the reputation of being a more pure form of democracy [FN53] when the process undermines democratic opportunities and violates procedural guarantees observed by almost every freely elected legislature in the world. In important ways, direct democracy is less "democratic" than the indirect, representative system. The initiative process could be reformed in ways that address some of these procedural concerns. [FN54] At present, it is enough to recognize that the initiative system, as it currently operates in California, is not as "democratic" as some claim it to be.

### C. Substance Concerns

Does it matter if a state like California decides to make laws through a process that sacrifices some democratic values? I would argue that there is an independent value to the democratic procedures described above. But in addition, the state's initiative system has facilitated substantive outcomes that undermine representative government and impose majoritarian values at the expense of minority rights.

Let us first examine the effect that initiatives have had on representative government in California. Although the initiative process has occasionally produced Progressive-oriented measures that have reinforced and improved representative government, [FN55] Populist-oriented measures that undermine representative government have predominated in \*1055 recent years. Over the past quarter century, Californians have approved a series of initiatives to cut taxes, [FN56] require voter approval for new taxes, [FN57] cap spending,

[FN58] earmark spending, [FN59] cut the legislature's budget, [FN60] and severely limit terms for elected officials. [FN61] In isolation some of these measures may have had merit, but combined, they have made it very difficult for government to address the changing needs of a big, complex, and heterogeneous state. [FN62] These limits on government's capacities are especially acute because, as discussed above, California initiatives (whether constitutional or statutory) are unamendable absent voter approval and thus become entrenched.

Along with Proposition 13 of 1978, Proposition 140 of 1990 is a perfect example of Populist-oriented initiative lawmaking. Driven by distrust of representative government, particularly the legislature, the measure cut the legislature's budget by nearly forty percent, forcing wholesale reductions in staff, and placed very short limits on members' terms: three two-year terms in the Assembly and two four-year terms in the Senate. The shortness of the terms magnified \*1056 their undermining impact on the legislature. [FN63] Populists rightly claim that it is virtually certain California would not have term limits were it not for the initiative process; legislators are too self-interested to impose term limits on themselves. [FN64] However, the initiative process's take-it-or-leave-it approach and lack of opportunities for compromise have produced an extreme form of term limitation that has severely undermined the legislature. Proposition 140, combined with other Populist-oriented initiatives, has created a situation in which California's inexperienced, term-limited legislators are forced to cope as best they can with a jerry-rigged system of complex and often conflicting initiative mandates. To say the least, it is a far cry from the rational, professional model of government the Progressives envisioned.

With respect to the second substantive concern, minority rights, it is clear that the direct initiative can be and has been used to disadvantage minorities. [FN65] The checks-and-balances system of representative government is designed to harmonize majority rule with protection of minority rights. In contrast, the direct initiative system, by bypassing checks and balances, is weighted heavily toward majority rule at the expense of certain minorities. Racial minorities, [FN66] illegal \*1057 immigrants, [FN67] homosexuals, [FN68] and criminal defendants [FN69] have been exposed to the electorate's momentary passions as Californians have adopted a large number of initiatives that represent Populist backlash against representative government's efforts to protect or promote the interests of racial or other minorities. These initiatives should not be too easily caricatured as majority efforts to tyrannize minorities--although some may indeed have been motivated by animus. The broader problem is that initiatives that directly and differentially affect unpopular minorities can tap into a strain of anti-minority sentiment in the electorate. [FN70]

#### \*1058 D. Faux Populism?

Some commentators concede that initiative lawmaking in its current form is far from the Progressive ideal, but argue that it does not really represent "Populism," either, in that it is not controlled by "the people," but rather by well-heeled [FN71] special interests (e.g., big business, big labor, trade associations) or political parties and public officials; moreover, some argue, "the people" are merely pawns in the \*1059 process who are powerless to shape proposals or register their true preferences. [FN72] It is hard to dispute that the present initiative system is a distorted form of Populism; interest groups and public officials, armed with the tools of the initiative industry, are often the ones driving the process. [FN73] Some political scientists, such as Daniel A. Smith, contend that even modern taxpayer revolts are not truly "Populist" movements, in that they are often run by professional organizations and receive financial backing from wealthy interests. [FN74] Other political scientists, such as Elisabeth Gerber, take a slightly different view, suggesting that a movement is "Populist" if its supporters are "citizen" groups supporting "broad based" interests, rather than "economic" groups pursuing "narrow" interests. [FN75] However, the important point is not whether a given initiative campaign is well-

financed or whether its objectives are broad or narrow. Instead, it is more important to note that initiative proponents are resorting to a process that bypasses representative government, and which more often than not, taps into the public's discontent with the government in order to undermine it. In this respect, the process is clearly "Populist" in its orientation.

#### E. Pressure on the Courts

As we have seen, the Populist-oriented initiative process has successfully bypassed the legislature and executive to enact laws directly, but it cannot bypass the courts. Courts are the filter through which all laws must pass, whether enacted by representative government or by the people directly. [FN76] Unlike the legislative process, in which judicial review is but the last of many redundant institutional checks \*1060 and balances, in the initiative process it is the only effective institutional check. In fact the courts play an extremely active and important role in checking and countering the otherwise unfiltered majoritarian initiative process. In California, over the past four decades, approximately two-thirds of all voter-approved initiatives have been challenged in court, and of those, nearly half have been invalidated in part or in their entirety. [FN77] In California and other states, challenge and invalidation rates vary by subject matter. Populist-oriented initiatives that affect unpopular minorities or undermine representative government are frequently challenged and sometimes invalidated. [FN78] By contrast, initiatives that seek to protect the environment (a fairly common initiative type) rarely face trouble in the courts. [FN79] In exercising their power of judicial review, courts have cured some of the worst abuses of the initiative process but at some risk. The same Populist impulse that delights in certain forms of initiative lawmaking is repulsed by judicial review. In the Populist mind, judicial review of ballot initiatives raises the specter of arrogant, elitist, insular judges usurping the power from the people themselves. At times, judicial invalidation of initiatives has led to Populist backlash against the courts. [FN80]

\*1061 All of these consequences of the Populist triumph--the threats to minority rights, the pressure on the courts, and the undermining of representative government--are disturbing to commentators from a range of political persuasions who admire the Progressives' conception of state government. It is that not-yet-dead Progressive vision that drives efforts to reform the initiative process.

#### IV. Proposals for Reform

Since its inception, California's initiative process has generated controversy, and occasional efforts have been made to constrain or otherwise change it. During the 1920s, two attempts were made to raise the signature threshold for tax-related initiatives, but these and several other early efforts to restrict the process failed. [FN81] At mid-century, initiative lawmaking significantly declined in California, and there was little pressure to reform or constrain the process. Yet if there ever was a window of opportunity to do so, the 1960s (an era of representation-reinforcing constitutional reforms) may have been it. As one member of the 1960s Constitutional Revision Commission reported, a minority faction tried to seize the opportunity:

Some members of the constitution revision commission made several attempts to change radically the provisions relating to initiatives and referendums. They believed that petition circulation and ballot proposition campaigns had become so complex and expensive that it was discouraging to all except highly organized interest and pressure groups. It was also argued that the complicated list of ballot propositions confronting the voter led to \*1062 considerable confusion resulting in a rather doubtful expression of popular will. Moreover, many commission members wished to prevent the frequent use of the initiative to

amend the constitution. Hence efforts were made to abolish the initiative entirely or to require a two-thirds or 60 percent vote of the people for ratification of a constitutional initiative. Some also tried for constitutional change that would require a 10 or 15 percentage of signatures to discourage the use of the petition device for constitutional amendments. Although ten to fifteen commissioners were active in the moves to bring about further change in the initiative process they did not muster enough support to muster a majority. [FN82]

In fact, the 1960s Commission's reforms made the initiative process easier, rather than more difficult, by lowering the signature requirements for initiative statutes from eight percent to five percent of the votes cast in the last gubernatorial election. [FN83] In addition, the 1960s reforms abolished the indirect initiative; thus, further reinforcing the legislature-bypassing Populist orientation of the California initiative.

By the early 1990s, however, following Proposition 13 and the subsequent surge in Populist initiatives, Progressive-oriented establishment types, academics, civic and professional leaders, good government reformers, and their allies in the legislature, had awakened to the threat initiative lawmaking presents to California's representative government. They began to organize, draft studies and reports, and form new commissions. [FN84] Over the past decade, a \*1063 range of options for reforming the initiative process has emerged. In this section, I will categorize the most prominent reform proposals and use the analytical framework developed above to evaluate them. Specifically, I will assess whether the proposed reform would serve the goal of **constraining** Populist-oriented initiative lawmaking. [FN85]

#### A. Protect the State Constitution

One set of reform proposals is motivated by the concern that it is too easy to amend the state constitution through the initiative process and would seek to make such amendments more difficult. These proposals include increasing the signature requirements for qualifying an initiative constitutional amendment, requiring a super-majority vote for adopting a constitutional amendment, or requiring that voters approve a constitutional amendment in consecutive \*1064 elections before it can go into effect. These proposals would sharpen the distinction between the constitution and ordinary statutes, a distinction that has been blurred since the enactment of the Populist-oriented 1879 Constitution, and would make it harder for voters to undermine representative government by changing its basic structure or by locking in policies and removing them from legislative control. The broad Populist objection to these proposals is that the people should be able to amend the constitution as they see fit, and it should not be more difficult to amend the constitution by popular initiative than it is by legislative constitutional amendment. A more narrow but important objection is that a simple majority should not be able to enact a constitutional amendment that imposes a future super-majority requirement. Some commentators believe that this objection can be met by requiring that an equal super-majority approval be required for imposing any future super-majority requirements. [FN86] There is little doubt, however, that by protecting the constitution from easy amendment, these proposals would constrain Populist-oriented initiative lawmaking.

#### B. Integrate the Legislature / Allow Amendments

For many Progressive-oriented reformers, connecting the initiative process more positively to the legislature is the most important and promising area for reform. They believe a shift in this direction would improve the quality of the initiative process by building in some opportunities for informed deliberation, refinement of proposals, and the like; prevent the bypassing of representative government by involving the legislature in the process at the front-end, and allowing it to modify initiatives after enactment; and increase the legislature's account-

ability and responsiveness by preventing it from punting on controversial matters addressed by initiatives. [FN87] Proposals to integrate the legislature into the initiative process take several forms. The first set of reforms would involve the legislature in the initiative process before the election, either through pre-election legislative review of all initiatives, with opportunities \*1065 for amendment, or through an optional indirect initiative. The other set of “integrating” proposals would provide the legislature opportunities to amend statutory initiatives after their enactment.

### 1. Mandatory Pre-election Review with Opportunities to Amend

Unlike the current initiative system, where initiative proponents generally do a complete end-run around the legislature, this reform would require them to submit their proposal to the legislature for review after the initiative has qualified for the ballot but prior to the election. Under most variations of this proposal, the legislature would be required to hold hearings on the proposed initiative, and there would be opportunities to amend and refine the proposal. Some forms of this proposal require the legislature to hold a non-binding vote on the initiative, which would then be published in the ballot pamphlet. The main challenge for this reform proposal is how to structure the amendment process. Some reformers suggest that the initiative proponent's consent should not be required, [FN88] but most agree that if the reform has any hope of success, the proponent must be given final say over whether to accept or reject amendments. If the amendment process is not binding, however, some question whether either initiative proponents or the legislature will take it seriously, given the general climate of distrust that exists between the legislature and many initiative proponents. Some legislators may not want to make clarifying changes to fix what they consider a “bad bill”; they may rather hope its flaws make it vulnerable to defeat at the polls or in court. On the other side, initiative proponents, who have opted for the costly initiative process rather than pursuing their proposal through the legislature, may not be inclined to accept changes suggested by legislators. If amendments do not require the proponent's consent, the reform would be a major change and would place a real constraint on Populist-oriented initiative lawmaking; if \*1066 consent is optional, however, the reform would be more neutral, and would not have much constraining effect. The harder question is whether this reform would have any effect at all or would just create a pro forma exercise.

### 2. Optional Indirect Initiative Process

A variation of the “integrating” proposal is to reinstate an optional indirect process for initiative lawmaking. The indirect initiative takes several forms in the states where it is used, but the general idea is that initiative proponents draw up a measure and gather enough petitions to qualify it for submission to the legislature, whereupon the legislature has a certain amount of time to adopt the measure; if it fails to do so, the measure then goes to the ballot for voter approval or rejection. Amendments are handled in different ways, but the general rule is that proponents must consent to them; if the proponent rejects the amendment, he or she can take the original measure to the voters for their approval. To create incentives for initiative proponents to choose the indirect option instead of the direct initiative, some proposals call for a two-tier qualification system, with significantly fewer signatures required to qualify an indirect initiative than a direct one. [FN89] As noted above, the California Constitution provided the indirect initiative option until 1966, when it was abolished as part of a constitution revision. [FN90] Prior to that, the mechanism was rarely used, and it tends to be disfavored in states where it is available. [FN91] The challenge now would be to create structures and incentives to make an indirect initiative system work in a climate where there is distrust between initiative proponents and the legislature. Populist-oriented initiative lawmaking would not be constrained by the introduction of this option, as long as it is voluntary and the

direct initiative option remains freely available. If the incentives are structured correctly, it might nudge the \*1067 initiative process in the direction of the Progressive vision.

### 3. Post-enactment Amendment

California is the only initiative state that prohibits the legislature from amending or repealing voter-approved statutory initiatives. [FN92] Most initiative states allow the legislature to amend or repeal statutory initiatives immediately after enactment, just as it can any other statute. [FN93] These states recognize that statutes by nature often require amendment as circumstances change, and the legislature should have the flexibility to make modifications to them even if they were enacted by initiative. The California rule, however, locks in initiative-made policies and thereby significantly undermines the legislature's authority and flexibility. The special status given to initiative statutes in California is clearly driven by distrust of the legislature, even though most legislators would be very wary of significantly changing or repealing a voter-approved initiative as is evidenced in states where they have the ability to do so. [FN94] Especially given the extensive nature of statutory initiative lawmaking in California over the past three decades, this is an area particularly ripe for reform. Again, reformers need to anticipate unintended consequences; specifically, if the system is reformed so that statutory initiatives can be amended or repealed without voter approval but constitutional initiatives cannot, initiative proponents will have greater incentives to pursue constitutional initiatives rather than statutory initiatives for ordinary policies. Accordingly, proposals to give the legislature the ability to \*1068 modify statutory initiatives should be coupled with proposals to make enactment of constitutional initiatives more difficult. Pursued in tandem, these reforms would place a significant constraint on Populist-oriented initiative lawmaking.

#### C. Regulate Access to the Ballot

Deciding how high to make the hurdle for qualifying an initiative for the ballot is important, and it is an area where Progressive-oriented reformers engage in a lot of muddled thinking. Populists act consistently with their principles when they suggest that the qualification process should be made easier, for example by ensuring that signature-gatherers have free access to public places, that the number of signatures be low and the time for qualification long, and that new technologies such as electronic signature-gathering be allowed. But some Progressives agree that the qualification hurdle should be lowered. [FN95] Progressives who take this view seek to help citizen groups that cannot afford paid petition gatherers gain access to the ballot. Aware that current Supreme Court decisions prevent them from restricting paid petition gatherers, these Progressives have decided to try to level the playing field downward. However, given the overwhelming Populist orientation of the California initiative process, it is foolhardy to make access to the system easier, at least until some of the **constraining** reforms are achieved. The real question is whether to invest limited "reform resources" on raising the qualification hurdle. At a minimum, Progressives should fend off proposals that could make access to the ballot easier, such as Internet signature gathering, [FN96] unless those proposals are carefully countered by **constraining** reforms.

#### D. Require Pre-election Legal Vetting

In California, approximately two-thirds of all voter-approved initiatives are challenged in court and of those, \*1069 nearly half are invalidated in part or in their entirety. [FN97] As discussed earlier, California initiatives' Populist orientation makes many of them vulnerable to legal attack. Many voters are frustrated when a court invalidates an initiative after the election. Some reformers believe that pre-election review of initiatives (either by

the courts or by the attorney general) would help remedy this situation, by identifying legal flaws before the fact. In theory, this proposal sounds appealing, but in practice it raises new concerns.

### 1. Pre-election Review by Courts

An initiative raises three primary types of legal issues: 1) has it met procedural requirements, such as the rules for qualification? 2) does it fail to meet subject matter requirements, such as the single subject rule? and 3) does it violate substantive state or federal constitutional provisions, such as equal protection or due process? [FN98] The first type of legal challenge is best resolved prior to the election, and is generally handled by the lower courts, which usually defer to the judgments of the secretary of state. The real questions about the court's appropriate pre-election role arise with respect to the other two categories. The California Supreme Court has refused to rule prior to the election on a measure's constitutional validity. [FN99] There are good reasons for this, including rules against issuing advisory opinions, the doctrine of ripeness, respect for separation of powers, and general considerations of judicial economy. [FN100] The general principle is that courts should not intervene in the lawmaking process to render a judgment about the constitutional validity of a proposal that may or may not become law. [FN101] The question of whether courts should review initiatives for subject matter compliance prior to the election is a harder one. [FN102] In some \*1070 respects, pre-election review for subject matter compliance raises some of the same concerns as reviewing it for substantive validity (e.g., it runs counter to notions of judicial economy to review a proposed measure that voters may never approve). Especially in the initiative context, the court's political capital is precious, and should be expended with care. In the past, the California Supreme Court has been wary of invalidating initiatives prior to the election for violation of subject requirements, [FN103] but there have been exceptions. [FN104] A recent example is the California Supreme Court's decision to invalidate Proposition 24 prior to the March 2000 election for violation of the single subject rule. [FN105] The decision was controversial because it seemed to set a tougher standard for single subject review, [FN106] but perhaps even more so because the court was inserting itself in the initiative process prior to the election. [FN107]

The question for reformers is whether to require the supreme court to conduct pre-election review of review initiatives. Several initiative states have institutionalized pre-election judicial review, at least with respect to whether the measure complies with the proper subject matter restrictions. In Florida, for example, the state supreme court reviews all initiatives before they are cleared to go on the ballot. [FN108] The Florida court plays a significant **constraining** \*1071 role in the state's initiative process, by strictly enforcing the Florida Constitution's single subject rule and thereby preventing many measures from ever reaching the ballot. For example, it has prevented Ward Connerly from placing on the Florida ballot initiatives to dismantle the state's affirmative action programs, holding that the measures violated the state constitution's single subject rule even though Connerly had divided what was essentially the same proposal as California's Proposition 209 into four separate initiatives. [FN109] The Florida court has taken heat for playing such an active "gatekeeping" role in the state's initiative process. [FN110]

California's reformers should be wary of requiring a pre-election role for the state supreme court. As the only institutional check on initiatives, the court already plays a crucial role in the process. While institutionalizing pre-enactment screening by the court could certainly have a **constraining** effect on Populist-oriented initiative lawmaking, it would make the court an even more constant participant in initiative controversies, would strain its docket, and would invite new pressures on the institution. [FN111] Before requiring the court to assume this burden, reformers should consider other alternatives for **constraining** Populist-oriented initiative law-

making.

## 2. Pre-election Review by the Attorney General

As an alternative to mandating pre-election review of initiatives by the courts, some reformers propose that the attorney general be charged with assessing the measure's \*1072 validity prior to the election. [FN112] As in some other states, the attorney general could be given the power to remove initiatives from the ballot for failure to comply with certain rules (violation of the single subject rule, etc.). [FN113] Alternatively, the attorney general could issue voters a non-binding advisory opinion regarding the legality of the initiative, a role that would be more "informational" than "constraining." Since in California the attorney general is a partisan official, the office's present role in the initiative process, drafting the ballot title, is already controversial, and some reformers want to shift that responsibility away from the attorney general to another office, such as the Legislative Analyst. Giving the attorney general the power to keep initiatives off the ballot by vetting them for compliance with subject requirements would generate further controversy. [FN114] Despite these problems, however, from an institutional perspective it is better to vest primary responsibility for this task in the attorney general than in the courts.

In sum, while institutionalizing pre-election subject-\*1073 matter review is potentially an effective way to constrain Populist-oriented initiative lawmaking, conveying that responsibility, especially to the court, raises practical concerns.

## 3. Improve Information

Some Progressive reformers pin their hopes for improving the initiative process on increasing citizens' information as they participate in the process. Improving information takes many forms, including increasing disclosure of the financial interests supporting or opposing an initiative, [FN115] tinkering with the ballot pamphlet to make it more accessible and informative to the average voter, [FN116] setting up public hearings on initiatives, [FN117] and jawboning journalists to provide more complete coverage of ballot measures. [FN118] These proposals may improve, to some degree, the quality of public discernment regarding initiatives and are likely to be relatively non-controversial. However, if they are non-controversial, it is in part because they do not go very far in **constraining** the Populist initiative process. Indeed, the danger in focusing exclusively on these kinds of proposals is that they can become palliatives that divert focus from reforms that more directly address the threat that Populist-oriented initiative lawmaking poses to representative government.

### E. Restrict Scope

The California Constitution contains provisions that at least potentially restrict the scope of Populist-oriented initiative lawmaking. They include the single subject rule, which requires that initiatives, as well as ordinary \*1074 legislation, embrace no more than one "subject," [FN119] and the no-revision rule, which states that initiative constitutional amendments can only amend, not revise, the constitution. [FN120] The manner in which these rules are interpreted and enforced can have enormous impact on initiative lawmaking. [FN121]

#### 1. Single Subject Rule

California adopted the single subject rule in 1948, and most other state constitutions also contain single subject requirements. [FN122] The generally-stated purpose of single subject rules is to prevent logrolling and to reduce voter confusion. [FN123] Clearly, strict application of the rule also can serve another purpose, which is to constrain initiative lawmaking. If a court decides that an initiative violates the single subject rule, it will invalidate the entire measure. [FN124] In the past, the California Supreme Court has chosen not to enforce this rule strictly; for years, it rejected single subject challenges to sweeping, complex initiatives. [FN125] In adopting a \*1075 “liberal construction” of the single subject rule, the court stated, “Our society being complex, the rules governing it, whether adopted by legislation or initiative, will necessarily be complex. Unless we are to cripple use of the initiative, risk of confusion must be borne.” [FN126] Based on this logic, the court has interpreted the single subject rule to require only that the elements of an initiative be “reasonably germane” or “reasonably related to a common theme or purpose”; it is not necessary that they “effectively interlock in a functional relationship.” [FN127] This generous approach sparked controversy. In *Brosnahan v. Brown*, [FN128] dissenting Justices Bird, Mosk, and Broussard argued that through its liberal construction of the single subject rule, the court had effectively repealed it. [FN129] Nevertheless, a majority of the court was committed to accommodating the initiative process: “It is our solemn duty to jealously guard the initiative power,” the court repeated in a number of cases, “it being one of the most precious rights of our democratic process.” [FN130] Reformers concerned about the increasing impact of Populist-oriented initiative lawmaking, however, thought the single subject rule should be made more restrictive. In 1997, State Senators Karnette, Lewis, Maddy, and Polanco introduced SCA 5, a constitutional amendment that would have tightened the single subject rule for initiatives by requiring not only that each provision be reasonably germane to the general purpose of the measure, but that each provision also be “reasonably interdependent” with all other provisions. [FN131] The measure failed to win two-thirds approval in the legislature but the idea of amending the constitution to give “teeth” to the single subject rule has received new consideration by the current initiative reform commission. [FN132] At a recent commission meeting, Commissioner Joseph Remcho presented a memorandum reviewing the history of the California Supreme Court’s \*1076 interpretation of the single subject rule, and proposing a change:

Article II, section 8(d) currently provides:

An initiative measure embracing more than one subject may not be submitted to the electors or have any effect.

Historically the purpose of the single subject rule has been to avoid “logrolling,” forcing people to vote in favor of one thing in order to get another. On paper, the prohibition against measures embracing more than one subject is as strong as anything in the Constitution. Not only do such measures violate the Constitution, but the Constitution also provides that they may not even be submitted to the electors.

Unfortunately, the modern history of enforcement of the rule has not been good. This stems in large part from the fact that the early modern cases came up in the context of wildly popular measures. Two appellate courts invalidated measures in the 1980s, but the Supreme Court had never taken one off the ballot until last year. . .

I believe that many measures survived because the courts were asked to invalidate measures that had secured overwhelming support by the voters. The Supreme Court often stated that it would give extra leeway to measures passed by the voters. On the other hand, courts were reluctant to take measures off before a popular vote, because it would deprive voters of their right to choose and because the case would not even come back to the courts if the measure failed to pass.

Strengthening the single subject rule would ensure that voters get a simple clean choice at the polls: an up or down vote on a measure, unencumbered by provisions included solely to secure more votes.

One proposal considered by the committee could be met by adding the following italicized language

to article II, section 8(d) so that it reads:

An initiative embracing more than one subject may not be submitted to the electors or have any effect. All of a measure's provisions must be both functionally related and reasonably germane to each other. The Attorney General may not prepare a title or summary for any measure not meeting these requirements, but shall permit a proponent to submit \*1077 separate initiatives for each subject.

This language would deal with the problem in two ways:

1. By requiring a measure to be both reasonably germane and functionally related it uses the standards enunciated by the courts, but adds some teeth to the rule. More importantly, it frees the courts of modern precedents in which many measures that reasonable people would see as embracing more than one subject were upheld. It allows the court to apply the rule in light of the way in which initiatives have come to be used in modern California.

2. By requiring the Attorney General to insist on separate measures, it provides a mechanism to resolve the single subject issue well in advance of significant expenditures by proponents and action by the people . . . [FN133]

Remcho's proposal would likely have another effect, as well: by combining a tougher single subject rule with binding pre-election review, the proposal would constrain the initiative process. Florida provides an example of how this combination of pre-election review and strict single subject enforcement can prevent measures from reaching the ballot. [FN134]

Stricter enforcement of the single subject requirement is consistent with recent trends in several initiative states. In the past few years, a number of state supreme courts have noticeably tightened enforcement of single subject rules or similar requirements. [FN135] In California, the court's recent \*1078 decision in *Senate v. Jones* [FN136] signals that it may be shifting away from its liberal interpretation of the single subject rule. Even though the court did not expressly alter its standard of review, [FN137] observers believe the majority's decision represents a new, more aggressive approach. [FN138] Some commentators do not want the court to give the single subject rule real teeth, because selective application of a strict rule would result in arbitrary invalidation of initiatives, and consistent application of it would preclude complex initiatives of all types, even "good" ones. [FN139] In the face of Populism's threat, however, it may be necessary for the California Supreme Court to make that bargain. If so, it needs to be acknowledged that an aggressive approach to single subject rule enforcement would place the court in the position of "initiative watchdog," thus exposing it to public backlash. [FN140]

## 2. No Revision Rule

An alternative constitutional provision that could be invoked to restrict initiative lawmaking is the "no-revision rule." Unlike the single subject rule which applies to both initiative statutes and initiative constitutional amendments, this rule applies only to initiative constitutional amendments. As with the single subject rule, the California Supreme Court has interpreted this rule liberally. [FN141] The court should reconsider this position. Enforcing the no-revision rule more strictly could have two salutary effects: it would constrain initiative lawmaking, and it would sharpen the distinction between constitutional initiatives and initiative statutes, an important reform objective.

\*1079 The following chart summarizes the major reform proposals discussed above, and indicates whether their effect on Populist-oriented initiative lawmaking would be "constraining," "neutral," or "expanding."

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\*1080 To summarize this perspective on initiative reforms, the main goal is not to make the initiative process easier or more accessible: it is to constrain Populist-oriented initiative lawmaking. Restricting the role of money in the process is not a viable option, due to U.S. Supreme Court decisions. [FN142] Instead, the leading elements of the “initiative **constraining**” agenda should be: 1) to distinguish more clearly between constitutional and statutory initiative lawmaking by making initiative constitutional amendments more difficult to enact, and initiative statutes less “constitution-like”; 2) to integrate \*1081 the legislature into the initiative process by allowing statutory initiatives to be amended before the election and after enactment; and 3) to tighten the scope of initiatives through stricter enforcement of constitutional constraints on initiative lawmaking. Proposals to improve voter information have merit and are non-controversial but do not have a significant **constraining** effect and so should not be the reformers' primary objective. Finally, pre-election legal vetting, by either the supreme court or the attorney general, is a **constraining** change but raises practical concerns and should be approached with care.

## V. Prospects

Is this agenda for **constraining** the initiative process achievable? What are the obstacles to these reforms and what conditions are necessary to overcome them?

Given the extent to which the California initiative process is entrenched, any significant change to it would be a major achievement. It is generally understood that major constitutional change can only occur when conditions are ripe, when events create a “window of opportunity.” Professor Bruce Ackerman has described such situations at the federal level as “constitutional moments.” [FN143] According to Ackerman's definition, in “constitutional moments,” a period of agitation leads to transformative change, which survives a period of testing, earns broad and deep support, and is locked in place; the new principles cannot easily be dislodged. [FN144] History thus, can be understood as periods of “normal politics” occasionally interrupted by more intense and compelling moments of “higher lawmaking.” [FN145] Ackerman argues that at the federal level, the list of “constitutional moments” is short--the founding, the reconstruction period, and the New Deal. [FN146] California's constitution is far more malleable than the federal constitution, so this dualism may not be neatly applicable to the California context. Nevertheless, it is perhaps useful to consider moments in California history \*1082 where there was significant and lasting constitutional change. The drafting and adoption of California's constitution of 1879 would qualify, since it established the Populist conception of the constitution as a means for locking in policies and binding representative government. [FN147] The Progressive amendments of 1911--including, but not limited to, the introduction of direct democracy--would also certainly meet the definition. [FN148] The period of the mid-1960s, when the legislature was reapportioned on a one-person-one-vote basis, [FN149] and then fully professionalized through constitutional revision, [FN150] constitutes another “constitutional moment” although that era's impact was undermined by the neo-Populism that followed shortly thereafter. Indeed, the adoption of Proposition 13 was such a watershed event in the state's history that it probably qualifies as a “constitutional moment” as well: it both locked in lasting change in state government and ushered in an era of Populist-oriented initiative lawmaking. [FN151]

**Constraining** California's initiative system in the manner I have described would seem to require a “constitutional moment” of almost equal magnitude. Absent such a moment, reformers can make incremental change at the margins of the process, but major reforms are unlikely, given the romanticized and deeply entrenched nature of the system. [FN152] Of the “constitutional moments” described above, the one that \*1083 serves as the most hopeful precedent occurred during the 1960s, during which a group of reformers worked for

years to build public support to improve government by strengthening the legislature. [FN153] Now, reformers have to convince the public that they can improve government by **constraining** the initiative process. Any measure that is seen as “legislature-enhancing” at the expense of “the people” faces hard sledding. [FN154] This is not news to reformers. Serious efforts to propose reforms to California's initiative process have been underway for a decade, yet nothing has happened. So far, there has not been a sufficient “window of opportunity” to make significant Progressive-oriented change. Instead, we are still living in the Populist Era ushered in by Proposition 13 and reconfirmed by a series of subsequent statewide votes, particularly the enactment of Proposition 140. There is much evidence to suggest that the public remains distrustful of representative government, and little evidence to suggest that it would embrace serious efforts to strengthen it by **constraining** the people's initiative power. [FN155]

If it is true that we are not living in a moment that will permit significant “initiative **constraining**” proposals, reformers may have to lower their expectations and either seek more incremental reforms or else wait and work to create a more propitious moment. On one point, however, reformers should be clear: the most important principle is to do no harm. Given the Populist-orientation of California's initiative process, they should resist any changes that expand it. Any reforms that emerge from current or future commissions should seek to constrain **Populism**, and redirect the initiative process toward a vision that enhances rather than undermines the institutions of representative government.

\*1084 In the meantime, if the moment is not right for **constraining** reforms, the state supreme court has a duty to become the “watchdog” of the initiative process. More aggressive enforcement of existing constitutional rules for initiative lawmaking, e.g., the single subject and no-revision rules, can have significant **constraining** effects. Progressive reformers must recognize, however, that the court assumes a political risk by more aggressively checking initiative lawmaking. The same Populist impulse that currently drives the initiative process can also be directed against the court. Accordingly, reformers should not just comfortably rely on the court to protect California's representative government from the state's Populist-oriented initiative process, but instead should work to create the necessary conditions for **constraining** reforms.

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[FN1]. Commissioner William Hauck, Comments at the Public Meeting of the Speaker's Commission on the California Initiative Process (Dec. 18, 2000). For information on the Commission's work, see its web page (visited June 1, 2001) < <http://www.cainitiative.org> >.

[FN2]. In this article, I limit my discussion to statewide initiative lawmaking. Many cities and counties in California (and in other states) provide mechanisms for direct legislation. Local initiative lawmaking creates its own set of concerns, some of which are similar to those raised by the statewide process. Issues unique to local initiatives fall outside the scope of this discussion.

[FN3]. For further discussion of this distinction, see Bruce E. Cain & Kenneth P. Miller, *The Populist Legacy: Initiatives and the Undermining of Representative Government, in Dangerous Democracy?: The Battle over Initiatives in America* (Larry J. Sabato et al. eds., 2001).

[FN4]. California adopted the initiative, referendum, and recall in 1911. See *infra* note 17 and accompanying text. Twenty-two states adopted the initiative or referendum (or both) between 1898 and 1918. See Thomas E. Cronin, *Direct Democracy: The Politics of Initiative, Referendum and Recall* 51 (1989); see also David Magleby, *Direct Legislation: Voting on Ballot Propositions in the United States* 38-40 (1984).

[FN5]. See Cronin, *supra* note 4, at 43-59; see also Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 *Mich. L. & Pol. Sci. Rev.* 11 (1997).

[FN6]. See Cronin, *supra* note 4, at 43-59.

[FN7]. See, e.g., League of Women Voters of California, *Initiative and Referendum in California: A Legacy Lost?: A Study Update of Direct Legislation in California from Progressive Hopes to Current Reality* (1998).

[FN8]. See Cal. Const. art. II, § 8(d), art. XVIII; see also *infra* note 17 and accompanying text.

[FN9]. For a classic history of the Populist movement, see John D. Hicks, *The Populist Revolt: A History of the Farmers' Alliance and the People's Party* (1931).

[FN10]. The term "Populist" was first used in the early 1890s as an epithet against the People's party and its members, but party adherents gradually came to accept it. See *id.* at 238.

[FN11]. See *id.* at 406-08.

[FN12]. Populist candidates enjoyed a measure of success in the elections of 1892 and 1894, capturing numerous state and local offices, seats in Congress, and electoral votes for the presidency. After 1896, however, when Populists endorsed the ill-fated candidacy of the Democratic presidential nominee, William Jennings Bryan, the party's fault lines emerged, and it quickly disintegrated as an independent party and coherent political movement. See *id.* at 378-79.

[FN13]. Professor Hans A. Linde notes that antipathy toward the California legislature was so strong that some members of the 1879 Constitutional Convention wanted to abolish the legislature entirely. See Hans A. Linde, *Who Is Responsible for Republican Government?*, 65 *U. Colo. L. Rev.* 709, 718 (1994).

[FN14]. See Karl Manheim & Edward P. Howard, *A Structural Theory of the Initiative Power in California*, 31 *Loy. L. Rev.* 1165, 1183-84 (1998). Examples of "ordinary policies" inserted in the 1879 Constitution include a requirement that the legislature protect the state from the presence of aliens, see Cal. Const. of 1879, art. XIX, § 1 (1879), rules governing the adoption of textbooks by local school boards, see *id.* art. IX, § 7, and a prohibition on lotteries, see *id.* art. IV, § 26. See *The Constitution of the United States and the Constitution of California* (1879).

[FN15]. In 1903, Los Angeles became the first city in the state to adopt the initiative, referendum, and recall. Dr. Haynes continued to advocate for adoption of direct democracy (at both the local and state level) during the Progressive period. For a discussion of early efforts to introduce direct democracy in California, see V.O. Key, Jr. & Winston W. Crouch, *The Initiative and Referendum in California* 423-31 (1939); California Comm'n on Campaign Financing, *Democracy by Initiative: Shaping California's Fourth Branch of Government* 39 (1992) [hereinafter *California Comm'n on Campaign Financing*].

[FN16]. See generally Arthur A. Ekirch, Jr., *Progressivism in America: A Study of the Era from Theodore Roosevelt to Woodrow Wilson* (1974). For a general discussion of distinctions between Populists and Progressives, see Richard Hofstadter, *The Age of Reform from Bryan to F.D.R.* 131-34 (1955).

[FN17]. See Cal. Const. amends. 22, 23 (Special Election 1911). Senate Constitutional Amendment (SCA) 22 (Initiative and Referendum) was approved 76% to 24% (168,744 Yes to 52,093 No); SCA 23 (Recall) was approved 77% to 23% (178,115 Yes to 53,755 No). See Secretary of State Frank C. Jordan, *Summary of Amendments to the Constitution of California (1883-1920)* 9-10 (1921).

[FN18]. See Jordan, *supra* note 17, at 9-11; see also Kevin Starr, *Inventing the Dream: California Through the Progressive Era* 254-59 (1985) (describing the California Progressives' range of reforms between 1910 and 1913, all of which were designed to enhance state government's effectiveness and professionalism). During the same period, another leading Progressive, Woodrow Wilson, maintained that Progressive advocates of initiative lawmaking had no intention of undermining representative processes, but rather wanted to redeem them. See Cronin, *supra* note 4, at 54.

[FN19]. Wash. Const. art. II, § 1. For a detailed discussion of Washington's initiative process, see Jeffrey T. Even, *Direct Democracy in Washington: A Discourse on the People's Power of Initiative and Referendum*, 32 *Gonz. L. Rev.* 247 (1996-97).

[FN20]. See Wash. Const. art. I, § 1(a).

[FN21]. See *id.*

[FN22]. Article II, section 1(c) of the Washington Constitution reads as follows:

No act, law, or bill approved by a majority of the electors voting thereon shall be amended or repealed by the legislature within a period of two years following such enactment: Provided, that any such act, law, or bill may be amended within two years after such enactment at any regular or special session of the legislature by two-thirds of all the members elected to each house with full compliance with section 12, Article III, of the Washington Constitution, and no amendatory law adopted in accordance with this provision shall be subject to referendum. But such enactment may be amended or repealed at any general or special election by direct vote of the people thereon.

[FN23]. See *id.* art. II, § 41. Although the Washington Constitution provides for statutory initiatives only, some Washington initiative advocates have nevertheless argued that the constitution can be amended by initiative as well. The Washington State Supreme Court, however, has consistently rejected that view. See, e.g., *Gerberding v. Munro*, 949 P.2d 1366, 1377; see also Even, *supra* note 19, at 268, 270.

[FN24]. Perhaps in part as a result of these structural features, initiative lawmaking in Washington State has adhered more closely to the Progressive ideal than in some other states. Washington is a relatively "high use" initiative state; in the history of the process, only four states (Oregon, California, North Dakota, and Colorado) have adopted more statewide initiatives. See Initiative and Referendum Institute Historical Database (visited May 21, 2001) <<http://www.iandrinstitute.org>>. At least until very recently, however, Washington's experience with initiative lawmaking has avoided Populist excess. The rise in Washington of initiative entrepreneurs such as Tim Eyman, proponent of Populist-oriented tax limitation measures I-695 of 1999 and I-722 of 2000, indicate the state's initiative process may be headed in a more Populist direction, but the structural constraints on the process discussed here will prevent the Washington initiative process from becoming as Populist as initiative lawmaking

in California.

[FN25]. See Bruce E. Cain et al., *Constitutional Change: Is It Too Easy to Amend Our State Constitution?*, in *Constitutional Reform in California: Making State Government More Effective and Responsive* 265 (Bruce E. Cain & Roger G. Noll eds., 1995). The authors contrast the California Constitution's ease of amendability with the difficulty in amending the federal Constitution, and attribute the high rate of amendment in part to the specificity of the state constitution. They note that while legislative constitutional amendments (LCA) are far more frequent than initiative constitutional amendments (ICA), the ICA process makes it relatively easy for the initiative electorate to lock in fiscal decisions and other policy preferences into the state constitution.

[FN26]. See *id.* at 276-77.

[FN27]. One constraint is the state constitution's rule that the initiative process may only be used to "amend" not "revise" the constitution. See Cal. Const. art. XVIII. The state supreme court has generally been lax in its enforcement of this rule. See, e.g., *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208 (1978) (upholding Proposition 13 of 1978 against a challenge that it violated, among other things, the no-revision rule); *Brosnahan v. Brown*, 32 Cal. 3d 236 (1982) (upholding Proposition 8 of 1982, a "victim's rights" initiative, against a similar challenge); *Legislature v. Eu*, 54 Cal. 3d 492 (1991) (upholding Proposition 140 of 1990, the term limits initiative, against a similar challenge). An exception is *Raven v. Deukmejian*, 52 Cal. 3d 336 (1990), which invalidated in part Proposition 115 of 1990, a criminal justice initiative, for impermissibly "revising" the state's constitution.

[FN28]. Arizona limits legislative post-election amendments to initiatives, but only when the initiative receives a majority of all registered voters. See Ariz. Const. art. IV, pt. 1, § 1(6). Since this has never happened in practice, California is the only state that restricts the legislature in this way.

[FN29]. See Cal. Const. art. I, § 10(c); see also *Beneficial Loan Soc'y v. Haight*, 215 Cal. 506 (1932) (invalidating a 1931 statute for conflicting with the 1918 Usury Act, adopted by initiative). The court reaffirmed that acts of the legislature may not conflict with an initiative statute, unless specific provision has been made to that effect.

[FN30]. The following states provide for the indirect initiative: Alaska, Maine, Massachusetts, Michigan, Mississippi, Nevada, Ohio, Utah, Washington, and Wyoming. See M. Dane Waters, *Testimony to the Speaker's Commission on the California Initiative Process* (Dec. 18, 2000).

[FN31]. A rationale for this decision was that the mission of the 1960s Constitutional Revision Commission was, in part, to delete "superfluous" provisions from the bloated state constitution. Because the indirect initiative had been so infrequently used (only four indirect initiatives had been qualified to the legislature in over a half-century), it seemed to be a constitutional surplusage. Interview with Fred Silva, Executive Director of the 1990s Constitution Revision Commission (Feb. 16, 2001).

[FN32]. See Secretary of State Bill Jones, *A History of the California Initiative Process* 16-25 (1996).

[FN33]. The Constitutional Revision, designated on the ballot as Proposition 1a, was approved by the legislature in 1966 as ACA 13 after Governor Edmund G. "Pat" Brown gave it his support. See generally Eugene C. Lee, *The Revision of California's Constitution*, 3 CPS Brief, California Policy Seminar 3-6 (Apr. 1991). The proposal made numerous changes to the state constitution, most notably creating a full-time, professional legislature. The

ballot argument in favor of the proposal stressed the importance of “effective” government:

One of our most crucial needs in this time is effective government--based on a modern Constitution .... California's constitution is hardly modern. It is the third longest Constitution in the world and it has been amended over 300 times since 1879. In short, it is a mess. In 1962, by more than a 2-1 vote, the people mandated modernization of their Constitution. As a result, a blue-ribbon Constitution Revision Commission of 69 leading Californians was appointed to recommend a revised Constitution. These prominent citizens from all walks of life worked without pay for three years and spent thousands of hours at their task. The result is Proposition 1-a.... The reforms of Proposition 1-a have been labeled by party leaders and non-partisan groups alike as essential to the effective operation of government.... State government today faces new challenges and new responsibilities not dreamed of in 1879. This new Constitution helps to meet these challenges by making government itself more flexible and able to do the job which our citizens have a right to expect. If states are to survive and prosper in our system, they need the tools of effective government.

Secretary of State Frank M. Jordan, Proposed Amendments to the Constitution: Propositions and Proposed Laws Together with Arguments, General Election 1-2 (1966) [hereinafter Proposed Amendments]. The ballot argument in favor of Proposition 1a was signed by both Democratic Governor Brown and his Republican challenger that year, Ronald Reagan. See *id.* at 1. California voters overwhelmingly approved the changes, by a vote of 4,156,416 Yes to 1,499,675 No (75%-25%). See Secretary of State Frank M. Jordan, California Statement of the Vote, General Election 35 (1966).

[FN34]. See Margie Lloyd, California's Golden Moment: The Last Opportunity to Heal Constitutional Ills, in California Politics and Policy 49 (1996); see also Peverill Squire, The Theory of Legislative Institutionalization and the California Assembly, 54 J. Pol. 1026-53 (1992). The Senate Office of Research still exists, but the Assembly Office of Research did not survive the budget cuts following Proposition 130 of 1990.

[FN35]. These changes helped make California's legislature the most respected in the nation. See William K. Muir, Jr., Legislature: California's School for Politics 13 (1982) (citing a 1971 study of the Citizen's Conference on State Legislatures). Professor Muir's book provides an excellent account of how the California legislature operated in the decade after the 1960s reforms.

[FN36]. See Proposed Amendments, *supra* note 33, at 27-31.

[FN37]. See 6 The Field Institute, California Opinion Index: A Digest Describing the Public's Confidence in Institutions (1981). The report showed a decline in Californians' confidence in the state legislature throughout the 1970s, bottoming out in 1978.

[FN38]. Argument of John V. Briggs in Favor of Proposition 13, in California Voters Pamphlet, Primary Election, June 6, 1978.

[FN39]. See Peter Schrag, Paradise Lost: California's Experience, America's Future 188-99 (1998) (discussing Proposition 13's catalytic effect on the initiative process). Schrag argues:

[T]here's no doubt that ... it was [Proposition 13 proponents] Howard Jarvis and Paul Gann who started the modern plebiscitary cycle and inaugurated California's new political era.... Proposition 13 not only spawned the network of consultants, direct mail specialists, and other business compromising what some people now call, with only minor exaggeration, California's “Initiative Industrial Complex,” but prompted a seismic shift in the state's political center of gravity, as well.

*Id.* at 188-89. See also David S. Broder, Democracy Derailed: Initiative Campaigns and the Power of Money 6 (2000) (“The modern-day romance with the initiative began on June 6, 1978, when two old geezers restructured

California government and arguably changed the course of public policy across the nation.”).

[FN40]. See Proposed Amendments, *supra* note 33, at 28-69 (updated to include 1998).

[FN41]. See *infra* note 78 and accompanying text.

[FN42]. See Magleby, *supra* note 4, at 180-84.

[FN43]. Key & Crouch, *supra* note 15, at 458.

[FN44]. Once an initiative petition is submitted for circulation, amendments to the initiative's text are prohibited. See California Comm'n on Campaign Financing, *supra* note 15, at 79. In Oregon, by contrast, during the circulation stage, proponents may make amendments that do not “substantially change the substance of the measure.” Or. Rev. Stat. § 250.045 (1999).

[FN45]. Accountability is a separate, and important, democratic norm which the initiative process violates. For example, unlike the legislative process, the initiative process contains no conflict-of-interest prohibitions. Indeed, many initiatives are proposed by groups that want to line their own pockets, and there is nothing to restrict them from doing so. See Cain & Miller, *supra* note 3, at 45-46.

[FN46]. For a description of initiative proponents' strategy, see Jim Schultz, *The Initiative Cookbook: Recipes and Stories from California's Ballot Wars* (1996).

[FN47]. See California Comm'n on Campaign Financing, *supra* note 15, at 79-91 (citing several types of flaws that often plague initiatives, including ambiguous or imprecise terminology, omissions or oversights, excessive length, complicated wording, and unconstitutional provisions); see also Richard B. Collins & Dale Oesterle, *Governing by Initiative: Structuring the Ballot Initiative: Procedures that Do and Don't Work*, 66 U. Colo. L. Rev. 47, 76-77 (1995).

[FN48]. Indeed, initiative proponents often seek polarization. Jim Schultz notes: “For many initiative campaigns the basic strategy comes down to two main tasks. First, make the initiative controversial so that the public is paying attention. Second, define the sides so you are the good guys and the other side is evil incarnate.” Schultz, *supra* note 46, at 7.

[FN49]. See Elisabeth R. Gerber, *Prospects for Reforming the Initiative Process, in Dangerous Democracy?: The Battle over Initiatives in America*, *supra* note 3 (citing *The Field Institute, The Field Poll No. 1909*, Oct. 31, 1998); see also Magleby, *supra* note 4, at 139-44 (describing voter ignorance regarding ballot propositions).

[FN50]. Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 Am. Pol. Sci. Rev. 63-76 (1994).

[FN51]. Shaun Bowler & Todd Donovan, *Demanding Choices: Opinion, Voting, and Direct Democracy* (1998).

[FN52]. Magleby, *supra* note 4, at 144.

[FN53]. See, e.g., Justice Hugo Black, who during oral argument in *Reitman v. Mulkey*, 387 U.S. 369 (1967) (striking down California's Proposition 13 of 1964 which sought to restrict the state government's ability to enact fair-housing laws), expressed his view that the initiative process is “as near to a democracy as you can get.” 64 *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* (P. Kurland

& G. Casper eds., 1975).

[FN54]. See *infra* Part IV.

[FN55]. One example of a Progressive-oriented measure is Proposition 9 of 1974, the Political Reform Act, now codified at section 81,000 of the California Government Code. This Act established the state's Fair Political Practices Commission and enacted new rules regulating campaign financing, lobbying, conflicts of interest, and ethics.

[FN56]. See, e.g., Proposition 13 of 1978 (reducing the property tax); Proposition 6 of 1982 (repealing the state's gift and inheritance taxes); Proposition 7 of 1982 (establishing income tax indexing).

[FN57]. See, e.g., Proposition 13 of 1978 (requiring voter approval of property tax increases); Proposition 218 of 1996 (requiring voter approval for local government taxes).

[FN58]. See, e.g., Proposition 4 of 1979 (establishing state spending limit).

[FN59]. See, e.g., Proposition 37 of 1984 (earmarking lottery revenues); Proposition 98 of 1988 (guaranteeing a minimum percentage of the state budget for education); Proposition 99 of 1988 (earmarking tobacco tax revenues); Proposition 10 of 1998 (earmarking tobacco tax revenues). Note that not all legislature-**constraining** initiatives are sponsored by political conservatives. The political "left" has also invoked the initiative process to tie the legislature's hands.

[FN60]. See Proposition 140 of 1990 (mandating a cut in the legislature's budget of approximately 40% and capping future increases).

[FN61]. See *id.* (limiting terms of governor, legislators, and other state constitutional officers).

[FN62]. See generally Elizabeth G. Hill, *Ballot Box Budgeting*, in EdSource Publications (1990). Hill noted: "By our estimates, approximately 75 percent of the state's General Fund expenditure is not subject to legislative control through the budget process. More than half of this restriction is due to initiatives...." *Id.* at 3. See also Cain et al., *supra* note 25, at 289 (noting that "some of the most critical fiscal decisions have been put into the Constitution by the ICA process, and this has limited the ability of elected officials to deal with fiscal crises").

[FN63]. See Bruce E. Cain, *The Varying Impact of Legislative Term Limits*, in *Legislative Term Limits: Public Choice Perspectives* 21, 35 (Bernard Grofman ed., 1996).

[FN64]. Nationwide, with the exception of North Dakota, Illinois, and Mississippi, every state where citizens have the opportunity to place initiatives on the ballot (i.e., in 21 of the 24 states with the initiative process), term limits have been adopted. In Washington State, the state supreme court invalidated the state's voter-approved term limit initiative. See *Gerberding v. Munro*, 949 P.2d 1366 (1998). By contrast, with the exception of Louisiana, none of the 26 states that lack provisions for initiative lawmaking have adopted term limits through the legislative process. (The New Hampshire legislature attempted to impose term limits on the state's representatives in Congress, but not on itself.) Similarly, despite strong pressure for congressional term limits, members of Congress have declined to adopt proposals to limit their own terms. Interview with Paul Jacob, National Director of U.S. Term Limits, Inc. (Feb. 25, 2000).

[FN65]. Direct democracy's threat to minority rights is, of course, one of the primary reasons Madison and most

of the other Founders favored a representative system replete with checks and balances. See generally James Madison, Alexander Hamilton & John Jay --The Federalist Papers (Penguin Books 1987) (1788).

[FN66]. California initiatives that sought to overturn or block state efforts to protect racial minorities include Proposition 14 of 1964, which sought to prohibit state adoption of fair housing laws (invalidated in part by *Reitman v. Mulkey*, 387 U.S. 369 (1967)) and Proposition 21 of 1972, which sought to prohibit forced busing to desegregate public schools (invalidated in part in *Santa Barbara Sch. Dist. v. Superior Court*, 13 Cal. 3d 315 (1975)). An example from an earlier period is Proposition 1 of 1920 (the Alien Land Law), which sought to strengthen prohibitions on land ownership by non-citizens, and was especially targeted at Japanese farmers. See Key & Crouch, *supra* note 15, at 474-76.

[FN67]. The prime example is Proposition 187 of 1994. See *infra* note 70 and accompanying text. Other initiatives targeted at immigrants have sought to persuade the federal government to allow voting materials to be printed in English only (Proposition 38 of 1984), and to reinforce English as the state's official language (Proposition 63 of 1986).

[FN68]. The recent example is Proposition 22 of 2000, which constitutionalizes the state's ban on recognition of same-sex marriages. An earlier initiative, Proposition 6 of 1978, which sought to prohibit homosexuals from teaching in the public schools, was defeated by the voters. See Jones, *supra* note 32, at 110.

[FN69]. Criminal defendants are an unpopular minority whose rights are at particular risk in a pure-majoritarian system. In the history of the California initiative process, six statewide measures have qualities that increase criminal penalties or restrict defendants' rights. These are the most popular type of initiative; voters have approved all of them, often by large margins. See *id.*

[FN70]. For a discussion of this problem, see Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 Wash. L. Rev. 1 (1978). More specifically, consider Proposition 187 of 1994. Proposition 187 was a sweeping proposal designed to attack the influx of immigrants into the state (especially poor, undocumented immigrants from Latin America) and to demand action from a government that (in the sponsors' view) had been too slow and indulgent in responding to this crisis. The initiative targeted undocumented (i.e., "illegal") immigrants but it would also likely impact many in the broader immigrant population. Many voters did not understand the measure's full scope and implications, nor the questions regarding its legality. But they understood the initiative's basic thrust: California was suffering the social and economic effects of a recent wave of immigration and voters needed to force government into action to "save our state." Proposition 187's proponents pounded these Populist and nativist themes in their ballot argument in favor of the initiative:

Proposition 187 will go down in history as the voice of the people against an arrogant bureaucracy.

**WE CAN STOP ILLEGAL ALIENS.**

If the citizens and taxpayers of our state wait for the politicians in Washington and Sacramento to stop the incredible flow of ILLEGAL ALIENS, California will be in economic and social bankruptcy....

While our own citizens and legal residents go wanting, those who choose to enter our country ILLEGALLY get royal treatment at the expense of the California taxpayer.

**IT IS TIME THIS STOPS!...**

Should tax paid bureaucrats be able to give sanctuary to those ILLEGALLY in our country?...

The federal government and state government have been derelict in their duty to control our borders. It is the role of our government to end the benefits that draw people from around the world who ILLEGALLY enter our country. Our government actually entices them.

Passage of Proposition 187 will send a strong message that California will no longer tolerate the dereliction of duty by our politicians....

Vote YES on PROPOSITION 187. ENOUGH IS ENOUGH!

The pro-187 campaign aired a television advertisement that showed grainy, black-and-white footage of immigrants racing across the Mexican border into California as an announcer ominously intoned: "They keep coming...." The anti-187 forces took to the streets. Needless to say, the initiative stirred up deep passions and polarized the state. Proposition 187 was approved by the voters (by a 59%-41% vote), but largely invalidated by the federal courts on federal preemption grounds. See *League of United Latin Am. Citizens v. Wilson*, No. 94-7569 MRP, 1998 U.S. Dist LEXIS 3368 (C.D. Cal. Mar. 13, 1998).

[FN71]. The debate over the nature of money's influence in the initiative process is lively. See, e.g., California Comm'n on Campaign Financing, *supra* note 15, at 263-91 (stating the thesis that wealthy interests control and manipulate the initiative process); Broder, *supra* note 39, at 163-98. However, several leading scholars take a different view, arguing that while money helps initiative proponents gain access to the ballot, it generally cannot "buy" initiative elections; money is a more effective resource for defeating initiatives than in enacting new ones. See Elisabeth Gerber, *The Populist Paradox: Interest Group Influence and the Promise of Direct Legislation* (1999). "Certainly the role and influence of economic interest groups is different from what modern critics charge. Economic groups are limited in their ability to achieve direct influence over policy, especially direct modifying influence." *Id.* at 148. See also Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory, and the First Amendment*, 29 *UCLA L. Rev.* 505 (1982) (noting that large expenditures by opponents can effectively kill initiatives).

[FN72]. See Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 *Harv. L. Rev.* 434, 436 (1998) (arguing that while single-issue direct democracy may make people feel that they have more voice in government, it may actually prevent people from expressing their true priorities and preferences among issues).

[FN73]. See Magleby, *supra* note 4, at 59-76. Note that interest groups' dominant role in the initiative process is not new; Key and Crouch, writing in the 1930s, observed this. See Key & Crouch, *supra* note 15, at 572.

[FN74]. See Daniel A. Smith, *Tax Crusaders and the Politics of Direct Democracy* (1998).

[FN75]. Gerber, *supra* note 71.

[FN76]. See *Citizens Against Rent Control/Coalition for Fair Hous. v. City of Berkeley*, 475 U.S. 260 (1986).

[FN77]. See Kenneth P. Miller, *The Role of Courts in the Initiative Process: A Search for Standards* 12-13 (1999) (unpublished paper presented at the 1999 Annual Meeting of the American Political Science Association, Atlanta, GA). This study showed that, between 1960 and 1999, California voters adopted 55 initiatives; 36 of them (65%) were challenged in court. Of those challenged, 11 were invalidated in part, seven in their entirety, and four cases were still pending. Fifty-six percent of all challenged initiatives were thus either partly or entirely invalidated. See *id.*

[FN78]. For example, between 1960 and 1998, voters in California, Oregon, and Colorado approved 11 initiatives that specifically affected racial or other minorities. Nine of eleven were challenged in court; five of those (55%) were invalidated in part or in their entirety, with one still pending. See *id.* at 21-22. During the same period, voters in those three states approved 39 initiatives to reform or constrain representative government. Twenty-six of those were challenged in court; 16 (77%) of those challenged were invalidated in part or in their entirety, with five still pending. See *id.* at 22-23.

[FN79]. Between 1960 and 1999, voters in California, Oregon, and Colorado adopted 17 environmental initiatives. Only four were challenged in court and none were invalidated. See *id.* at 19-20.

[FN80]. See Gerald F. Uelman, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 *Notre Dame L. Rev.* 1133 (1997). For example, in 1994, Nebraska Supreme Court Justice David Lanphier authored a decision invalidating the state's term limit initiative, which Nebraskans had approved by a 70% margin. The sponsors of the initiative organized a campaign to remove him from the bench. In 1996, Lanphier was soundly defeated in a retention election. See *id.* at 1134.

[FN81]. See California Comm'n on Campaign Financing, *supra* note 15, at 44-45. Voters soundly defeated a 1920 initiative to raise the signature requirement for tax-related measures to 25% of the vote in the last gubernatorial election, as well as a subsequent attempt in 1922 to raise the signature requirement to 15%. In 1948, the legislature proposed and voters approved an amendment to the constitution to restrict all initiatives to a "single subject." See *id.* at 46. The single subject requirement is now contained in article II, section 8(d) of the California Constitution. For a history of the single subject rule's enactment in 1948 and evolution since, see Daniel H. Lowenstein, *California Initiatives and the Single Subject Rule*, 30 *UCLA L. Rev.* 936, 949-53 (1983). As I will later discuss, the "single subject rule" has the potential to reduce the scope and impact of initiative law-making, but for decades California courts chose not to strictly enforce it. See *infra* note 125 and accompanying text.

[FN82]. Bernard L. Hyink, *California Revises Its Constitution*, *W. Pol. Q.* 637, 645 (Sept. 1969). Hyink noted that those opposed to these changes included members who represented business interests, members of the legal profession, and legislators who also served as commission members. They maintained that the initiative represented a right and a privilege of the people and should not be withdrawn or subjected to more restriction. See *id.*

[FN83]. See *supra* note 33.

[FN84]. Prominent contributions to the new initiative reform movement included academic studies and reform proposals by Professors Philip L. Dubois and Floyd F. Feeney. See *Improving the California Initiative Process: Options for Change* (1992) (a comprehensive study commissioned by the California Policy Seminar, a joint program of California state government and the University of California, comparing initiative processes in various states and proposing reforms to the California initiative process). See also California Comm'n on Campaign Financing, *supra* note 15 (a comprehensive study commissioned by the California Commission on Campaign Financing, a bi-partisan group of elite, Progressive-oriented California academics, professionals, and business-leaders, critiquing the California initiative process and proposing reforms); Citizen's Comm'n on Ballot Initiatives, *Report and Recommendations on the Statewide Initiative Process*, Sacramento (Jan. 1994) [hereinafter *Citizen's Comm'n on Ballot Initiatives*] (report of a bipartisan 15-member commission, chaired by former Legislative Analyst A. Alan Post, charged by the legislature and the governor to make recommendations regarding initiative reform).

[FN85]. In analyzing reform proposals, it is important to note a category of reforms that could have a **constraining** effect on the initiative process but which is off-limits--namely reforms that restrict money in the process. There is no doubt that large sums of money fuel the California initiative process. In 1998, for example, proponents and opponents of California initiatives spent approximately \$250 million in the June and November elections combined. This compares with \$88 million spent by all general election candidates for the U.S. House of Representatives that year. See Gerber, *supra* note 71. Moreover, money can buy access to the ballot. A pro-

ponent willing to spend a sufficient amount is able to qualify almost any measure for the ballot. See Elizabeth Garrett, *Money, Agenda Setting, and Direct Democracy*, 77 *Tex. L. Rev.* 1845 (1999). In California, the price is currently somewhere between one and two million dollars. See Gerber, *supra* note 71. The U.S. Supreme Court has held that contributions and expenditures in initiative campaigns are protected by the First Amendment, as applied to the States by the Fourteenth. See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981) (These cases follow the logic of *Buckley v. Valeo*, 424 U.S. 1 (1976)). As a result, California cannot constrict the flow of money that fuels the initiative system. The state may not, for example, limit initiative campaign expenditures. See *Citizens Against Rent Control*, 454 U.S. 290 (banning paid gatherers of petition signatures); *Myer v. Grant*, 486 U.S. 414 (1988) (imposing special requirements on paid petition gatherers); *Buckley v. American Constitutional Law Found.*, 525 U.S. 182 (1999). Unless the Court changes its position on these issues (and there is no indication that it is inclined to do so), reformers must look elsewhere for ways to constrain the process.

[FN86]. See California Comm'n on Campaign Financing, *supra* note 15, at 344.

[FN87]. See Schrag, *supra* note 39, at 216.

[FN88]. See Elisabeth R. Gerber, *Reforming the California Initiative Process: A Proposal to Increase Flexibility and Legislative Accountability*, in *Constitutional Reform in California: Making State Government More Effective and Responsive* 291, 308 (Bruce E. Cain & Roger G. Noll eds., 1995).

[FN89]. See, e.g., Memorandum from Gary K. Hart to Speaker's Initiative Commissioners, *Regarding Indirect Initiative 2* (Feb. 23, 2001) (noting that "[i]n order to encourage initiative seekers to consider seriously the indirect initiative, most proponents believe there ought to be some lesser signature threshold to qualify for the ballot (somewhere in the 50-80% range) and/or some additional time to gather signatures (currently 150 days, perhaps adding another 30-50 days)").

[FN90]. See *supra* note 30 and accompanying text.

[FN91]. See DuBois & Feeney, *supra* note 84, at 23.

[FN92]. See Cal. Const. art. X, § 10(c); see also *supra* note 28 (regarding Arizona's rules). Under the California rule, post-election legislative amendments to initiatives are forbidden unless the initiative itself expressly permits amendment. In recent years, a majority of initiatives that have qualified for the ballot have authorized amendments, but usually only by a supermajority, and only to further the purposes of the initiative. The initiative sponsor retains discretion over whether or not to allow amendments, however, and many important initiatives have not so provided. See California Comm'n on Campaign Financing, *supra* note 15, at 94-95; Gerber, *supra* note 88, at 293.

[FN93]. A few states require a waiting period (e.g., Alaska, amend anytime but no repeal for two years (Alaska Const. art. XI, § 6); Washington, no repeal for two years, amend or repeal within two years with two-thirds vote of legislature (Wash. Const. art. II, § 1(c)).) See also DuBois & Feeney, *supra* note 84, at 45.

[FN94]. See DuBois & Feeney, *supra* note 84, at 45-46; see also Key & Crouch, *supra* note 15, at 481-87.

[FN95]. See, e.g., California Comm'n on Campaign Financing, *supra* note 15, at 343; Citizen's Comm'n on Ballot Initiatives, *supra* note 84, at 5 (both calling for extending the qualification period from 150 to 180 days).

[FN96]. This idea is currently being studied by the California Secretary of State. See California Secretary of State, California Digital Signature Regulations (visited May 23, 2001) <<http://www.ss.ca.gov/digsig/regulations.htm>>.

[FN97]. See Miller, *supra* note 77, at 12-13.

[FN98]. See James D. Gordon III & David B. Magleby, Pre-election Judicial Review of Initiatives and Referendums, 64 Notre Dame L. Rev. 298, 302 (1989).

[FN99]. See Brosnahan v. Eu, 31 Cal. 3d 1 (1982) (rejecting pre-election review of Proposition 8 of 1982).

[FN100]. See Gordon & Magleby, *supra* note 98, at 304-13.

[FN101]. See *id.*

[FN102]. Several commentators advocate pre-election review for compliance with subject-matter requirements. See *id.* at 314 (arguing for pre-election review for compliance with subject-matter requirements, but not for substantive validity); Douglas C. Michael, Pre-election Judicial Review: Taking the Initiative in Voter Protection, 71 Cal. L. Rev. 1216 (1983) (recommending pre-election review for subject-matter compliance); Michael J. Farrell, The Judiciary and Popular Democracy: Should Courts Review Ballot Measures Prior to Elections?, 53 Fordham L. Rev. 919 (1985) (recommending pre-election review of "threshold requirements").

[FN103]. See Brosnahan, 31 Cal. 3d 1.

[FN104]. E.g., *McFadden v. Jordan*, 32 Cal. 2d 330 (1948) (invalidating, prior to the election, the proposed "ham and eggs" initiative for violation of the no-revision rule).

[FN105]. See *Senate v. Jones*, 21 Cal. 4th 1142, 1167 (1999).

[FN106]. See *id.* at 1176. In dissent, Justice Joyce L. Kennard (joined by Justice Janice R. Brown), distinguished between this opinion and earlier, more "lax" enforcement of the single subject rule. See also Gerald F. Uelman, Taming the Initiative, Cal. Law., Aug. 2000, at 46, 49.

[FN107]. See *Jones*, 21 Cal. 4th at 1169-72 (criticizing the court's pre-election review of Proposition 24 as a "rush to decision"). Justice Kennard argued that in the absence of a clear showing of invalidity (which she said did not exist in this case), it is more appropriate to review a decision after an election than before. *Id.* at 1169 (citing Brosnahan, 31 Cal. 3d at 4).

[FN108]. Article IV, section 10 of the Florida Constitution and section 16.061 of the Florida Statutes direct the attorney general to seek an advisory opinion from the state supreme court regarding compliance with single subject and titling rules.

[FN109]. Advisory Opinion to the Attorney General Re: Amendment to Bar Government from Treating People Differently Based on Race in Public Education (and related initiatives), 778 So. 2d 888 (Fla. 2000) [hereinafter Advisory Opinion].

[FN110]. After the Florida court blocked his initiative from the ballot, Connerly said, "[I]f ever there were a case of a judicial malpractice, this is it ... I swear to you, if I were a resident of Florida, I'd start an impeachment

process tomorrow. It's such a partisan court, it's unbelievable." Janet Marshall, *Court Kills Affirmative Action Vote*, *Lakeland Ledger*, July 14, 2000, at B1.

[FN111]. For discussion of the political pressures state court judges face (especially in the context of reviewing popular initiatives), see Uelmen, *supra* note 80, at 1149 ("Judges considering the constitutionality of voter efforts are not likely to be blind to the specter of an interest group structure energized to carry out the same kind of voter campaign in displacing offending judges that was used in getting the plebiscite passed in the first place."). See also Julian N. Eule, *Judicial Review of Direct Democracy*, 99 *Yale L.J.* 1503, 1580-83 (1990); Miller, *supra* note 77.

[FN112]. See Memorandum from Joe Remcho to David Abel, Chair, and Members, Speaker's Commission on the Initiative Process, Regarding Post-Election Review Committee (Feb. 26, 2001). In this memorandum, Commissioner Remcho suggests that the attorney general review initiatives for compliance with single subject requirements. If the attorney general finds that the initiative does not comply with the single subject rule, he or she may not prepare a title and summary for the measure. The Commission subsequently explored alternatives to this proposal, such as vesting this role in a panel that consists of the attorney general and other officials. See also *infra* note 141 and accompanying text.

[FN113]. Several states provide for pre-election administrative review (usually by the attorney general) for compliance with subject matter requirements. See DuBois & Feeney, *supra* note 84, at 30-36. California presently does not have such a rule. See *Schmitz v. Younger*, 21 *Cal. 3d* 90, 92-93 (1978) (holding that the attorney general has no power to deny a title and summary where an initiative's validity is doubtful).

[FN114]. The attorney general's existing pre-election role (setting ballot titles for initiatives) is already controversial. Some initiative proponents believe the language of the ballot title is essential to an initiative's success or failure and that attorneys general have exhibited bias in their drafting of titles. Accordingly, they have sought to shift the task of drafting the ballot title from the attorney general to what they presume to be a more "neutral" body. See Proceedings of the Speaker's Commission on the California Initiative Process (Dec. 18, 2000). Those who distrust the attorney general worry that if given the power to bar initiatives from the ballot, he or she would become in effect an "initiative czar." See comments by Commissioner Colleen McAndrews, Proceedings of the Speaker's Commission on the California Initiative Process (Feb. 26, 2001). However, since the attorney general is accountable to the statewide electorate, voters could punish any abuse of discretion.

[FN115]. See California Comm'n on Campaign Financing, *supra* note 15, at 344-45; DuBois & Feeney, *supra* note 84, at 170-72, Citizen's Comm'n on Ballot Initiatives, *supra* note 84, at 5-8. If reformers cannot reduce the money in the initiative process, at least they can try to reduce its influence.

[FN116]. See California Comm'n on Campaign Financing, *supra* note 15, at 345; DuBois & Feeney, *supra* note 84, at 170.

[FN117]. See California Comm'n on Campaign Financing, *supra* note 15, at 341; see also Leroy J. Tornquist, *Direct Democracy in Oregon: Some Suggestions for Change*, 34 *Willamette L. Rev.* 675 (1998) (promoting a Citizen's Initiative Review Committee to assess all qualified initiatives and provide impartial review).

[FN118]. See California Comm'n on Campaign Financing, *supra* note 15, at 344.

[FN119]. See *Cal. Const. art. II, § 8(d)*.

[FN120]. See *id.* art. XVIII.

[FN121]. See, e.g., Lowenstein, *supra* note 81. Professor Lowenstein has argued that the single subject rule allows for a wide range of interpretation because the concept of “subject” is “infinitely malleable.” He notes:

If we examine only the words to the single subject rule, two extreme interpretations are possible. On the one hand, we might plausibly conclude that no initiative could possibly violate the rule. Consider the most bizarre assortment of unrelated provisions you can imagine. The mere fact that the provisions have been put together in one measure makes them constitute a “single subject,” if only for purposes of discussion and study. On the other hand, the language of the single subject rule also permits an interpretation that would abolish the initiative process altogether. That is, it is impossible to conceive of a measure that could not be broken down into parts, which could in turn be regarded as single subjects.

*Id.* at 967.

[FN122]. See Anne G. Campbell, *Unintended Consequences of the Single Subject Rule for Ballot Initiatives: the Judiciary's Influence over a Legislative Power*, Paper Presented at the 2000 Annual Meeting of the Western Political Science Association 6 (Mar. 24-26, 2000).

[FN123]. See Lowenstein, *supra* note 81, at 954.

[FN124]. See, e.g., *Senate v. Jones*, 21 Cal. 4th 1142 (1999) (removing Proposition 24 in its entirety from the ballot for violation of the single subject rule).

[FN125]. See, e.g., *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208 (1978) (upholding Proposition 13 of 1978 against single subject challenge); *Fair Political Practices Comm'n v. Superior Court*, 25 Cal. 3d 33 (1979) (upholding the Political Reform Act, Proposition 9 of 1974, against a similar challenge); *Brosnahan v. Brown*, 32 Cal. 3d 236 (1982) (upholding the “Victims' Bill of Rights,” Proposition 8 of 1982, against a similar challenge).

[FN126]. *Fair Political Practices Comm'n*, 25 Cal. 3d at 41-42.

[FN127]. *Legislature v. Eu*, 54 Cal. 3d 512-13 (1991).

[FN128]. 32 Cal. 3d 236 (1982).

[FN129]. See *id.* at 262.

[FN130]. See, e.g., *Amador Valley*, 22 Cal. 3d at 248; *Brosnahan*, 32 Cal. 3d at 241.

[FN131]. *California Senate Constitutional Amendment 5* (1997).

[FN132]. See *Remcho*, *supra* note 112.

[FN133]. *Id.*

[FN134]. In Florida, where initiatives are available only to amend the constitution (but not to enact statutes), the supreme court interprets the state's single subject rule strictly. In searching for a violation of the single subject rule, the court looks to see whether the initiative affects multiple “functions of government.” *Fine v. Firestone*, 448 So. 2d 984, 990 (Fla. 1984). This standard, according to one member of the court, is “practically insurmountable.” *Evans v. Firestone*, 457 So. 2d 1351, 1360 (Fla. 1984) (Shaw, J., concurring).

[FN135]. See, e.g., *Amalgamated Transit Union Local 587 v. State*, 11 P.3d 762 (Wash. 2000) (invalidating Washington Initiative 695, a Populist-oriented tax limitation initiative, for violation of the state's single subject rule and on other grounds); *Armatta v. Kitzhaber*, 959 P.2d 49 (Or. 1998) (invalidating Oregon Amendment 40, a "tough on crime" constitutional initiative, and establishing a new, strict interpretation of the state's "separate vote requirement" for constitutional amendments); *Marshall v. State*, 975 P.2d 325 (Mont. 1999) (following Oregon's *Armatta* rule); *Aisenberg v. Campbell*, 975 P.2d 180 (Colo. 1999) (excluding from the ballot an initiative for violation of the state's single subject rule); Advisory Opinion, *supra* note 109 (invalidating four Ward Connerly-sponsored anti-affirmative action initiatives for violation of Florida's single subject rule on other grounds).

[FN136]. 21 Cal. 4th 1142 (1999).

[FN137]. See *id.* at 1167-68 (holding that the initiative fails to satisfy the "reasonably germane" test).

[FN138]. See, e.g., *Uelmen*, *supra* note 106.

[FN139]. See *Lowenstein*, *supra* note 81, at 964-70. A further unintended consequence, *Lowenstein* notes, is that initiative drafters will try to manipulate provisions of an initiative to create "artificial interdependencies" in order to meet the stricter single subject standard. *Id.* at 965-66.

[FN140]. See *Uelmen*, *supra* note 80.

[FN141]. See, e.g., *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208 (1978) (upholding Proposition 13 of 1978 against the claim that it violated the no-revision rule); *Legislature v. Eu*, 54 Cal. 3d 492 (1991) (upholding Proposition 140 of 1990 against a similar challenge).

[FN142]. See *supra* note 85.

[FN143]. Bruce Ackerman, *We the People 2: Transformations* 4-5 (1998).

[FN144]. See *id.*

[FN145]. *Id.* at 6; see also Bruce E. Cain & Roger G. Noll, *Principles of State Constitutional Design*, in *Constitutional Reform in California*, *supra* note 25, at 9, 12-13.

[FN146]. See Ackerman, *supra* note 143, at 7.

[FN147]. See *Persily*, *supra* note 5, at 20-21 (applying the concept of "constitutional moment" to the founding of western states).

[FN148]. California historian Kevin Starr describes the years between 1910 and 1913 as a "second founding" which "seemed like the very recreation of the political and social order of California." Starr, *supra* note 18, at 254.

[FN149]. See *Reynolds v. Sims*, 377 U.S. 533 (1964) (requiring that state legislative districts be apportioned on an equal population basis. Prior to that decision, rural areas of the state had been significantly over-represented in the legislature at the expense of urban areas; the shift in apportionment helped facilitate the professionalization of the legislature). See also Peverill Squire, *The Theory of Legislative Institutionalization and the California*

Assembly, 54 J. Pol. 1026 (1992).

[FN150]. See Lee, *supra* note 33, for a historical perspective of the 1960s reforms.

[FN151]. See Schrag, *supra* note 39, at 188-89.

[FN152]. See John Ferejohn, Reforming the Initiative Process, in *Constitutional Reform in California*, *supra* note 25, at 313 (discussing the difficulties of altering the initiative process: "Reforming the initiative process can be politically dangerous because such attempts often appear to be undemocratic and high-handed. The initiative seems so obviously democratic and self-justifying, that those who would limit it appear to be self seeking, corrupt, arrogant, or simply out of touch with the people.").

[FN153]. See Hyink, *supra* note 82, at 637.

[FN154]. See Ferejohn, *supra* note 152, at 313-14.

[FN155]. According to surveys, Californians strongly support the initiative process and believe that voters making choices at the ballot box are more likely than the governor and the legislature to solve the state's problems. See Mark Baldassare, PPIC Statewide Survey: Californians and Their Government, in *San Francisco: The Public Policy Institute of California* 4 (2001). Recent polling by Baldassare shows public support for increasing disclosure of financial backers of initiatives as well as for pre-election review of initiatives to avoid drafting errors and problems with ballot language and to flag "legal or constitutional problems." *Id.* at 416. There is no evidence, however, that the public would support reform that significantly constrained the process.

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