

# Review Essay

## Assessing California's Hybrid Democracy

THE COMING AGE OF DIRECT DEMOCRACY:

CALIFORNIA'S RECALL AND BEYOND.

By Mark Baldassare† & Cheryl Katz††.

Lanham, MD: Rowman & Littlefield Publishers, 2007.

Pp. 247. \$72.00 cloth; \$24.95 paper.

DEMOCRACY BY INITIATIVE:

SHAPING CALIFORNIA'S FOURTH BRANCH OF GOVERNMENT.

By the Center for Governmental Studies†††, second edition, 2008.

Pp. 402. Available for download without charge online at

[http://cgs.org/images/publications/cgs\\_dbi\\_full\\_book\\_f.pdf](http://cgs.org/images/publications/cgs_dbi_full_book_f.pdf), or

by hard copy through request to the Center for Governmental Studies.

PARTY OF ONE: ARNOLD SCHWARZENEGGER

AND THE RISE OF THE INDEPENDENT VOTER.

By Daniel Weintraub††††. Sausalito, CA: Polipoint Press, 2007.

Pp. 235. \$19.95 hardcover.

*Reviewed by Richard L. Hasen†††††*

### INTRODUCTION

In the early part of this decade, it appeared that California voters stood to use the devices of direct democracy—the initiative, referendum, and the recall—to take a more major role in crafting the state's public policy. In 2003 California for the first time recalled a sitting governor, Gray Davis, and replaced him with actor-bodybuilder Arnold Schwarzenegger.<sup>1</sup>

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1. For a detailed analysis of the 2003 recall, see *CLICKER POLITICS: ESSAYS ON THE CALIFORNIA RECALL* (Shaun Bowler & Bruce E. Cain, eds., 2006).

Schwarzenegger, a moderate Republican in a majority Democratic state, was able to win a plurality of votes in a ridiculously crowded field of 135 candidates by making bipartisan appeals against “politics as usual” and railing against “special interests” and a dysfunctional Sacramento.<sup>2</sup> Not only had Schwarzenegger gained office through a device of direct democracy, but “never before had a sitting governor used initiatives as a primary means of advancing his legislative agenda.”<sup>3</sup> Schwarzenegger’s election promised invigoration of “hybrid democracy”<sup>4</sup> in which voters use the initiative process and other direct-democracy devices to share governing responsibilities more equally with the state’s legislature.

Now, at the end of the decade, despite the promise of hybrid democracy, it appears that voters remain the junior partners in governance in the Golden State. Schwarzenegger’s boldest attempt to bypass the legislature and go directly to voters came in a special election he called in 2005. Out of a total of an astounding \$300 million spent on ballot measure activity in the 2005 special election,<sup>5</sup> Schwarzenegger raised and spent \$56 million supporting his package of measures.<sup>6</sup> Yet, all of the measures that Schwarzenegger backed went down to defeat, some by large margins.<sup>7</sup>

The 2005 experience was not isolated. One lesson of this decade is that the devices of direct democracy remain too blunt and expensive as tools for

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2. See DANIEL WEINTRAUB, PARTY OF ONE: ARNOLD SCHWARZENEGGER AND THE RISE OF THE INDEPENDENT VOTER 32–34 (2007). Schwarzenegger secured the vote of 48.6 percent of voters in the 2003 recall election. See ELECTIONS DIV., OFFICE OF SEC’Y OF STATE, STATEMENT OF VOTE: OCTOBER 2003 STATEWIDE SPECIAL ELECTION, at xii–xiv (2003), [http://www.sos.ca.gov/elections/sov/2003\\_special/sum.pdf](http://www.sos.ca.gov/elections/sov/2003_special/sum.pdf) [hereinafter STATEMENT OF VOTE 2003].

3. MARK BALDASSARE & CHERYL KATZ, THE COMING AGE OF DIRECT DEMOCRACY: CALIFORNIA’S RECALL AND BEYOND 19 (2008).

4. Elizabeth Garrett coined the term in Elizabeth Garrett, *Hybrid Democracy*, 73 GEO. WASH. L. REV. 1096, 1097 n.7 (2005) (noting that Garrett’s colleague Matt Spitzer had used the term “mixed democracy” but that Garrett chose the term “hybrid” to “capture both Spitzer’s idea of a mixture and the notion of cross-fertilization.”). Garrett saw three dynamics to hybrid democracy:

First, candidate elections can be influenced by the presence of initiatives on the ballot. . . . Second, democratic structures and the laws regulating elections are likely to be different in a Hybrid Democracy than in a wholly representative democracy. . . . Third, Hybrid Democracy affects the policies that lawmakers adopt because they are aware that the political game includes the possibility of initiative and referendum. Strategic politicians, notably, Arnold Schwarzenegger, take advantage of Hybrid Democracy as they govern using the threat of initiative as a bargaining tool.

*Id.* at 1098.

Though Baldassare and Katz repeatedly use the term “hybrid democracy” in their book, see, e.g., BALDASSARE & KATZ, *supra* note 3, at 1 (“California’s experience serves as an example of ‘hybrid democracy’ that could spread to other states”), they do not credit Garrett for the term.

5. *Id.* at 289.

6. CTR. FOR GOVERNMENTAL STUDIES, DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA’S FOURTH BRANCH OF GOVERNMENT 295 (2d ed. 2008).

7. WEINTRAUB, *supra* note 2, at 81.

anything but interstitial governance, filling in the spaces between the bulk of legislation passed by the legislature. While initiative supporters who have enough money can qualify just about anything for the ballot<sup>8</sup>—and those lacking money often can qualify nothing<sup>9</sup>—significant negative spending has derailed many measures.<sup>10</sup> Indeed, California voters went to the polls in statewide elections twelve times in this decade, and by the time the decade ends in 2010 that number will reach fourteen.<sup>11</sup> Between 2002 and 2009 voters were asked to approve sixty-nine ballot measures—forty-three voter initiatives<sup>12</sup> and twenty-six ballot measures proposed by the legislature.<sup>13</sup> California voters approved 73 percent of the legislative ballot measures—nineteen of the twenty-six—the majority of which were bond measures. But they approved only fourteen of forty-three initiatives, a rate of only 32.5 percent.<sup>14</sup> Proponents and opponents spent over \$1.3 billion on ballot measure-related activity in California between the years 2000 and 2006.<sup>15</sup>

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8. CTR. FOR GOVERNMENTAL STUDIES, *supra* note 6, at 284 (“Says Fred Kimball of the signature-gathering firm Kimball Petition Management, ‘If you want to have your kid’s birthday as a holiday, give me a million and half dollars and I’ll at least get it on the ballot for people to vote on.’”).

9. *See id.* at 169 (“The fact that no California initiative has relied exclusively on volunteers since 1982, and that very few have used volunteers at all, indicates the difficulty in organizing and sustaining a grassroots movement capable of collecting several hundred thousand signatures.”).

10. *Id.* at 301 (“Opposition expenditures are effective at chipping away popular support for initiatives and defeating measures at the polls, especially if opponents significantly outspend proponents.”). *But see id.* (“A multitude of other factors that affect voter choice can intervene under certain circumstances and create exceptions to the rule.”).

11. Californians voted in March 2002 (state primary), November 2002 (general election), October 2003 (recall election), March 2004 (state primary), November 2004 (general election), November 2005 (statewide special election), June 2006 (state primary), November 2006 (general election), February 2008 (state primary), June 2008 (presidential primary), and November 2008 (general election). *See* ELECTIONS DIV., CAL. SEC’Y OF STATE’S OFFICE, STATEWIDE ELECTION RESULTS AND DATES, [http://www.sos.ca.gov/elections/elections\\_elections.htm](http://www.sos.ca.gov/elections/elections_elections.htm) (last visited July 17, 2009). Most recently, a special election was held in May 2009 to consider measures necessary to implement California’s draconian budget cuts. Five of the six legislatively-proposed measures failed. *See* ELECTIONS DIV., CAL. SEC’Y OF STATE, STATEMENT OF VOTE: MAY 19, 2009, STATEWIDE SPECIAL ELECTION, <http://www.sos.ca.gov/elections/sov/2009-special/complete-sov.pdf> (last visited July 17, 2009). The only measure that passed was Proposition 1F, to cut legislators’ salaries in certain circumstances. *See id.*; *see also infra* notes 37–38 and accompanying text. Primary and general elections are scheduled in 2010. These figures do not include additional local elections.

12. I include in this category four voter-initiated referendums considered at the February 2008 election. *See* ELECTIONS DIV., CAL. SEC’Y OF STATE, STATEMENT OF VOTE: FEBRUARY 2008 PRIMARY ELECTION 12 (2008), [http://www.sos.ca.gov/elections/sov/2008\\_primary/12\\_official\\_declaration.pdf](http://www.sos.ca.gov/elections/sov/2008_primary/12_official_declaration.pdf).

13. The author compiled these statistics by examining the record of the vote in the elections from 2002 through 2009. *See* STATEWIDE ELECTION RESULTS, *supra* note 11.

14. Removing the four 2008 referenda from the totals, *see supra* note 12, the approval percentage falls to ten of thirty-nine measures, or 25.6 percent.

15. CENTER FOR GOVERNMENTAL STUDIES, *supra* note 6, at 282.

Despite this flurry of activity, California's governance appeared in shambles for much of the decade. Indeed, the biggest problem was the California legislature's inability to approve a state budget under the state constitution's tough rule requiring two-thirds approval of budgets,<sup>16</sup> bringing the state to the brink of financial collapse in 2008.<sup>17</sup> Moreover, the initiative process proved especially divisive in 2008 when California voters narrowly approved Proposition 8, a measure amending the California Constitution to bar gay marriage.<sup>18</sup> The measure faced a post-election challenge in the California Supreme Court<sup>19</sup> and large street protests.<sup>20</sup> Incidents of harassment of those who financially supported the measure were also reported.<sup>21</sup>

The one bright spot so far this decade was the 2008 passage of Proposition 11, a measure that took the job of redistricting out of the hands of legislators and gives the power to a group of citizens.<sup>22</sup> Proposition 11 is far from perfect—its Rube Goldberg machinery for the appointment of citizen redistricters makes me very nervous<sup>23</sup>—but its passage shows a potential path for using direct democracy to cure some of the structural defects in California's system of governance. As I discuss in Part IV, governmental reform may be the greatest potential use of California's hybrid democracy, and the unheralded success of this decade.

Before turning to the question of the future, it is worth looking back at the lessons from this decade. The three very worthy books under review offer different perspectives on hybrid democracy in California at the beginning of the new century, and each offer lessons on how direct democracy might be used in

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16. See CAL. CONST. art. IV, § 12(d).

17. See Jennifer Steinhauer, *California, Nearly Broke, Edges Nearer Brink*, N.Y. TIMES, Feb. 17, 2009, at A14.

18. For the text of the measure, the ballot arguments, and legislative analysis, see ELECTIONS DIV., OFFICE OF SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: 2008 GENERAL ELECTION 54–57 (2008), <http://voterguide.sos.ca.gov/past/2008/general/pdf-guide/vig-nov-2008-principal.pdf> [hereinafter ELECTION 2008 INFO. GUIDE]. Proposition 8 passed with 52 percent of the vote. See ELECTIONS DIV., OFFICE OF SEC'Y OF STATE, STATEMENT OF VOTE: NOVEMBER 2008 GENERAL ELECTION 6 (2008), [http://www.sos.ca.gov/elections/sov/2008\\_general/sov\\_complete.pdf](http://www.sos.ca.gov/elections/sov/2008_general/sov_complete.pdf) [hereinafter STATEMENT OF VOTE 2008].

19. Jesse McKinley, *Top Lawyer Urges Voiding Proposition 8*, N.Y. TIMES, Dec. 20, 2008, at A11. The California Supreme Court upheld Proposition 8 against a challenge that it constituted an impermissible “revision” of the state constitution. *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009). But it held that the approximately 18,000 gay marriages conducted before the passage of Proposition 8 remained valid. *Id.*

20. Jessica Garrison, *Angrier Response to Prop. 8 Arises*, L.A. TIMES, Nov. 13, 2008, at A1.

21. Brad Stone, *Prop. 8 Donor Website Shows Disclosure is 2-Edged Sword*, N.Y. TIMES, Feb. 8, 2009, at BU3.

22. The text of the measure itself, as well as the official summary and arguments in favor and against Proposition 11, appear in ELECTION 2008 INFO. GUIDE, *supra* note 18, at 70–74.

23. The measure's title and summary contains a simplified version of the procedure: “Requires government auditors to select 60 registered voters from applicant pool. Permits legislative leaders to reduce pool, then the auditors pick eight commission members by lottery, and those commissioners pick six additional members for 14 total.” *Id.* at 70.

the future to improve California's governance. Daniel Weintraub's portrait of Governor Schwarzenegger's term in office shows the limits of a "postpartisan" governor attempting to bypass the legislature through the initiative process.<sup>24</sup> The Center for Governmental Studies (CGS) offers both a comprehensive overview of the initiative process in California and a smorgasbord of reforms.<sup>25</sup> Baldassare and Katz paint a portrait of California voters and their views about the initiative process.<sup>26</sup> Together, these books show both the promise and limits of hybrid democracy in California.

## I

### THE SCHWARZENEGGER LESSON

In *Party of One: Arnold Schwarzenegger and the Rise of the Independent Voter*, Weintraub, a journalist and opinion columnist for the *Sacramento Bee*, offers a very readable and insightful portrait of Governor Schwarzenegger. Like Schwarzenegger, Weintraub's politics are centrist and to some extent postpartisan.<sup>27</sup> His reading of Schwarzenegger's rise to the governorship is mostly sympathetic. The portrait that Weintraub paints emerges of Schwarzenegger is of an earnest individual, egotistical but without guile, who succeeded in attaining the American dream and who sought the governorship out of a Kennedyesque commitment to public service. Schwarzenegger began life by believing everyone should pull themselves up by their own bootstraps, until he recognized that government help was sometimes necessary because "[n]ot everybody has boots."<sup>28</sup>

Schwarzenegger comes across in Weintraub's book as a personification of the median California voter: liberal on social issues, conservative on fiscal issues, and ready to rail against the special interests' hold on Sacramento politics.<sup>29</sup> But more than anything, Schwarzenegger comes across as naïve about the ability of his "party of one" to get anything done in California.

The lesson that Schwarzenegger appeared to take away from the successful 2003 recall was one about unlimited "people power." But the recall power is essentially a negative one that California voters have exercised only rarely<sup>30</sup> to force some change to the system. Indeed, it is hard to use direct

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24. See WEINTRAUB, *supra* note 2.

25. See CTR. FOR GOVERNMENTAL STUDIES, *supra* note 6.

26. See BALDASSARE & KATZ, *supra* note 3.

27. See WEINTRAUB, *supra* note 2, at 2. ("Like Schwarzenegger, I am not wedded to the views of any one political party. I have been a registered Republican and a registered Democrat, and I am currently registered with no party at all.")

28. *Id.* at 14.

29. Schwarzenegger's "entire campaign was built around the idea that 'special interests' had taken control of the government. 'Money goes in,' he said, 'favors go out, and the people lose.' Carrying a broom to rallies around the state, he pledged to sweep the influence peddlers from the Capitol and restore the power to the people." *Id.* at 32.

30. There have been 118 attempts in California to recall elected officials. Only five have been successful, the most recent being the recall of Governor Davis in 2003. STATEMENT OF VOTE

democracy to get positive change through the direct passage of significant legislation. Weintraub explains that, even from his bully pulpit, with his continuing ability to use his movie star aura to attract large crowds, Schwarzenegger has been limited in his ability to harness “people power,” either directly through the initiative process or indirectly through the legislature by threatening that he would go around them and directly to the people to get what he wanted.

While Schwarzenegger had an early success in 2004 by getting workers compensation reform through the legislature under the threat of an initiative bypass,<sup>31</sup> his subsequent attempts at hybrid democracy have been much less successful. He tried to run to the right of the California legislature by supporting a series of budget reform and other measures in a special election he called for 2005. Even the calling of the special election itself was controversial, given its cost and voter fatigue from two elections in 2002, a recall in 2003, and two in 2004. The measure drew heavy opposition from Democrats and unions, with the California Teachers Federation levying a surcharge on its members to raise over \$50 million to be spent to defeat the measures.<sup>32</sup> In Weintraub’s view, Schwarzenegger’s overheated rhetoric against his opponents, such as when he referred to the Democratic legislative leaders as “girlie men,”<sup>33</sup> did him little good in burnishing his postpartisan credentials. Unclear from Weintraub’s account is where the “real” Schwarzenegger was on these issues. Was his initial call for postpartisanship or his harsh partisan rhetoric more genuine? To Weintraub, Schwarzenegger is a vacillator, and never disingenuous.

After the \$300 million election in 2005, Schwarzenegger professed that he had learned his lesson:

I’ve always relied on the people, and I always listened very carefully to the people. . . . And that’s something that you have to do when you’re in the movie business. . . . If one of the movies goes in the toilet, you know that was the wrong story, that’s not the kind of movie you want to do. . . . [S]o I’ve learned from that, that the people sent a message to us that, ‘Don’t come to us with all your stuff. . . . Work it out at the Capitol.’ And so that’s exactly what we’re going to do.<sup>34</sup>

But “[w]ork[ing] it out at the Capitol” proved far more difficult than the statement suggested. Weintraub describes how Schwarzenegger lurched somewhat to the left after the 2005 election and before his reelection bid in a majority-Democratic state, choosing former Democratic Party activist Susan Kennedy as his new Chief of Staff.<sup>35</sup> But if Schwarzenegger was trying to make

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2003, *supra* note 2, at x.

31. WEINTRAUB, *supra* note 2, at 64–65.

32. *Id.* at 80, 106.

33. *Id.* at 74.

34. *Id.* at 85 (quoting Schwarzenegger).

35. *Id.* at 44.

peace on his left with Democrats, he had new-found problems on his right with Republicans. Though Schwarzenegger easily won reelection in 2006 as a Republican incumbent against a weak Democratic candidate, Phil Angelides,<sup>36</sup> he had little luck getting Republicans in the state legislature to sign on to his programs. Weintraub does not consider how a more traditional Republican governor, with a natural base of party support in the state legislature, would have fared in passing legislation in the Democrat-dominated legislature.

Nowhere were California's problems greater than with the state budget. Each year's budget battle was worse than the last, coming to a head in 2008 when a \$42 billion budget deficit led to state worker furloughs, massive budget cuts, and the state issuing "IOUs" for income tax refunds. Though under California's two-thirds budget requirement it took the votes of only three Republican senators and three Republican Assembly members to pass a drastic budget cut and a temporary tax hike to close the budget cap, Schwarzenegger struggled to seal the deal with his fellow Republicans. Ultimately, Schwarzenegger and the Democrats gave in to a series of demands by a holdout Republican senator to eliminate a proposed gas tax increase and to put a number of ballot measures on the ballot, including a measure asking voters to establish a "top two" primary in California.<sup>37</sup> The budget measures all failed; once again California voters used their "negative" direct democracy power to reject the legislature's tax and spending proposals.<sup>38</sup>

Weintraub's book ends after the 2006 election, and that is a shame, as some of Schwarzenegger's toughest battles have come since then. I hope that Weintraub will write a revised edition after 2010, when the entire Schwarzenegger era may be assessed. At the end of 2006, Schwarzenegger appeared as a phoenix rising from the ashes of the 2005 special election, ready to do renewed battle against the ever-shifting class of special interests. That

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36. *Id.* at 138.

37. Kevin Yamamura, Aurelio Rojas & Jim Sanders, *Budget Plan Goes to Schwarzenegger After Legislature's OK*, SACRAMENTO BEE, Feb. 19, 2009, at 1A. The authors stated,

As part of [Senator] Maldonado's agreement, lawmakers approved measures asking voters to approve constitutional amendments to establish an open primary system and ban legislative pay increases during deficit years. But legislative leaders refused to grant him his proposal to eliminate legislative pay altogether when the budget is late. Leaders also agreed to Maldonado's demand to eliminate the 12-cent additional gas tax. . . . The money will be replaced with a 0.25 percent increase in the state income tax rate, federal stimulus dollars and more than \$600 million in line-item vetoes.

*Id.* All of the measures besides the top two primary measures appeared on the May 2009 ballot. The open primary measure will appear on the June 2010 ballot. See Dan Walters, *Do California Primaries Need to Change?*, SACRAMENTO BEE, Mar. 15, 2009, at 3A.

Under a "top two" primary, all voters, regardless of party affiliation, get to vote in the first round for candidates of any party. The top two vote-getters, regardless of affiliation, go on to the second round of voting. The top vote-getter in the second round wins the office. S.B. 6, 2009-2010 Leg., Reg. Sess. (Cal. 2009), available at [http://electionlawblog.org/archives/sca\\_4\\_bill\\_20090219\\_amended\\_sen.pdf](http://electionlawblog.org/archives/sca_4_bill_20090219_amended_sen.pdf) (last visited May 15, 2009).

38. See *supra* note 11 and accompanying text.

Schwarzenegger could win in a landslide election in 2006 is a testament to the force of his personality. He was able to brush aside criticism of his fundraising tactics, unlike his predecessor Gray Davis; after all, Schwarzenegger claimed he was too rich to be bought, yet he raised over \$300 million for his various campaign committees, much of it in six-figure donations from major corporate interests.<sup>39</sup> Though voters rejected all the proposals he brought to the ballot in 2006 and he seemed to have little influence over members of his own party, Schwarzenegger nonetheless remained popular, except among more partisan Democrats and Republicans, until the recent budget quagmire. But as the sole member of the “party of one,” his alliance with “the people” has not proved to be up to test in his battle against the state legislature and California’s strong interest groups. As I suggest in Part IV, it is too early to assess the overall success of the Schwarzenegger governorship. His greatest legacy may be in the area of political reform.

## II

### IMPROVING THE CALIFORNIA INITIATIVE PROCESS

The Weintraub book is one that a political junkie would bring along to a day at the beach. That is likely not true of the Center for Governmental Studies’ tome, *Democracy by Initiative: Shaping California’s Fourth Branch of Government*. First, the book clocks in at over 400 dense pages and would be too bulky for a beach bag. More importantly, the second edition of the CGS’s work on the California initiative process lacks the drama and personality of the Schwarzenegger story aptly told by Weintraub.

But the CGS book is worthy of close and serious study by those interested in the workings and dysfunctions of the California initiative process. Almost every aspect of the process gets scrutiny in this work, from the rules on qualifying measures for the ballot, to the scope of the initiative power, campaign financing, media coverage of initiatives, and even the Secretary of State’s website. No question is too big or too small for this volume, from whether California voters should be allowed to “revise” rather than simply “amend” the state constitution—yes<sup>40</sup>—to whether there should be a mix of serif and sans serif typeface used in the ballot pamphlet to improve readability—also yes.<sup>41</sup>

CGS proceeds from a progressivist tradition, accepting the “people power” notion behind the original impetus for direct democracy and seeking to return the California initiative process to the grassroots. The main message of the book appears to be about getting enough information to voters to make informed decisions about how to vote on ballot measures. Thus, the book

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39. WEINTRAUB, *supra* note 2, at 63.

40. See CTR. FOR GOVERNMENTAL STUDIES, *supra* note 6, at 228.

41. See *id.* at 341.

argues that (1) money plays too great of a role in both the qualification process and ballot measure elections, especially given the one-sided spending for some initiatives;<sup>42</sup> (2) the press does not adequately and fairly cover ballot measure issues;<sup>43</sup> and (3) the Secretary of State's office needs to do a better job in communicating relevant information to voters, especially through Internet-based technologies.<sup>44</sup>

The analysis along these lines is somewhat unsatisfying for two reasons. First, the book makes a number of unstated assumptions about how voters respond to information, advertising, and cues in the ballot measure process. That is, the recommendations in the communications area will seem sensible only if one already has adopted the CGS worldview about the role that campaign advertising and money play in ballot measure elections. If one does not accept this world view, there is little in the book to convince a reader that the center's conclusions are the correct ones.

More importantly, the authors propose a series of changes to California's initiative process that are of dubious constitutionality. For example, CGS advocates a \$100,000 contribution limit in ballot measure campaigns, a \$10,000 limit to candidate-controlled ballot measure committees, and a limit on total expenditures spent by ballot measure committees supporting or opposing a measure.<sup>45</sup> Aside from the limit on contributions to candidate-controlled committees, these other measures are likely unconstitutional.<sup>46</sup> Along similar lines, CGS advocates a return to the "Fairness Doctrine" in the context of ballot measure elections, seeking to require broadcasters to cover both sides of ballot measure campaigns and to give away free advertising to make up for one-sided advertising in a ballot measure election.<sup>47</sup> The Obama administration does not appear poised to revive the Fairness Doctrine.<sup>48</sup> Even if it did, I would not want

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42. See *id.* at 13, ch. 8. As Matsusaka writes, the CGS volume does a good job of pointing readers to the relevant scholarly literature. He notes that after citing Dan Lowenstein's work on one-sided spending, the book "then also alerts the reader to a recent series of papers, some unpublished, that question the conventional view based on larger data sets and more sophisticated empirical techniques than were employed by the first generation of research." John G. Matsusaka, *Initiatives: Slouching Toward Respectability?*, 8 ELECTION L.J. 55, 57 (2009) (book review).

43. CTR. FOR GOVERNMENTAL STUDIES, *supra* note 6, at ch. 7.

44. See *id.* at ch. 6. CGS is more satisfied with some other aspects of the process. For example, it supports the current means by which judges review initiatives for violation of the single-subject rule. See *id.* at 330. I am much more skeptical of the use of the single-subject rule. See Richard L. Hasen, *Ending Court Protection of Voters from the Initiative Process*, 116 YALE L.J. POCKET PART 117 (2006), <http://thepocketpart.org/2006/11/1/hasen.html>.

45. CTR. FOR GOVERNMENTAL STUDIES, *supra* note 6, at 307–09.

46. See Richard L. Hasen, *Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns*, 78 S. CAL. L. REV. 885, 899 (2005). CGS relies heavily on my article to argue for the constitutionality of all of these measures, though I think they paint the possibility of constitutionality of spending limits and general contribution limits in a much brighter way than I did in my article.

47. CTR. FOR GOVERNMENTAL STUDIES, *supra* note 6, at 272–74.

48. See John Eggerton, *Obama Restates Opposition to Return to Fairness Doctrine*, BROADCASTING & CABLE, Feb. 18, 2009, <http://www.broadcastingcable.com/article/174455->

to be on the side of the doctrine before the Roberts Court.<sup>49</sup>

It is not that the authors believe that their proposals would pass constitutional muster; they are clear that there are serious constitutional doubts with some of their proposals. But the authors did not take the next step, and argue for potential changes that might be on more solid constitutional footing. For example, the authors reject as unworkable or impractical a public financing program for ballot measures.<sup>50</sup> Yet they offer nothing else that could deal realistically with the problem of large or one-sided spending in ballot measure elections.

The one area missing from the otherwise-comprehensive analysis of the California initiative process relates to the potential for the process to produce anti-minority legislation.<sup>51</sup> Proposition 187, an anti-undocumented workers measure, and Proposition 209, an anti-affirmative action measure, barely get a mention in the book (the book's publication preceded the passage of Proposition 8, banning gay marriage in the California Constitution). Though CGS mentions Julian Eule's important argument that courts should scrutinize initiative measures more closely because they lack the usual legislative filters that can protect minority rights,<sup>52</sup> they raise the issue only in passing, failing to integrate it into their vision of a better direct democracy in California. It is as though their progressive vision has blinded them to the real and dark possibility that true voter interests may sometimes be to trample minority rights.

Overall, however, the book is extremely valuable. Anyone thinking about reforming California's initiative process should begin with the CGS volume and its careful and comprehensive approach to initiative reform.

### III

#### SATISFYING THE VOTERS

Like the Weintraub book, Baldassare and Katz's *The Coming of Age of Direct Democracy*<sup>53</sup> covers the period from the California recall through the 2006 elections. Like the CGS book, the Baldassare and Katz volume does not make good beach reading. But the book stands as a clear and comprehensive

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49. For a look at the Roberts Court's views of First Amendment doctrine in the analogous campaign finance context, see Richard L. Hasen, *Beyond Incoherence: The Roberts Court's Deregulatory Turn in FEC v. Wisconsin Right to Life*, 92 MINN. L. REV. 1064 (2008).

50. CTR. FOR GOVERNMENTAL STUDIES, *supra* note 6, at 313–14.

51. Matsusaka also faults the book for “the absence of a connection between . . . [CGS's] reform agenda and the serious problems facing the state.” Matsusaka, *supra* note 42, at 57. Though the book does not deal with these interconnections, CGS is otherwise doing so, including through co-organizing meetings on a potential constitutional convention for the state. See Bay Area Council, California Constitutional Convention Summit Agenda, February 24, 2009, [http://www.bayareacouncil.org/docs/CCC\\_Agenda.pdf](http://www.bayareacouncil.org/docs/CCC_Agenda.pdf).

52. CTR. FOR GOVERNMENTAL STUDIES, *supra* note 6, at 320–22 (discussing Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1506 (1989)).

53. BALDASSARE & KATZ, *supra* note 3.

record of California public opinion leading up to and through the first term of the Schwarzenegger administration. Baldassare is the president and chief executive officer of the Public Policy Institute of California (PPIC), which runs one of the most respected polling operations in the state.

The thesis of the book is that California has moved toward a hybrid democracy, with an ever-increasing role for the initiative process in the state. The authors claim that “[a] new system of governance has evolved in California over five elections in a half-decade of furious political activity. An era of a ‘hybrid democracy’ is now underway, with elected representatives through the legislative process and voters at the ballot box jointly sharing responsibility for making public policy.”<sup>54</sup> They further state that this “is not a temporary trend, as all indications point to permanent power sharing between representative government and direct democracy.”<sup>55</sup>

With the benefit of just a bit more hindsight than was available when the book was published, the Baldassare and Katz claim appears exaggerated. It is too much to say that voters and the legislature “jointly share responsibility” for making public policy in California, at least any more than has been true historically. The 32.5 percent approval rating of initiatives from 2002 through 2009<sup>56</sup> is actually lower than the period in the 1980s, when 48 percent of initiatives were approved,<sup>57</sup> or the 1990s, when 39 percent were approved.<sup>58</sup> The same is true of the number of initiatives approved: twenty-one approvals in the 1980s,<sup>59</sup> twenty-four in the 1990s,<sup>60</sup> and fourteen from 2002 to 2009.<sup>61</sup> Nor do the authors make the case that the initiatives approved in this decade were qualitatively more important than those in earlier decades. The main difference between earlier decades and this decade is the California recall election and the current governor’s professed desire to use the devices of direct democracy. The recall is unlikely to be repeated any time soon, and Governor Schwarzenegger’s attempts to harness “people power” to bypass the legislature have not proven to be very successful.

The main benefit of the Baldassare and Katz book is that it offers detailed and interesting PPIC polling data for the 2000s, especially regarding voters’ views on the initiative process. Consistent with the approach of the CGS book, Baldassare and Katz’s data demonstrate that California voters like the initiative process, but are concerned about the role of money in the process and the potential for voter information overload.

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54. *Id.* at 219.

55. *Id.*

56. *See supra* note 14 and accompanying text.

57. CTR. FOR GOVERNMENTAL STUDIES, *supra* note 6, at 6.

58. *Id.*

59. *Id.* at 61.

60. *Id.*

61. *See supra* note 14 and accompanying text.

Thus, in August 2006, 71 percent of likely voters in California “said they were satisfied with the way the initiative process is working in California,”<sup>62</sup> a trend that crossed party lines and demographic groups.<sup>63</sup> Similarly, in 2005, 42 percent of likely voters said that initiatives should have the greatest influence on policy in California, compared to 35 percent for the legislature and 16 percent for the governor.<sup>64</sup>

Nonetheless, in 2004, 35 percent of adults reportedly thought the initiative process needed “major changes,”<sup>65</sup> almost the same percentage as when the question was asked in 2000.<sup>66</sup> “More than six in ten adults (62%) and likely voters (61%) . . . said there generally were too many propositions on the state ballot.”<sup>67</sup> In addition, 65 percent of likely voters “believed that special interests had ‘a lot’ of control over initiatives.”<sup>68</sup> In November 2006, 56 percent of voters “strongly agreed that too much money was spent by the initiative campaigns.”<sup>69</sup>

What is especially interesting about voter opinion on the initiative process in California is how steady it has been throughout the decade, even given the unusual circumstances of the 2003 gubernatorial recall and a presence of a governor committed to the initiative process as a matter of ideology and policy.<sup>70</sup> California voters liked the process whether they agreed with the governor and his initiative agenda or not, and that trend is likely to continue in California after Schwarzenegger leaves office.

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62. BALDASSARE & KATZ, *supra* note 3, at 31.

63. *Id.*

64. *Id.* at 157.

65. *Id.* at 121.

66. *Id.* at 122 (“When we last asked this question in October 2000, 32 percent of Californians said major changes were needed and 43 percent called for minor changes in the initiative process.”).

67. *Id.* at 158.

68. *Id.*

69. *Id.* at 207.

70. In a survey conducted by Public Policy Institute of California (PPIC) after the November 2008 elections, survey results were consistent. MARK BALDASSARE ET AL., PUB. POLICY INST. OF CAL., PPIC STATEWIDE SURVEY DECEMBER 2008: CALIFORNIANS AND THEIR GOVERNMENT (2008), available at <http://www.ppic.org/main/publication.asp?i=860>. Approximately 67 percent of California voters were somewhat or very satisfied with the initiative process. *Id.* at 20. Thirty-five percent of California voters believed major changes in the initiative process were necessary. *Id.* Fifty-one percent of voters strongly agreed and 24 percent of voters somewhat agreed that too much money was spent on political campaigns. *Id.* at 21. Sixty-three percent of voters strongly or somewhat agreed that the wording of initiatives on the state ballot was too confusing. *Id.* Fifty-two percent of voters strongly or somewhat agreed that there were too many initiatives on the state ballot. *Id.*

PPIC also polled about some specific reforms. Seventy-seven percent of California voters favored a system of review and revision of proposed initiatives to try to avoid legal issues and drafting errors. *Id.* The same proportion favored a period of time in which the initiative sponsor and legislature could meet to see if there were compromise solutions before initiatives go on the ballot. Half the voters believed initiatives should be allowed only in November general elections, rather than also in primaries and special elections. *Id.*

#### IV THE ROAD AHEAD

Despite the hoopla about Governor Schwarzenegger's "party of one" and a new age of hybrid democracy in California, the pattern in the 2000s appears mostly the same as that of past decades: California voters have occasionally passed important measures through the initiative process, but for the most part, public policy in the state continues to be crafted by the state legislature and the governor.

The best hope for increased "people power" through the initiative process is for initiative proponents to focus on so-called good government measures that assure a better legislative process, such as open primaries, redistricting reform, and budget reform.<sup>71</sup> Historically, about 21 percent of voter initiatives have related to governmental or political processes.<sup>72</sup> Already in this decade, voters have considered more initiatives in this subject area than in any other decade since the establishment of the initiative process in California.<sup>73</sup> Budget reform seems especially urgent given the California legislature's continuing difficulties in passing a budget, and it might take a state constitutional convention to make more major changes in the process.<sup>74</sup>

The fate of redistricting reform in the 2000s provides a good lesson for how initiatives might be used to enact political reform. Governor Schwarzenegger first backed a redistricting measure in 2005, Proposition 77, which Democrats widely viewed as a political power grab. Gubernatorial recall proponent Ted Costa sponsored the measure, and none of the major good government groups in California signed the ballot pamphlet argument in favor of the measure.<sup>75</sup> The measure failed at the ballot box, garnering only 40 percent of the vote.<sup>76</sup> Only a majority of Republicans supported it, while majorities of Democrats and independents opposed it.<sup>77</sup>

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71. At the time of this writing, proponents were circulating an initiative in California to lower the threshold for legislative budget approval from two-thirds to 55 percent. *See* Michael Rothfeld & Eric Bailey, *California's Budget Fiasco Legacy Could Be Reform*, L.A. TIMES, Feb. 20, 2009, at A1.

72. CTR. FOR GOVERNMENTAL STUDIES, *supra* note 6, at 64.

73. *See id.* (Voters considered fourteen initiatives on governmental and political processes from 2000 to 2006, compared to less in each of the preceding decades back to 1912).

74. *See supra* note 51 (discussing CGS's exploration of a possible state constitutional convention).

75. *See* ELECTIONS DIV., OFFICE OF SEC'Y OF STATE'S OFFICE, INFORMATION GUIDE: 2005 SPECIAL STATEWIDE ELECTION 34 (2005), [http://www.sos.ca.gov/elections/bp\\_nov05/voter\\_info\\_pdf/favor77.pdf](http://www.sos.ca.gov/elections/bp_nov05/voter_info_pdf/favor77.pdf).

76. BALDASSARE & KATZ, *supra* note 3, at 163.

77. *Id.* at 161. Indeed, far from the initiative process being one beyond the reach of political parties, the parties have tried to use the initiative process to their advantage in California; *see also* Daniel A. Smith & Caroline J. Tolbert, *The Initiative to Party: Partisanship and Ballot Initiatives in California*, 7 PARTY POL. 739 (2001); Richard L. Hasen, *Parties Take the Initiative (and Vice Versa)*, 100 COLUM. L. REV. 731 (2000).

Voters supported redistricting reform only when Governor Schwarzenegger teamed up with good government groups such as Common Cause.<sup>78</sup> But, eventually, they gave up on congressional redistricting, which had national partisan implications. Proposition 11, which appeared on the November 2008 ballot, squeaked by with 50.9 percent of the vote,<sup>79</sup> securing the support of 59 percent of Republicans and 54 percent of independents, though only 44 percent of Democrats.<sup>80</sup> Its passage revealed a coalitional model that could be used for future good government reform. The “top two” primary measure, which will appear on the June 2010 ballot,<sup>81</sup> likely will rely heavily on independent voters. Similarly, budget reforms will depend on Democrats and independents. The cooperation of good government groups and their “seal of approval” could be important cues for voters, smoothing the passage of these major pieces of legislation and assuring voters that the measures transcend partisan politics.

The lesson of the 2000s, as told in various ways by these three books, is that California voters often like the tools of direct democracy, but are generally judicious in which initiatives they are willing to approve. Though the public policy of the state cannot be directed primarily by the voters through plebiscitary democracy, voters can take steps to improve the system by which the legislature and governor make policy. If Schwarzenegger leaves office having passed redistricting reform, primary reform, and budgetary reform, he will have achieved significant accomplishments. This is, perhaps, a more modest version of hybrid democracy, but also one that is a more realistic vision of what voters can do at the ballot box.

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78. The ballot argument in favor of Proposition 11 (and rebuttal to the “no” argument) were signed by the League of Women Voters, AARP California, the California Taxpayer’s Association, California Common Cause, the Orange County Professional Firefighters Association, and the Los Angeles Area Chamber of Commerce. ELECTION 2008 INFO. GUIDE, *supra* note 18, at 72–73.

79. See STATEMENT OF VOTE 2008, *supra* note 18, at 7.

80. BALDASSARE ET AL., *supra* note 70, at 13.

81. The “top two” primary is modeled after Washington State’s primary, which the Supreme Court recently upheld against a facial First Amendment challenge. See *Wash. State Grange v. Wash. State Republican Party*, 128 S.Ct. 1184 (2008). For more on the measure, see *supra* note 37 and accompanying text.