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PARTIES TAKE THE INITIATIVE (AND VICE VERSA)

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Conventional wisdom holds that the initiative process weakens the role of parties in democratic politics. However, this wisdom depends on the assumption that the parties do not use the initiative process to further their own agendas. Although that assumption may have been accurate historically, this Article presents empirical evidence that the parties, at least in California, have begun to exploit the initiative process to both encourage voter turnout and refine party stances on issues.

Part and parcel of the conventional wisdom that initiatives weaken parties is the idea that the courts should view initiatives that regulate the parties with suspicion. This Article argues, to the contrary, that because parties are able to exploit the initiative process, there should be no special judicial scrutiny of initiatives regulating parties.

INTRODUCTION

Political parties, like myriad other groups, serve as intermediaries between voters and the government.¹ The Democratic and Republican Parties are especially powerful intermediaries, because between them these two major political parties dominate both Congress and state legislatures.² In about half the states,³ however, the initiative process throws a monkey wrench into the major parties' role as intermediaries.⁴

The conventional wisdom is that the initiative process weakens the intermediary role of political parties.⁵ Initiatives allow voters to bypass

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1. On the parties as intermediaries, see Samuel Issacharoff & Daniel R. Ortiz, *Governing Through Intermediaries*, 85 Va. L. Rev. 1627 (1999).

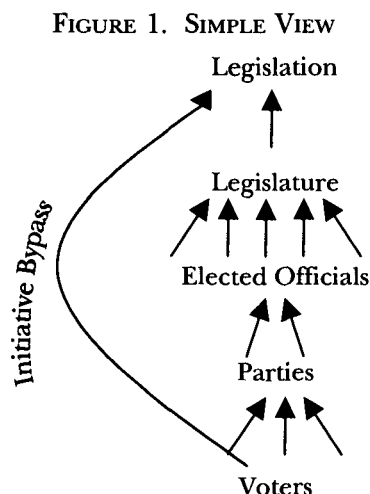
2. See Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 Sup. Ct. Rev. 331, 366.

3. See Elisabeth R. Gerber, *The Populist Paradox: Interest Group Influence and the Promise of Direct Legislation* 16–17 (1999). The extent of the initiative power varies across states. See *id.* at 16–17.

4. This Article considers only the relationship between the Democratic and Republican parties and the initiative process. I do not consider the initiative process's effect on third parties. For the remainder of this Article, I refer to the major parties simply as “the parties” or “political parties.”

5. For a book-length argument, see Arthur Lipow, *Political Parties and Democracy: Explorations in History and Theory* (1996), especially the introduction and chapters 1 and

the parties and elected representatives to pass legislation directly. Figure 1 illustrates how this "initiative bypass"⁶ potentially interferes with a model of politics placing parties as intermediaries between voters on the one hand and elected representatives (and the legislation the representatives pass through the legislature) on the other.



Following this model, those who favor a strong party system tend to dislike initiatives; they argue that the initiative bypass causes voters to make policy choices without benefit of a partisan cue,⁷ leading to incoherent legislation and a legislature under less pressure to tackle difficult political problems.⁸ On the other hand, those who oppose a strong party

2; see also David B. Magleby, *Direct Legislation: Voting on Ballot Propositions in the United States* 199 (1984) (direct democracy "has made the political party a far less potent force in state politics"). Both Lipow and Magleby attribute some of the losses of party power to the adoption of the direct primary to choose party nominees, a device enacted generally as part of the Progressive agenda.

6. See Charles Bell & Charles Price, *Are Ballot Measures the Magic Ride to Success?*, *Cal. J.*, Sept. 1988, 380, 384 ("In theory, the initiative was supposed to be a sort of last-resort option for private citizens to propose new laws or constitutional change, thus bypassing a recalcitrant Legislature."); see also David McCuan et al., *California's Political Warriors: Campaign Professionals and the Initiative Process* in *Citizens as Legislators: Direct Democracy in the United States* 55, 55 (Shaun Bowler et al. eds., 1998) (for supporters of the initiative process, "amateurism meant that 'professional' politicians could be bypassed by citizen-sponsored initiatives, and that narrow and sectional interests could thus be defeated by supporters of the 'common good'"). I do not mean to suggest in Figure 1 that voters explicitly choose parties who in turn choose elected officials; instead, voters use party labels to help choose elected officials.

7. See Gerber, *supra* note 3, at 17-18.

8. A leading report on the initiative process in California summarizes the issue this way:

Some observers complain that the initiative process has led to the irrelevance and further deterioration of California's political parties. Political parties formerly staked out positions on key issues and pushed legislation to advance those

system favor initiatives, seeing them as a valuable check on the power of parties.⁹ Indeed, the initiative began as part of the populist and progressive movements that aimed in part to weaken the power of political parties.¹⁰

The argument that the initiative process necessarily weakens political parties, however, presupposes a static political situation. In particular, the view assumes that parties are incapable of using the initiative process to their own advantage. Such a static view appears to be in line with prior empirical evidence. In 1939, V.O. Key and Winston Crouch observed that parties in California had not exploited the initiative process.¹¹ Similarly,

interests. Today more and more issues are directed through the initiative process instead of the legislative process. This siphoning of significant issues away from the legislature may further fragment the political parties and separate them from the voters. Party coalitions built around a cohesive policy agenda will be more difficult to form as voters are more swayed by single-issue politics. Furthermore, the initiative process may blur the normal party lines. Though elected officials of the majority party are given a mandate to rule, the minority party can go to the ballot instead of adhering to the rules and objectives of the majority.

California Commission on Campaign Financing, *Democracy By Initiative: Shaping California's Fourth Branch of Government* 68–69 (1992) [hereinafter CCCF]; see also Magleby, *supra* note 5, at 189 (“The initiative weakens political parties because it allows groups to force public decision on issues framed by the groups themselves.”); Alan Rosenthal, *The Decline of Representative Democracy: Process, Participation, and Power in State Legislatures* 33–34 (1998) (“initiatives have reduced the power of elected officials to make policy and allocate fiscal resources”).

9. See Magleby, *supra* note 5, at 27 (noting that direct democracy proponents argue that the practice will reduce the power of political parties and party bosses).

10. See Thomas E. Cronin, *Direct Democracy: The Politics of Initiative, Referendum, and Recall* 44 (1989) (at the time the initiative arose, “the two main political parties were largely, and sometimes entirely, under the influence of the railroads, trusts, and monopolies”); Philip L. Dubois & Floyd Feeney, *Lawmaking By Initiative: Issues, Options and Comparisons* 2 (1998) (populists and progressives “believed that legislators and political party machines had become far too dependent on special interests. Trusting the populace itself to make better judgments, they thought that the cure was more democracy.”); *id.* at 12 (“The party machines [in California] were controlled largely by the Southern Pacific railroad. One of the principal aims of the initiative movement was to break out of this control.”); see also CCCF, *supra* note 8, at 36–37 (describing rise of California initiative through opposition to the dominance of the state legislature by the Southern Pacific railroad, and quoting journalist in 1896 reporting that the railroad controlled both the Republican and Democratic Parties in California); Cronin, *supra*, at 45, 54–59; Gerber, *supra* note 3, at 4; Richard Hofstadter, *The Age of Reform: From Bryan to F.D.R.* 254 (1955) (describing the “political machine” as the “proximate enemy” of Progressives); V.O. Key, Jr. & Winston W. Crouch, *The Initiative and Referendum in California* 430 (1939) (“[p]arty conventions did the bidding of the railroad attorneys”); Magleby, *supra* note 5, at 22 (Progressives wanted to “excise or severely limit the power of special interests, political parties, and corporations”); Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 *Mich. L. & Pol. Rev.* 1, 22 (1997) (describing “party machines and corporate trusts” as the common enemy of Progressives). For a cultural history of the California progressive movement, see Kevin Starr, *Inventing the Dream: California Through the Progressive Era* (1985).

11. See Key & Crouch, *supra* note 10, at 447.

in her study of seventy-two ballot initiatives across four states during a six-year period in the 1980s, Betty Zisk found only two instances where initiative sponsorship, fund raising, or campaigning took place along party lines.¹² She also found that party organizations in California were only “occasionally active in endorsing and working for ballot issues, as were candidates for party nominations.”¹³ Numerous studies have found that parties rarely endorse or oppose initiatives.¹⁴ It is no wonder that Richard Briffault concluded just a few years ago that “the political parties rarely become involved in ballot proposition contests.”¹⁵

This Article presents the first empirical evidence that parties are using the initiative process to their advantage. Just as it took parties in federal elections a number of election cycles to understand how to use “soft money” to gain electoral advantage,¹⁶ parties are beginning only now to harness the power of the initiative.

I demonstrate my argument through an analysis of California initiatives in the 1990s. By looking at the substance of initiatives, campaign finance, and party politics, I show in Part I that parties no longer are passive observers of the initiative process. Instead, political parties, elected officials, and candidates have used the initiative process successfully to define themselves and to advance their own chances of election. Though it would be premature to consider parties as “major players” in the process, the data show that parties are highly adaptable organizations, making selective use of initiative campaigns as part of their set of political tools.

Nonetheless, as I demonstrate in Part II, parties still have much to learn about the initiative process. In particular, the parties have failed to respond adequately to initiatives aimed at regulating party structure.

12. See Betty H. Zisk, *Money, Media, and the Grassroots: State Ballot Issues and the Electoral Process* 237 (1987).

13. *Id.* at 114.

14. See Arthur Lupia, *Shortcuts versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 *Am. Pol. Sci. Rev.* 63, 65 (1994) (noting that none of the five insurance initiatives on the 1988 California ballot had a party label attached to it); see also Dubois & Feeney, *supra* note 10, at 216 (noting that reformers argue for greater disclosure of initiative campaign finance to provide information to voters “particularly in campaigns where there are often no party labels or other cues to assist voters”); Gerber, *supra* note 3, at 17 (stating that political parties “rarely” endorse initiatives and referendums). But see Lupia, *supra*, at 74 n.8 (noting that some prominent figures of both parties took a stand on the insurance initiatives); Magleby, *supra* note 5, at 174 (“In voting on statewide propositions, however, the party cue is generally absent both on the ballot itself and in the campaign.”).

15. Richard Briffault, *Ballot Propositions and Campaign Finance Reform*, 1996 *Ann. Surv. Am. L.* 413, 424; see also *id.* at 439 (concluding that the “absence of ballot-qualified candidates and parties and the absence of electoral institutions for determining who controls a ballot-proposition campaign” would also make it difficult to use public funding for ballot propositions).

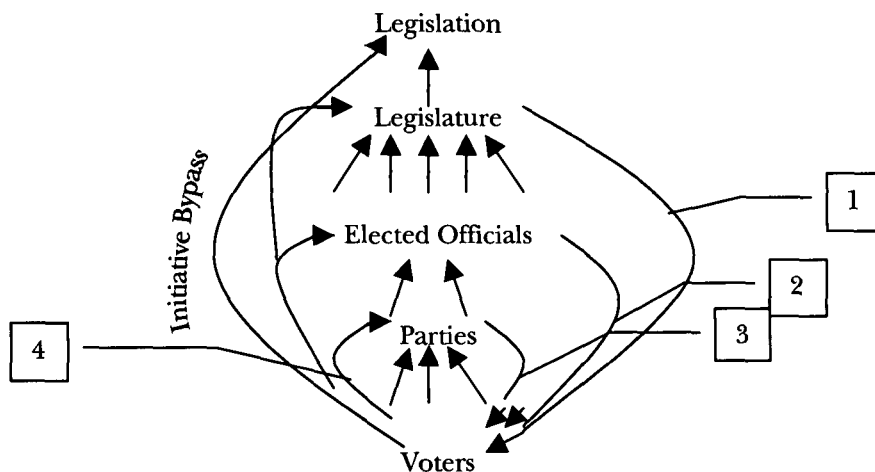
16. See Richard Briffault, *The Political Parties and Campaign Finance Law*, 100 *Colum. L. Rev.* 620, 630 (2000) (describing explosion of party use of soft money in the 1990s).

One such initiative was California's recent Proposition 198, which established a blanket primary. To defeat party regulation through the initiative process, parties will need to engage the public in a debate about the merits of strong party autonomy. The parties' current strategy of relying on the legislature and the courts for protection appears to be a dangerous one.

I. CALIFORNIA INITIATIVES AND THE PARTIES IN THE 1990s: LESSONS LEARNED

The initiative bypass, illustrated in Figure 1 above, is just one of many possible ways in which the initiative process, political parties, elected officials, candidates, and voters might influence one another. Figure 2 illustrates four possible modes of interaction beyond the simple initiative bypass: (1) The legislature may expend resources convincing the voters to vote for or against a particular initiative;¹⁷ (2) Elected officials (and candidates running for election) may use the initiative process to boost their own candidacies and parties and to define themselves for voters; (3) Parties may use the initiative process to boost the party by defining themselves through the substance of initiatives and the minority party in the legislature may attempt an end-run around the legislature; and (4) Voters may regulate parties, elected officials, and the legislature through the initiative process.¹⁸

FIGURE 2. MORE COMPLEX VIEW



17. The legislature, at least in California, also has the power (and the obligation when it comes to bond proposals) to place measures on the ballot for voter approval. See Cal. Const. art. XVI, § 1; *infra* notes 71-73 & 73 (discussing a particular legislative ballot measure, Proposition 3).

18. Interaction (4) is an example of the initiative bypass where the subject matter is regulation of parties, elected officials, or the legislature.

All four modes of interaction need not be present in each jurisdiction with an initiative process. However, I have found evidence of the third mode of interaction, party use of the initiative, in California during the last decade. In particular, my study of interaction between the parties and the sixty-three initiatives on the statewide California ballot in the 1990s¹⁹ shows significant party activity in the initiative process.²⁰

Table 1 shows the initiatives' subject matter. Initiatives appeared on the California ballot once during a special election in 1993, and twice in 1990, 1992, 1994, 1996, and 1998; voters approved twenty-seven (approximately 43%) of them.

TABLE 1. CALIFORNIA 1990S INITIATIVES BY SUBJECT AREA

<i>Subject matter</i>	<i>Number of Voter initiatives</i>	<i>Approval Rate</i>
Business/labor	13	42%
Civil rights	2	100%
Crime	6	67%
Education	4	25%
Environment	8	38%
Gambling/morality	1	0%
Gov't/pol. process	11	45%
Health/welfare	5	20%
Revenue & tax	12	42%
Transportation	1	100%
TOTAL	63	43%

Sources: See Appendix

In the 1990s, California parties, elected officials, and candidates used the initiative process successfully to define themselves. The process also has had an interesting reflective effect: Parties and candidates associated themselves with initiatives on high-salience issues (such as initiatives regarding civil rights or crime) as a means of providing voters with a cue

19. The Appendix to this Article describes my methods for collecting data. Facts and figures that I cite in this Article without footnotes are derived from Appendix sources.

20. I hope this "snapshot" view of the interaction of parties and the initiative process is valuable even though California's experience is not necessarily typical of states with the initiative process: California is a state with a comparatively high use of the initiative process. See Gerber, *supra* note 3, at 77. Also, California has a relatively weak party system. See John R. Owens et al., *California Politics and Parties* 4 (1970) (characterizing California parties as "weak and ineffectual" and blaming that weakness on a number of factors including the initiative process); Kay Lawson, *Political Party Renewal*, in 2 *California Policy Choices* 203, 204 (John J. Kirlin & Donald R. Winkler eds., 1985) ("For most of the twentieth century, political parties have played almost no part in California's policymaking processes."); Eugene C. Lee, *California, in Referendums: A Comparative Study of Practice and Theory* 87, 87 (David Butler & Austin Ranney eds., 1978) (noting that California is characterized by a weak party system). However, if the parties can benefit from the initiative process under the conditions in California, it is also likely parties will do well where both the initiative process is used less frequently and the parties are stronger.

about their ideology, and the association also gave voters important cues about whether to vote for particular initiatives.²¹ Thus, then-Governor Pete Wilson told voters something important about his politics by supporting the anti-illegal immigrant Proposition 187, and people assessed their support for Proposition 187 knowing that Wilson favored the initiative.

In the 1990s, elected officials and candidates like Wilson lent their name and money to particular initiatives both to pass the initiatives and to add content to their own candidacies. Wilson, for example, spent heavily or lobbied hard for Proposition 165 (welfare reform),²² Proposition 187 (ending government benefits for illegal immigrants),²³ Proposition 209 (anti-affirmative action),²⁴ and Proposition 226 (making it more difficult for unions to raise political money from members).²⁵ Observers believe that Wilson and the Republican Party's support for Proposition 187 were responsible both for Wilson's gubernatorial re-election and, as the political mood shifted, for the later decline of the Republican Party's popularity in California.²⁶

21. See Shaun Bowler & Todd Donovan, *Demanding Choices: Opinion, Voting, and Direct Democracy* 64–65 (1998) (finding in study of California voters that the initiative endorsement decisions of party leaders influenced both highly educated and less educated voters' positions on the desirability of the initiatives). Alvarez and Butterfield found that partisan candidate endorsements were more important than party affiliation in explaining voter support for Proposition 187. See R. Michael Alvarez & Tara L. Butterfield, *The Resurgence of Nativism in California? The Case of Proposition 187 and Illegal Immigration* 4, 9, 13 (July 30, 1999) (unpublished manuscript on file with the *Columbia Law Review*).

22. Wilson spent \$1,826,004 supporting the initiative that he sponsored. On the sponsorship, see California Secretary of State, *California Ballot Pamphlet, General Election 7* (Nov. 3, 1992).

23. See Peter Schrag, *Paradise Lost: California's Experience, America's Future* 61–62 (1998) (Wilson based "a large part of his 1994 reelection campaign on Proposition 187"); *id.* at 229–34.

24. See *id.* at 234–36 (describing Wilson's strong support for Proposition 209); see also *infra* text accompanying note 51 (describing conversation between Wilson and Newt Gingrich about the politics of Proposition 209).

25. Wilson spent \$1,253,366 to promote Proposition 226. See California Secretary of State, *Financing California's Statewide Ballot Measures: Campaign Receipts and Expenditures Through June 30, 1998*, at 23 [hereinafter *California Campaign Report*].

26. For arguments suggesting that Wilson gained reelection through use of Proposition 187, see Alvarez & Butterfield, *supra* note 21, at 16; Gerber, *supra* note 3, at 121 n.1. On the Republican Party's later decline being caused by support of Proposition 187, see Schrag, *supra* note 23, at 237–38 (arguing that Republicans "seemed to be starting to realize that, at least for the long run, Wilson's blatant style of race-and-immigration politics was a descending road to electoral oblivion"); Evelyn Nieves, *California Calls Off Effort to Carry Out Immigrant Measure*, *N.Y. Times*, Jul. 30, 1999, at A1 ("And with Proposition 209, which banned affirmative action by government bodies, and Proposition 227, which ended bilingual education, Proposition 187 is considered largely responsible for a voter turnout that ended the Republican Party's 16-year control of the Governor's office in 1998."); Alvarez & Butterfield, *supra* note 21, at 17.

Like elected officials and candidates, parties²⁷ have used the initiative process to boost their electoral chances. State party organizations endorsed at least some initiatives,²⁸ and they publicized their positions through means such as "slate mailers"²⁹ mailed to California voters before the election.³⁰ Table 2 shows the subject matter of initiatives upon which the state parties spent at least some money in the 1990s.³¹ The

27. In my analysis of campaign finance data below, I focus on the state central committees of the California Democratic and Republican Parties. I recognize that the term "party" may refer to the party organization, the party in government, or the party-in-the-electorate. See Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 Tex. L. Rev. 1741, 1760 (1993); see also *id.* at 1759 ("Unlike a chair, or a planet, or a baked potato, a political party is not something that occupies a particular space at a particular time or that can be discerned with the senses."). These central committees, however, are dominated by legislators from the respective parties. See *San Francisco County Democratic Central Committee v. Eu*, 826 F.2d 814, 820 (9th Cir. 1987), *aff'd*, 489 U.S. 214 (1989) (noting dominance of elected party officials on party central committees). But see Lowenstein, *supra*, at 1781 & n.167 (calling into question evidence supporting the Ninth Circuit's contention). Thus, at the risk of reifying the party, see *id.* at 1764 & n.85, I focus on the activities of the central committees as representing the interests of the state party organization and the party-in-government. I do not claim the parties speak for the party-in-the electorate; on that point, see *infra* note 75. And I recognize that party leaders sometimes act independently of the organized party, and sometimes also to its detriment. See *infra* note 58 (describing Van de Kamp strategy, which arguably fits into this category).

28. I do not claim that the endorsements themselves carry much weight. The important question is whether significant party resources get devoted to supporting or opposing these initiatives.

29. Campaign disclosure forms that I examined do not give details on the format of the slate mailers or to whom they were sent. On slate mail generally, see Shanto Iyengar et al., *The Stealth Campaign: Experimental Studies of Slate Mail in California* (Sept. 1999) (paper prepared for presentation at the 1999 Annual Meeting of the American Political Science Association describing slate mail in California) (unpublished manuscript on file with the *Columbia Law Review*). The parties are certainly not the only organizations, or even the most prevalent ones, that use slate mailers before elections. See *id.* at 3 ("In California, although slate mailers occasionally originate from parties, they are usually published by private entrepreneurs, some of whom mail millions of pieces per election."); see also Schrag, *supra* note 23, at 213-14 (describing how commercial operators create slate mailers from non-existent political organizations and sell endorsement space to the highest bidder).

30. Data on initiative endorsement decisions made by the California Republican Party and the Democratic State Central Committee were unavailable for most elections. However, party spending (sometimes only nominal spending on slate mailers) for or against particular initiatives appears to be a good proxy for party positions. For the most recent election, I compared the endorsement decisions of the state Democratic party with its spending decisions. I found the endorsement decisions on the party's web site. See California Democratic Party, California Democratic Party's Official Recommendations for Ballot Propositions (visited July 9, 1999) <<http://www.ca-dem.org/dems/cadems.nsf>>. I then compared them with the campaign finance data I describe in the Appendix. There was a perfect correlation: Party spending (although sometimes nominal) went in the same direction as the endorsement of the party. For those propositions for which the party remained neutral, the party expended no money.

31. The numbers also do not include spending by the national political parties, sub-state party organizations, or party leaders. For example, national Democratic and

Republicans spent over \$5.4 million supporting or opposing thirty initiatives; Democrats spent just under \$2 million supporting or opposing thirty-three initiatives.

TABLE 2. STATE PARTY SPENDING ON INITIATIVES BY SUBJECT AREA

Number of initiatives supported or opposed by:

<i>Subject matter of propositions</i>	<i>Democrats</i>	<i>Republicans</i>
Business/labor	9	7
Civil rights	1	2
Crime	4	3
Education	2	3
Environment	7	0
Gambling/morality	0	1
Gov't/pol process	5	7
Health/welfare	1	4
Revenue & tax	4	3
Transportation	0	0
TOTAL	33	30

Sources: See Appendix

Table 2 shows the types of initiatives that the parties spent money opposing or supporting in the 1990s.³² Much of that spending was nominal,³³ often merely reflecting a party's decision to expend money to include a position on a particular initiative on a list of suggested votes sent on slate mailers to party faithful. Table 3, showing significant party spending (greater than \$25,000) on initiatives, reveals more about how parties used the initiative process as part of their election strategies. The parties spent these more significant sums on qualifying initiatives for the ballot, "get-out-the-vote" drives, newspaper advertisements, phone banks, mailers, and contributions to initiative support or opposition groups, all tied in with the particular initiative.

The Democratic Party's experience with Proposition 165 shows one way in which a party tried to use the initiative process to its electoral advantage. Proposition 165 was a welfare reform initiative proposed by Pete

Republican organizations spent heavily on Propositions 118 and 119, which were aimed at taking reapportionment decisions away from the Democrat-dominated legislature. See *infra* text accompanying notes 46–47.

32. The figures include both contributions to committees formed to support or oppose initiatives as well as party expenditures independently supporting or opposing initiatives. Prior studies, such as the CCCF study, *supra* note 8, considered only party contributions to initiative committees.

33. Cf. *id.* at 277 (noting that in the 1990 race, the percentage of political party contributions to initiatives other than the reapportionment initiatives (Propositions 118 and 119) never exceeded 3% of total contributions); see also *id.* at 390 (noting that political parties contributed only 0.7% of total contributions to the eighteen most expensive initiatives in California history up to 1990).

TABLE 3. LARGER (> \$25,000) STATE PARTY SPENDING ON CALIFORNIA 1990s INITIATIVES

Prop.	Subject matter	Party	Position	Amount
118	Reapportionment and ethics reform	Republican	Support	\$200,000
119	Reapportionment by commission	Republican	Support	78,866
130	Stronger environmental protection	Democratic	Support	29,698
164	Congressional term limits	Democratic	Oppose	35,000
165	Welfare reform	Democratic	Oppose	944,957
same		Republican	Support	238,171
167	Tax increase on wealthy, corps.	Republican	Oppose	62,497
174	School vouchers	Democratic	Oppose	176,085
same		Republican	Support	419,304
184	Three-strikes law	Republican	Oppose	432,207
187	Makes illegal immigrants ineligible for public benefits	Republican	Support	400,286
198	Establishes blanket primary	Republican	Oppose	48,899
200, 201, 202	Attorney fees and insurance initiatives	Democratic	Oppose	30,216
same		Republican	Oppose	171,540
209	Ends affirmative action	Democratic	Oppose	361,136
same		Republican	Support	2,881,672
210	Increases minimum wage	Democratic	Support	53,437
223	Limits school spending on administration	Republican	Oppose	31,157
226	Prohibits negative checkoff for union political contributions	Republican	Support	51,557
8	Public school reform	Democratic	Oppose	83,126
same		Republican	Support	243,592

Sources: See Appendix

Wilson.³⁴ Data showed that voters opposing the initiative were likely to vote for Democrats.³⁵ The state Democratic Party spent nearly \$1 million supporting a voter registration and “get-out-the-vote” drive against Proposition 165.³⁶ Indeed, the Democrats’ support for “No on 165” was such partisan activity that the Federal Election Commission sued the party for violating the Federal Elections Campaign Act (FECA). The FEC claimed that the Democrats’ contributions to the “No on 165” committee violated the FECA because they were aimed in part at boosting turnout for Democratic candidates running for federal office but the contributions did not come from funds raised and earmarked for the federal election.³⁷

The Table 3 data demonstrate that the parties have run on their typical bread and butter issues to help define themselves *through* the initiatives and to boost turnout of party faithful.³⁸ Democrats have staked out more liberal positions on issues such as welfare reform (Proposition 165), education (Propositions 8 and 174), and affirmative action (Proposition 209). Republicans took opposite positions on these initiatives, and spent significant sums supporting an end to government benefits for illegal immigrants (Proposition 187) and anti-crime initiatives such as a “three strikes” law (Proposition 184). This party spending does not include occasional (but sometimes substantial amounts of) money flowing *into* the parties from initiative supporters or opponents,³⁹ something that may account for party action (or inaction⁴⁰) regarding these initiatives.

The significant spending by the state parties on a handful of high-salience initiatives shows that party organizations have done their best to adapt to the presence of the initiative process. The parties appropriated the messages from some high-salience initiatives as a means of increasing the effectiveness of the parties’ voting cue and used the energy generated by initiative campaigns to boost turnout for their candidates.

34. See *supra* note 22; see also Schrag, *supra* note 23, at 318 n.64.

35. See *FEC v. California Democratic Party*, 13 F.Supp.2d 1031, 1032 (E.D. Cal. 1998).

36. See *supra* Table 3.

37. See *California Democratic Party*, 13 F.Supp.2d at 1033. The litigation remains pending.

38. The pattern somewhat predates the 1990s. See Magleby, *supra* note 5, at 173–76 (recounting partisan battles over a handful of important propositions in the 1970s).

39. In one recent example, the utility-backed committee opposing Proposition 9 (regarding payment for nuclear reactor cleanups) contributed \$500,000 to each of the parties. Thanks to Craig Holman for first alerting me to these payments.

Sometimes money flows both ways. Table 3 indicates that Republicans spent \$243,592 supporting Proposition 8. Much of that money went to a committee controlled by Pete Wilson, “Californians for Educational Responsibility—Yes on 8.” But that organization donated \$117,500 to the Republican Party two weeks before the general election. The measure later went down to defeat.

40. Following the half-million dollar donations by the anti-Proposition 9 committee, see *supra* note 39, the Democratic Party spent a nominal amount (\$6,866) on slate mailers opposing Proposition 9; Republicans spent nothing. Given the politics of the initiative (Proposition 9 was sponsored by the liberal Calpurg), the Democrats would have been more likely to support the initiative than the Republicans.

In some circumstances, the parties had greater control over an initiative by providing important seed money necessary to qualify an initiative for the ballot. For example, Republican Party support for Proposition 187's qualifying campaign was crucial in getting the measure on the ballot.⁴¹

Republicans outspent the Democrats more than two-to-one on initiative politics. In part, it might be that Republicans simply raised more money and therefore they had more money to spend. But there is also an institutional explanation: Republicans were the minority party in the California legislature for most of the 1990s.⁴² The majority party has less need than the minority party to build its strength through the initiative process.⁴³ It can pass legislation (or at least present such legislation to the governor of the other party) to increase the salience of its voting cue. The minority party needs other avenues besides legislation to secure publicity and advance its agenda.

The Republicans tried using the initiative to deal directly with their minority status. Republican-supported initiatives tried to wrest the redistricting process from the state legislature, following similar attempts in the 1980s.⁴⁴ A court-appointed commission conducted redistricting in the 1990s after the Democratic legislature and Republican governor

41. See *infra* note 55.

42. Republicans controlled the state assembly from 1994 through 1996. The Democrats controlled the Assembly otherwise throughout the 1990s and they controlled the state senate for the entire period. See California Legislative Handbooks, 1990–1998.

43. See Bell & Price, *supra* note 6, at 383 (suggesting that Democratic legislators would use the initiative process more energetically if Republicans took control of the legislature).

44. Voters considered a number of redistricting ballot measures in the 1980s. In 1981, the Democratic legislature completed redistricting following the 1980 census. Voters then rejected the redistricting scheme in a referendum held in 1982. See *Legislature v. Deukmejian*, 669 P.2d 17, 35–36 (Cal. 1983) (Richardson, J., dissenting). The California Supreme Court nonetheless let the 1982 elections proceed under the rejected plan. See *id.* The new California legislature, still controlled by Democrats, enacted a new redistricting plan, passing it with a two-thirds vote as an “urgency” measure, thereby insulating it from the referendum process. See *id.* at 22. Republican leaders then attempted to place a reapportionment initiative on the ballot for a special election to be held in 1983, but the California Supreme Court held that the election could not be held because reapportionment could only occur once within the 10-year period following each census. See *id.* at 18. In 1984, voters rejected Proposition 39, which would have created a non-partisan commission to conduct future redistricting. See John M. Allswang, *California Initiatives and Referendums 1912–1990: A Survey and Guide to Research* 151–52 (1991). For a further look at the reapportionment initiatives and referenda in the 1980s, see Morgan Kousser, *Reapportionment Wars: Party, Race, and Redistricting in California, 1971–1992 in Race and Redistricting in the 1990s* 134 (Bernard Grofman ed., 1998); see also Zisk, *supra* note 12, at 204–05 (documenting both media attention to and party expenditures on the Proposition 9 campaign).

Attempts to use the initiative process for redistricting date back well before the 1980s. In 1926, Californians considered and rejected the first initiative proposing a reapportionment commission. See Allswang, *supra*, at 66–67 (describing Proposition 20). Reapportionment plans also appeared on the ballot in 1928 (Proposition 1), 1958

failed to agree on a plan.⁴⁵ Perhaps expecting continued Democratic dominance of the legislature, the national and state Republican party organizations spent heavy sums to support the redistricting reform initiatives, Propositions 118 and 119.⁴⁶ State Democratic leaders and a national Democratic organization spent heavily against it, and the measure failed.⁴⁷

Republicans, especially Pete Wilson,⁴⁸ also supported Proposition 226, which would have weakened union fund raising, a traditional source of money for Democrats. The initiative would have eliminated the ability of unions to raise political funds from union members through automatic deductions from the members' paychecks unless the member gave affirmative permission (currently, the unions generally deduct funds unless the member objects).⁴⁹ Voters rejected Proposition 226 after heavy union spending against it.⁵⁰

The parties' interaction with the initiative process in California during the 1990s demonstrates how parties are mutable institutions capable of using available means to further the goals of their members. The association of the Republican party with initiatives such as Proposition 187 (ending benefits to illegal immigrants) and Proposition 209 (ending state affirmative action programs) no doubt gave voters a tangible example of party ideology. As Wilson remarked in a conversation with Newt Gingrich accidentally overheard by a journalist, Proposition 209 has "... become a partisan issue . . . that works to our advantage [and] has every bit the potential to make a critical difference [in the campaign]."⁵¹ In California, if not the nation,⁵² the initiative process has become another partisan tool.

(Proposition 13), 1960 (Proposition 15), and 1962 (Proposition 23). See Allswang, *supra*, at 67–68, 104–05, 115–16.

45. See *Wilson v. Eu*, 823 P.2d 545 (Cal. 1992) (approving reapportionment plan of special masters).

46. See CCCF, *supra* note 8, at 277, 413–14; *supra* Table 3.

47. See *id.* at 413–14.

48. See *supra* note 25 (detailing Wilson's payments supporting Proposition 226).

49. See California Secretary of State, California Voter Information Guide, Primary Election Ballot Pamphlet 4–5 (June 2, 1998).

50. Unions and their allies spent more than \$23 million to oppose the initiative. See California Secretary of State, Financing California's Statewide Ballot Measures: Campaign Receipts and Expenditures Through June 30, 1998.

51. Schrag, *supra* note 23, at 236 (quoting Peter King, *The Curtain Pulled Back for a Moment*, L.A. Times, Sep. 9, 1996, at A3); see also Todd Donovan et al., *Contending Players and Strategies, Opposition Advantages in Initiative Campaigns in Citizens as Legislators: Direct Democracy in the United States* 80, 94 (Shaun Bowler et al. eds., 1998).

52. The California initiative process has affected national party politics. Alvarez and Butterfield demonstrate how the national political parties used Proposition 209 as part of their presidential campaigns. See R. Michael Alvarez & Tara L. Butterfield, *The Revolution Against Affirmative Action in California: Politics, Economics, and Proposition 209* (Apr. 7, 1998) (unpublished manuscript, on file with the *Columbia Law Review*).

The evidence of the parties' current involvement in the initiative process is impressive compared to the parties' past initiative activity,⁵³ but I do not want to overstate the extent of the involvement. The single most expensive initiative race on record, Proposition 5 (regulating gaming on Native American reservations) attracted \$92 million in total funds from groups supporting and opposing it.⁵⁴ By contrast, the parties together spent only \$7.4 million on *all* initiative activities in the 1990s.

Instead, parties concentrated their initiative-related spending on a few salient initiatives. For example, the Republican Party's contribution of approximately \$400,000 to support Proposition 187 was almost ten times larger than the next largest contribution, and made up almost half of the total contributions received.⁵⁵

Nor does the parties' spending on initiatives eclipse party spending on direct support for party candidates.⁵⁶ We are witnessing only the beginning of a trend, and the extent to which the parties will increase the resources they devote to the initiative process remains to be seen. Presumably, rational party leaders will continue devoting resources towards the initiative process so long as it is a cost-effective way to secure additional votes and other party benefits.

Moreover, none of the evidence adduced in this Part negates the theory set forth in the introduction of this Article that initiative bypass may weaken the parties. The important empirical question, however, is whether any such weakening is offset by the parties' new use of the initiative to boost the parties' electoral fortunes.⁵⁷ Answering such a question would require a sophisticated measure of party strength that is beyond the scope of my project here. However, the evidence I have adduced allows us to comfortably reject the notion that the initiative process *necessarily* weakens the parties.⁵⁸ Furthermore, even if the initiative process

53. See Zisk, *supra* note 12, at 114.

54. See California Secretary of State, Financing California's Statewide Ballot Measures: Campaign Receipts and Expenditures Through December 31, 1998, at i.

55. See California Secretary of State, Financing California's Statewide Ballot Measures: 1994 Primary and General Elections 37 (July 1995).

56. One counterexample is Republican Party spending just before the November 1996 election, where the party spent over \$1,870,000 supporting Proposition 209, out of total spending in the period for all candidates and propositions of just below \$3.3 million.

57. That is not to say that the strengthening of political parties in this way is necessarily good. Schrag, for example, derides the California initiative process as "a device of impulse that tends to be only marginally respectful of minority rights or interests, and that lends itself to demagogic wedge campaigns designed to boost voter turnout for other political purposes." Schrag, *supra* note 23, at 21.

58. Nor is there reason to give much credence to speculation that the initiative process could undermine the parties by giving elected officials and candidates an ability to create a voting cue for themselves without relying on the party label. See Lee, *supra* note 20, at 119:

The initiative will be employed by candidates for public office as part of their personal campaign strategy. In fact, this will be the prime motivation behind the

overall does weaken the parties, the parties' new use of the initiative process appears to counteract that trend at least in part.

II. LESSONS NOT YET LEARNED: THE CASE OF PROPOSITION 198

Part I demonstrated that parties have begun using the initiative process as another tool to build support for the party and its candidates. In this Part, I discuss an area where the parties are still behind the learning curve: countering initiatives regulating the parties themselves.⁵⁹ I demonstrate the point through an examination of Proposition 198, establishing the blanket primary in California. Though the parties fought this

drafting and sponsorship of some measures. The activity may increase as issues and personalities fill the vacuum left by increasingly weak party ties.

The danger is that candidates will use the initiative process, rather than the political party, as the means of signaling the voters about their positions on issues.

The California experience in the 1990s belies this concern. From the candidates' perspective, initiatives are inferior to parties as means of creating a voting cue. Initiative campaigns last only for one election, and they do not create an infrastructure like a party that can be of general use to a candidate. The experience of John Van De Kamp, a Democratic gubernatorial candidate in 1990, shows the strategy's danger. Van de Kamp spent much of his fundraising time and his political capital raising money for three propositions on the November 1990 ballot. The propositions dealt with crime, the environment, and term limits. "The three initiatives were devised by Van de Kamp and his advisers as a general election stratagem—'Vote for me, vote for my platform.'" John Balzar, *Recount Gives Van de Kamp Democrats' Endorsement*, L.A. Times, Apr. 30, 1990, at A3. But by the time the initiatives appeared on the ballot in the general election, Van de Kamp had been eliminated in a primary run against Dianne Feinstein. Observers believe that Van de Kamp depleted his organizational resources from party officials by supporting the initiatives. See CCCF, *supra* note 8, at 62. He also lost party goodwill: Van de Kamp alienated other Democrats by authoring a term limits proposal, Proposition 131. See Charles Price and Ed Bacciocco, *Term Limits: Is This a Far, Far Better Thing Than We Have Ever Done Before?*, Cal. J., Oct. 1990, at 497, 498. Other Democrats opposed the initiative, and the measure went down to defeat. See CCCF, *supra* note 8, at 419.

The more likely future model for candidate use of initiatives is that of Pete Wilson's gubernatorial reelection campaign. Wilson coordinated his initiative activity with his gubernatorial campaign and with the state Republican party, which helped to fund his initiatives. This example shows that the initiative process may help the parties by further strengthening the message of its candidates and the ties between the candidates and the party. See Schrag, *supra* note 23, at 232 (noting that Proposition 187 had "been languishing in the signature-gathering process until Wilson, sensing its potential as a wedge against [then-Assembly speaker (Democrat) Willie] Brown and seizing on it as a way to define his own candidacy, prompted the state Republican Party to put up some \$200,000 to help it qualify."); see also *id.* at 235:

[Proponents of Proposition 209] would have gone nowhere had Pete Wilson and California Republicans not seen it as a wedge with which to drive internal divisions between the blue collar labor constituencies and the civil rights and minority wings of the Democratic Party. The Wilson campaign organization regarded the [Proposition 209] idea as a key element, not only in what it hoped would be a successful Wilson campaign for the 1996 Republican nomination for president, but in the general election campaign of whoever the ultimate standard bearer turned out to be.

59. Such initiatives fall into the fourth category of interactions described by Figure 2 above.

party-regulating initiative in the Legislature and the courts, so far they have been unwilling to contest the measure on its merits before the voters. The parties' ultimate success in the area of party regulation, however, depends upon taking their case to the people. The Legislature, at least in California, has only limited ability to overturn initiatives. The litigation over Proposition 198 is currently before the Supreme Court,⁶⁰ where the outcome is uncertain because of prior precedent.⁶¹ Even if the parties ultimately succeed in this case, however, they should not miss the broader point that the courts are unlikely to apply greater judicial scrutiny to party-regulating laws passed by initiative. As my examination of Proposition 198 shows, the parties need to rely primarily upon the political process itself for protection.

Since the rise of the initiative, proponents held it up as a tool to be used against parties.⁶² In the 1990s, California voters increasingly used the initiative to regulate the workings of political parties and elected officials. Voters approved state legislative term limits (Proposition 140), campaign finance reform (Proposition 208), and a blanket primary (Proposition 198). The voters also rejected a ballot measure proposed by the Legislature (Proposition 3) to create an exception to the blanket primary for presidential nominating delegates—something required by the national parties in order to seat a California delegation at the national conventions.⁶³ California is hardly unique in using the initiative to regulate the political process; every state enacting term limits except one did so by initiative rather than through the state legislature.⁶⁴

In all, California voters considered eleven initiatives dealing with government and the political process during the 1990s,⁶⁵ approving five of them.⁶⁶ The voters even approved an initiative instructing members of Congress to vote for term limits, though the *proponents* of the initiative urged a "no" vote, believing the measure—because of legal developments

60. *California Democratic Party v. Jones*, 169 F.3d 646 (9th cir. 1999), cert. granted, 120 S.Ct. 977 (2000).

61. In *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986), the Supreme Court held that parties, not the state, have the right to determine the form of party primaries. *Tashjian* is distinguishable on a few grounds. Most importantly, in *Tashjian*, the Democratically controlled legislature prevented the Republican Party from permitting independents to vote in its primary. In this case, the people, not one of the parties, dictated the form of the primary.

62. See *supra* notes 9–10 and accompanying text.

63. See Senate Oks Plan to Solve Open Primary Problem / Voters would use 2d Ballot to Elect Party Delegates, S.F. Chron., Mar. 9, 1999, at A22 ("rules of the Democratic and Republican national committees forbid election of delegates to presidential nominating conventions from an open primary").

64. See Schrag, *supra* note 23, at 242.

65. See *supra* Table 1.

66. Voters approved Propositions 140, 164, 198, 208, and 225.

subsequent to qualifying the initiative—would be held unconstitutional and therefore waste the state's time and money.⁶⁷

The most far-reaching example of California voter regulation of political parties was the passage of Proposition 198 and the rejection of Proposition 3. Under the blanket primary created by Proposition 198,⁶⁸ any registered voter, including those registered as independents, could vote for any candidate in a primary without regard to political affiliation. For example, Proposition 198 allowed Republicans, Independents, and third-party voters to vote for one of the three Democratic gubernatorial candidates in the contested 1998 Democratic primary.

The parties did surprisingly little to oppose Proposition 198,⁶⁹ despite their belief that the new form of primary would hurt them.⁷⁰ Republicans spent \$48,899 opposing the measure;⁷¹ Democrats spent a mere \$4,630. The parties did not do much else to get their message out to the voters opposing Proposition 198, other than to have their respective party chairs sign the statement in the ballot pamphlet opposing the initiative.⁷²

At the parties' urging,⁷³ the California Legislature then placed Proposition 3 on the November 1998 ballot. This legislative ballot measure would have reversed Proposition 198 for the purposes of choosing dele-

67. California Secretary of State, California Voter Information Guide, Primary Election 26 (June 2, 1998).

68. See California Secretary of State, California Ballot Pamphlet, Primary Election 6–7 (Mar. 26, 1996). On the difference between blanket, open, semi-closed, and closed primaries, see *California Democratic Party v. Jones*, 169 F.2d 646, 650 (9th Cir. 1999), cert. granted, 120 S.Ct. 977 (2000).

69. "It appears that the political parties did not mount a campaign against Proposition 198 with the voters at the time of the election." *Jones*, 169 F.3d at 651 n.12.

70. The parties believed that the law infringed on their rights of association.

The parties' main argument is that a blanket primary permits voters who are not members of a particular party—who may indeed be hostile to that party's electoral interests—to vote in that party's primary and thus to participate in the process by which the party defines its positions on a variety of issues and by which it chooses its standard bearers.

Id. at 653.

71. Almost all of that money was in the form of an in-kind donation of a mailer in favor of a committee formed to oppose Proposition 198. According to Bob Schuman of the public affairs firm running the campaign opposing the initiative, state Democratic and Republican leaders initially considered running a joint campaign against the initiative. Democrats later decided not to spend any money against 198, in the hopes that Republicans would do so. After polling showed that it would be an uphill battle to defeat the proposition, Republicans then decided to devote their financial resources to other causes. Party leaders also believed they could successfully challenge the initiative in court. See Interview with Bob Schuman of Schuman, Hoy and Associates (Sept. 7, 1999) (notes of interview on file with the *Columbia Law Review*).

72. See California Secretary of State, California Ballot Pamphlet, Primary Election 35 (Mar. 26, 1996).

73. See John Marelius, Major Parties Strong-Arm State to Drop Open Primary, San Diego Union & Trib., May 17, 1999, at A3.

gates to national political party presidential nominating conventions.⁷⁴ This measure lost as well. Inexplicably, the parties formed no committees to support Proposition 3. Republicans spent nothing to support it; the state Democratic party spent only \$6,866 to identify the Democrats' opposition to the measure on a slate mailer.⁷⁵

Rather than fighting Proposition 198 in the voting booth, the parties turned to the courts for protection. In the Proposition 198 litigation, a federal district court and the Ninth Circuit upheld the rights of California voters to establish a blanket primary.⁷⁶ The Ninth Circuit squarely put the voters' interest in regulating the political process ahead of the parties' associational rights.⁷⁷ It held that voters had the right to decide that they wanted more moderate candidates, something the weight of political scientists' evidence suggests emerge from use of a more open primary.⁷⁸

74. California Secretary of State, California Ballot Pamphlet, General Election 4–5 (Nov. 3, 1998).

75. It would not be inexplicable if the parties never sought to have Proposition 3 put on the ballot in the first place. But why engage the Legislature in placing such a measure on the ballot without then marshaling the resources to support it? If the parties pushed the measure through the Legislature in the hope that the voters would pass it without the parties devoting any resources to its passage, such a hope had no empirical basis given strong voter support for Proposition 198.

76. The district court issued a decision that the Ninth Circuit adopted as its own in *California Democratic Party v. Jones*, 169 F.3d 646, 647–48 (9th Cir. 1999), cert. granted, 120 S.Ct. 977 (2000). The case is currently before the Supreme Court. See *supra* note 60.

77. The courts correctly rejected the idea that Proposition 198 could be viewed as a conflict between each party's organization and each party's party-in-the-electorate, that is, members of the public who are registered as members of the political party:

Defendants argue that because a majority of the members of the Democratic and Republican parties, and presumably of the minor parties, voted for Proposition 198, the membership of the parties have consented to Proposition 198 and therefore there is no issue for the court to resolve. There are three problems with this argument. First, even though the polls appear to be accurate, those polls do not report the votes of minor party members. It is only by inference that it can be concluded that minor party members also supported Proposition 198. Moreover, and second, even if the polls are accurate, this is not the way in which decisions customarily are made in our democracy. . . . Finally, the parties have selected certain procedures for the modification of their rules. These procedures require deliberation and decisionmaking by the parties' respective central committees. . . . The court therefore rejects the argument that the "parties," defined as the electorate, have agreed to Proposition 198 and that this lawsuit is merely an attempt by dissidents to carry on intra-party disputes that they previously lost at the ballot box.

Jones, 169 F.3d at 653 n.16.

78. Bruce Cain and Elisabeth Gerber are editing a forthcoming book examining the issues around the open primary. See Bruce Cain & Elisabeth Gerber, *California's Open/Blanket Primary: A Natural Experiment in Election Dynamics* (forthcoming); see also John R. Petrocik, *The Blanket Primary: Candidate Strategy and Voter Response* (Mar. 1999) (unpublished manuscript on file with the *Columbia Law Review*) (finding that candidates in blanket primary will appeal to cross-over voters who will respond by crossing party lines to vote for candidate in primary).

In assessing Proposition 198's constitutionality, the *Jones* court did not address the obvious question, which was whether it should consider the fact that the blanket primary law was passed by initiative rather than by a legislature. Such an argument has at least superficial appeal. Lowenstein, though skeptical of party associational claims, indirectly provides support for greater scrutiny of party regulation passed by initiative. He argues against heightened scrutiny of party regulations passed by the legislature because "when the government 'regulates' the parties, to a very large extent the parties are regulating themselves."⁷⁹ But such is not the case when a law regulating the parties is passed by initiative. There, the electorate is regulating the parties.

This difference suggests that courts perhaps should take a "hard judicial look" at laws regulating the political parties passed by initiative.⁸⁰ Although such a hard judicial look more strongly protects parties' associational rights, it comes at a cost: The initiative process is most valuable when it is used to regulate the political process, where self-interest and entrenchment of legislators makes it unlikely that the body will pass public-regarding election law.⁸¹ Making the initiative bypass harder to accomplish may serve to entrench legislative (including party) interests.

At bottom, the parties need special protection like the hard judicial look only if normal political processes fail to protect the parties. Such a circumstance seems quite unlikely. Parties generally remain well equipped to fend for themselves in the political process without additional court protection; courts should not ignore political parties' routine and pervasive exercise of influence over the legislative process.⁸² Accordingly, the hard judicial look is warranted only when the electorate shuts one or both of the parties out of the political process. This standard is akin to the standard the Supreme Court articulated in *Davis v.*

79. Lowenstein, *supra* note 27, at 1756.

80. Julian Eule argued for a hard judicial look at some laws passed by initiative, principally those concerning individual rights and equal protection of the laws. See Julian N. Eule, *Judicial Review of Direct Democracy*, 99 *Yale L.J.* 1503, 1559 (1990). His primary rationale for the harder look is that "direct democracy bypasses internal safeguards designed to filter out or negate factionalism, prejudice, tyranny, and self-interest. The judiciary must compensate for these process defects. It must serve as the first line of defense for minority interests; a back-up role is no longer adequate." *Id.* at 1549. I do not consider this broader argument in this Article. Indeed, Eule may have opposed the hard judicial look for initiatives regulating the parties. He wrote that where "the electorate acts to improve the processes of legislative representation, the justification for judicial vigilance is absent." *Id.* at 1559. Thus far, courts have refused (at least explicitly) to recognize a different standard for review of legislation passed by initiative. See *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295 (1981).

81. On the entrenchment problem, see Hasen, *supra* note 2; Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 *Stan. L. Rev.* 643 (1998); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 *Geo. L.J.* 491 (1997).

82. See Lowenstein, *supra* note 27, at 1758. In addition to "routine" and "pervasive," Lowenstein classifies such a role as "legitimate."

Bandemer.⁸³ In *Bandemer*, the Court recognized the justiciability of, but set a very high standard for, a claim that the state, acting through the majority party in the legislature, violated the Equal Protection Clause of the United States Constitution by engaging in "partisan gerrymandering" to the detriment of the other party.⁸⁴

The facts surrounding Proposition 198 illustrate why the hard judicial look generally is not required to protect political parties' associational rights. As noted above,⁸⁵ the parties did very little to convince the voters to reject Proposition 198. Yet the parties had enough power in the legislature to place Proposition 3 on the ballot. The parties then did almost nothing to support Proposition 3. The parties might have defeated Proposition 198 or sustained Proposition 3 if the Democrats had spent something close to the \$1 million that they spent opposing Proposition 165 or if the Republicans spent something close to the over \$2.8 million that they spent supporting Proposition 209. The parties simply failed to get the message out about the importance of defeating the blanket primary.

The evidence does not show that the parties were shut out of any political dialogue; rather it shows that the parties failed to engage the electorate in a debate over the values that the parties represent. In criticizing the party renewal movement, Lowenstein urged parties to take their case to the people, not to court.⁸⁶ This statement is all the more true applied to the initiative process. But the parties have not learned this lesson: Voters heard little about Propositions 198 and 3 until they reached the voting booth, where they had a disinclination to be charitable to the parties. Had the parties made a case for their relevance to the California voters, the results might have been different.⁸⁷

83. 478 U.S. 109 (1986).

84. See *id.* at 118–32 (holding that unconstitutional gerrymandering occurs "only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole").

85. See *supra* text accompanying notes 69–75.

86. See Lowenstein, *supra* note 27, at 1791. Lowenstein put his money where his mouth is, writing an op-ed article opposing Proposition 198. Daniel H. Lowenstein, A Recipe for Political Irresponsibility, *L.A. Times*, Mar. 22, 1996, at B9.

87. It is not the endorsement of the parties, but their devotion of resources to the issue, that could have made a difference. See Lowenstein, *supra* note 27, at 1785 nn.174–75 (contrasting unimportance of party endorsements with importance of devoting at least a modicum of resources toward an issue of importance).

I say that the results "might" have been different because admittedly the parties have a difficult argument to make. The parties needed to argue that Proposition 198 deserved defeat because strong party organizations are more important to democracy's health than further democratization of the nomination process. The argument smacks of elitism, and requires convincing the public about the benefits of a counter-majoritarian institution. But I do not believe such an argument would be out of the parties' reach, particularly because spending against initiatives tends to be effective. See Daniel H. Lowenstein, *Election Law—Cases and Materials* 561–62 (1995) (citing materials on the effect of opposition spending). But see Gerber, *supra* note 3, at 114–16 (noting that opposition

Far from being shut out of politics, parties have great influence over the political process. The point is demonstrated by the parties' strategy after defeat of their position on the blanket primary in the courts and the ballot box. The parties pushed through the California legislature a new law under which the California Secretary of State must code ballots in the blanket primary by party affiliation and then report results of voting for presidential delegates by party affiliation and total vote.⁸⁸ The national parties presumably will ignore the total votes and award delegates based on party affiliation. It remains to be seen whether the law will be challenged in court, and if challenged, whether it will be upheld: The California Constitution prohibits the Legislature from amending an initiative,⁸⁹ and arguably this law amends Proposition 198. Again, the parties are taking their battle everywhere but to the people.

Although the outcome of the Proposition 198 litigation is uncertain, neither the courts nor the Legislature will be willing or able to negate all initiatives regulating political parties. If political parties are concerned about how these initiatives will affect the health of the parties and democracy generally, they should take their case directly to the people. The parties could start by qualifying a measure for the ballot to overturn Proposition 198 and then actually working toward the measure's passage. Their experience with other initiative campaigns would assist them in this endeavor.

CONCLUSION

Parties are adaptable institutions capable of using available resources to their advantage, even resources like the initiative process aimed at weakening their political power. In California in the 1990s, parties did not control or even dominate the initiative process, but each party used a few high profile initiatives to improve its candidates' chances in elections. This trend has had at least one beneficial effect for voters: It has made voting on these initiatives more rational for voters by attaching a *de facto* party label to them.

The greatest threat that the initiative process poses to political parties is through the substance of the initiative, which, true to its Progressive roots, shows an anti-party bias. The parties thus far have failed to take their case to the people to reverse this bias. Instead, the parties have used other tools, like the legislature and the courts, to try to protect their associational rights. Because sometimes the legislature cannot act and the courts refuse to act, the parties ignore the initiative process regulating their rights at their peril.

spending by economic groups appears effective at lowering the probability of an initiative's passage while such spending by citizen groups does not).

88. Cal. Elec. Code §§ 15151, 15375, 15500 (West Supp. 2000).

89. See Cal. Const. art. II, § 10(c). The Constitution allows amendment without voter approval if the initiative so provides. Proposition 198 does not so provide.

APPENDIX

I gathered campaign finance data used in this Article by examining campaign disclosure forms on file at the California Secretary of State's office in Sacramento, the Los Angeles County Registrar of Voters, and, for older documents, at the California State Archives in Sacramento. To fill in gaps, I also relied upon summary reports issued by the Secretary of State's office. In examining the documents, I came across occasional discrepancies and I made what I hope are common sense judgments. Readers interested in my raw data should contact me by e-mail at <rick.hasen@lls.edu> or contact the *Columbia Law Review*.

For the categorization of initiatives by subject area, I made judgments based upon California's official ballot pamphlets and the "California Ballot Propositions" web page on the Los Angeles County Law Library web site, <www.lalaw.lib.ca.us/ballot.html>. The library web site also lists whether each ballot measure passed or failed. Official election results beginning with the June 1994 election are available on line at the California Secretary of State's home page, <www.ss.ca.gov>.