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Introduction

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**REBOOTING CALIFORNIA—
INITIATIVES, CONVENTIONS AND
GOVERNMENT REFORM:
SYMPOSIUM INTRODUCTION**

Karl Manheim, John S. Caragozian,** and
Donald Warner****

*All political power is inherent in the people.
Government is instituted for the protection, security and benefit
of the people; and they have the right to alter or reform the same,
whenever the public good may require it.*

—California Constitution of 1849, Article I, section 2¹

I. INTRODUCTION[†]

California is in trouble. Everyone knows it, but no one, it seems, is able to do anything about it. State government is failing its citizens in education, health care, infrastructure, parks, and elsewhere. Our chronic budget deficits are causing havoc in the delivery of public services and are depressing economic growth.² City, county, and

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1. The Constitution of 1879 repeated the same text, absent the last comma, and it has remained essentially the same since. This founding principle is now stated in the California Constitution, Article II, section 1: “All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require.”

† This Introduction and the articles in this Symposium issue were written for the campus symposium held on September 24, 2010. That was five weeks prior to the general election, at which some of the constitutional changes discussed in the articles were voted on. Where relevant, we have noted the results of the November 2, 2010, election.

2. The Legislative Analyst’s Office forecasts a General Fund deficit in excess of \$20 billion for 2010–2011 and similar amounts for the foreseeable future. “[T]he scale of the deficits is so vast that we know of no way that the Legislature, the Governor, and voters can avoid making additional, very difficult choices about state priorities.” *The 2010–11 Budget: California’s Fiscal*

school district budgets are repeatedly being raided, resulting in trickle-down misery.³ We know the Golden State⁴ has lost its luster when our license plates no longer carry that accolade but instead carry logos to “help our kids” and fund our firefighters, parks, environment, arts, universities, and a variety of other public services that once were among the nation’s best.⁵ At least it is better than a bake sale.

Not all of the state’s woes are of its own making. Some are due to the ongoing economic distress plaguing the nation and much of the developed world. California’s problems go far deeper and reach further back than the current recession. The more enduring problems are structural and affect the way we govern ourselves. Thus, while the people of California have retained the right to reform their government “whenever the public good may require it,” we have often had a hard time exercising that right in a constructive way.

Proposed solutions to California’s troubles are not in short supply, but ones that might actually work have been elusive. It seems that nearly every interest group—as well as many civic and governmental leaders—has a “fix” in mind. Many of these solutions wind up on the ballot, which results in a bewildering array of complex legislative and constitutional amendments being put before the voters on a regular basis. But, as it turns out, 38 million Californians,⁶ composing one of the most diverse populations in the world,⁷ struggle to competently exercise our inherent political power. The consequence is a “string of improvisations and hasty reforms

Outlook, LEGISLATIVE ANALYST’S OFFICE, Nov. 18, 2009, http://www.lao.ca.gov/2009/bud/fiscal_outlook/fiscal_outlook_111809.aspx.

3. *The 2010–11 Budget: California’s Fiscal Outlook*, *supra* note 2 (“[W]e estimate [school funding] will decline in 2010–11 and again in 2011–12. Thus, if the state funds schools at the levels reflected in our forecast, school districts could face significant difficulties due to the simultaneous decreases in federal and state/local funding.”).

4. “The Golden State” was made the official state nickname in 1968. *History and Culture—State Symbols*, CAL. STATE LIBRARY, <http://www.library.ca.gov/history/symbols.html> (last visited Oct. 11, 2010).

5. See *California Special Interest License Plates*, CAL. DEP’T OF MOTOR VEHICLES, <http://www.dmv.ca.gov/online/elp/elp.htm> (last visited Oct. 20, 2010).

6. *California 2010 Census*, CAL. COMPLETE COUNT, http://www.californiacompletecount.org/2010_census_explained/california_2010_census (last visited Oct. 11, 2010).

7. *California*, WIKIPEDIA, <http://en.wikipedia.org/wiki/California> (last visited Oct. 11, 2010).

that ha[ve] given California a governing system both unintended and unworkable.”⁸

The problems confronting California today are not nearly as dire as those that faced the nation at its inception. Still, as former state historian Kevin Starr has warned, we may be on the verge of becoming the “first failed state in America.”⁹ Accordingly, the challenge posed to the people of New York by Alexander Hamilton in Federalist Paper Number One is apropos:

[I]t seems to have been reserved to the people of this country, . . . to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force. . . . [T]he crisis at which we are arrived may with propriety be regarded as the era in which that decision is to be made; and a wrong election of the part we shall act may, in this view, deserve to be considered as the general misfortune of mankind.¹⁰

In the same spirit, but with less urgency, California’s own government structure needs repair. To that end, this Symposium issue of the *Loyola of Los Angeles Law Review* brings together notable scholars, political leaders, and policy advocates to address the overriding problems facing California today. As we shall see in the pages that follow, none of these groups have reached a consensus on these issues, either among the polity or the leaders and scholars of the state. But the purpose of this Symposium is more modest. This Symposium aims to contribute to the dialogue and perhaps inform it in positive ways. This will, we hope, provide material for thought and for action, a springboard both for further academic endeavor and for practical political and administrative steps toward reform. One

8. JOE MATHEWS & MARK PAUL, CALIFORNIA CRACKUP: HOW REFORM BROKE THE GOLDEN STATE AND HOW WE CAN FIX IT 2–3 (2010).

9. Thad Kousser, *Essay: The Blessings and Curses of Piecemeal Reform*, 44 LOY. L.A. L. REV. 569, 571 (2011) (quoting Kevin Starr in Paul Harris, *Will California Become America’s First Failed State?*, OBSERVER (London), Oct. 4, 2009, at 32, available at <http://www.guardian.co.uk/world/2009/oct/04/california-failing-state-debt>).

10. THE FEDERALIST NO. 1, at 1 (Alexander Hamilton) (A.B.A. ed., 2009).

thing is certain: California's luster is fading. We need a new approach.

The following articles, essays, and commentaries were presented at a live Symposium at Loyola Law School Los Angeles on September 24, 2010, a few weeks before the general election.¹¹ Earlier in the year, it appeared that the November ballot would include a proposal to call a constitutional convention.¹² The proposal ultimately did not make the ballot, but its proponents managed to launch several serious, albeit less ambitious in scope, efforts to bring about structural change. This Symposium issue covers those efforts, which consisted mostly of budgetary and political reforms.

The Symposium consisted of four panels, listed here along with the panelists. Contributors to this issue are indicated by asterisks and their pieces are briefly described later in this Introduction.

- *Fiscal and Budgetary Problems/Reforms*: Jon Coupal,¹³ John Heilman,¹⁴ Robert Hertzberg,¹⁵ and Sheila Kuehl.¹⁶ Dan Walters¹⁷ moderated this panel.
- *Electoral and Structural Reforms*: Jessica Levinson,^{*18} Justin Levitt,^{*19} Bruce McPherson,²⁰ and Allan Ides.^{*21} Sherry Bebitch Jeffe²² moderated this panel.

11. Not all of the oral presentations were accompanied by written submissions for the *Law Review*, but the Symposium website provides further information about all of the presenters. Loyola Law Sch. L.A., *Rebooting California: Initiatives, Conventions & Government Reform*, REBOOTCA.ORG, <http://rebootca.org> (last visited Oct. 20, 2010).

12. See *infra* notes 72–76 and accompanying text, and *infra* Part III.A.3.a; see also Steven Miller, *Getting to a Citizens' Constitutional Convention: Legal Questions (Without Answers) Concerning the People's Ability to Reform California's Government Through a Constitutional Convention*, 44 LOY. L.A. L. REV. 545, 547–48 (2011).

13. President, Howard Jarvis Taxpayers Association, whose talk was titled *Tax and Budget Limitations*.

14. Mayor, West Hollywood, California, and Professor of Law, Whittier Law School, whose talk was titled *Budgetary Impacts on California's Cities*.

15. Former Speaker, California State Assembly and Co-Chair, California Forward, whose talk was titled *Bipartisan Fiscal Reforms*.

16. Former Member, California State Senate, whose talk was titled *Tax and Budget Issues*.

17. Senior Political Writer and Columnist, *The Sacramento Bee*.

18. Director of Political Reform, Center for Governmental Studies, whose talk was titled *The Constitutionality of Open Primaries*.

19. Associate Professor of Law, Loyola Law School Los Angeles, whose talk was titled *The Potential of Citizen Redistricting*.

20. Former California Secretary of State and Leadership Council, California Forward, whose talk was titled *Get Real, and Reform*.

- *Mechanisms for Constitutional Reform*: Hon. Joseph Grodin,^{*23} Thad Kousser,^{*24} Ann Lousin,^{*25} Steven Miller,^{*26} and Raphael Sonenshein.^{*27} Karen Grigsby Bates²⁸ moderated this panel.
- *The Future of Direct Democracy—Reforming the Initiative Process*: Bruce Cain,²⁹ Christopher Elmendorf,³⁰ Robert Stern,^{*31} and Gerald Uelmen.^{*32} Warren Olney³³ moderated this panel.

In addition to our panelists and moderators, the Symposium featured as keynote speakers former Governor Gray Davis³⁴ and Daniel Schnur.³⁵ We owe a debt of gratitude to these keynote

21. Christopher N. May Professor of Law, Loyola Law School Los Angeles, whose talk was titled *Proportional Representation in the Legislature*.

22. Senior Fellow, School of Policy, Planning and Development, University of Southern California and Political Analyst, KNBC.

23. Former Associate Justice, Supreme Court of California and Distinguished Emeritus Professor, University of California Hastings College of the Law, whose talk was titled *Popular Sovereignty and Its Limits*.

24. Associate Professor of Political Science, University of California, San Diego, and Visiting Associate Professor, Bill Lane Center for the West, Stanford University, whose talk was titled *The Blessings and Curses of Piecemeal Reform*.

25. Professor of Law, John Marshall Law School, whose talk was titled *How to Conduct a Constitutional Convention*.

26. Hanson Bridgett LLP, Attorney for Repair California, whose talk was titled *Getting to a Constitutional Convention*.

27. Executive Director, Los Angeles Charter Reform Commission and Professor, California State University, Fullerton, whose talk was titled *Constitutional Revision Commissions*.

28. Los Angeles Correspondent for National Public Radio.

29. Director, Institute of Governmental Studies; Professor of Political Science, University of California, Berkeley, whose talk was titled *Fixing Ballot Box Budgeting*.

30. Professor of Law, University of California, Davis, whose talk was titled *Why Sensible Judicial Enforcement of the Amendment/Revision Distinction Requires a Constitutional Revision*.

31. President, Center for Governmental Studies, whose talk was titled *Improving the Initiative Process*.

32. Professor of Law, Santa Clara University School of Law, whose talk was titled *Enforcing the Single-Subject Rule for Initiatives*.

33. Host & Executive Producer, *Which Way, LA?* and *To the Point*, KCRW.

34. Gray Davis was California's 37th Governor (1999–2003). Prior to that, he was Chief of Staff to Governor Jerry Brown (1975–1981), California State Assemblyman (1983–1987), California State Controller (1987–1995), and the 44th Lieutenant Governor of California (1995–1999).

35. Chair, California Fair Political Practices Commission (FPPC) and Professor and Director, Jesse M. Unruh Institute of Politics, University of Southern California. Prior to being appointed to the FPPC, Schnur played an important role on the planning committee for the Symposium.

speakers, all of the panelists and moderators, and the many co-sponsors of the Symposium: the California State Association of Counties, the California Supreme Court Historical Society, the Center for California Studies at Sacramento State University, the Center for Governmental Studies, the Civil Justice Program at Loyola Law School Los Angeles, the Jesse M. Unruh Institute of Politics at the University of Southern California, the League of California Cities, and the United Way of California. Final thanks go to Victor Gold, Dean of Loyola Law School Los Angeles, for his indispensable support of this Symposium.

II. HOW WE GOT HERE

Californians “have the right to alter or reform the [state constitution], whenever the public good may require it.”³⁶ While as Californians we have managed to alter our constitution over 500 times since adopting it in 1879,³⁷ true reform has been elusive. The distinction, and perhaps the problem, is reinforced by the constitution itself, which permits “amendment” by voter initiative but does not permit voter-sponsored “revision.”³⁸ While the distinction between the meanings of “amendment” and “revision” is imprecise, the California Supreme Court has stated that a revision is “a fundamental change in the basic governmental plan or framework established by the Constitution.”³⁹ An amendment is a lesser change.⁴⁰

36. CAL. CONST. of 1849, art. I, § 2.

37. See Scott Dodson, *The Peculiar Federal Marriage Amendment*, 36 ARIZ. ST. L.J. 783, 803 n.127 (2004). Dodson suggests that as aggressive as California is in altering its constitution, it neither holds the record nor is unique in this respect. *Id.* For example, Alabama has amended its constitution over 700 times, and Texas has amended its over 400 times. *Id.*

38. Compare CAL. CONST. art. II, § 8(a) (“The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them.”), with CAL. CONST. art. XVIII, § 1 (“The Legislature by rollcall vote entered in the journal, two-thirds of the membership of each house concurring, may propose an amendment or revision of the Constitution . . .”).

39. *Strauss v. Horton*, 207 P.3d 48, 99 (Cal. 2009).

40. The California Supreme Court summarized its past holdings on the revision/amendment distinction in *Strauss*, 207 P.3d at 88–98. While we do not intend this Introduction to analyze the century-plus of case law on the difference between a revision and an amendment, it is fair to say that the court held that a proposed change in the constitution could affect “our basic plan of government” through either the *quantity* or the *quality* of the changes. If, by either measure, the proposed change sufficiently affected the “basic plan,” then the proposal would be a revision and the initiative would thus be unlawful. The holding in *Legislature of California v. Eu*, 816 P.2d 1309 (Cal. 1991), that “it must necessarily or inevitably appear from the face of the challenged

These labels—“revision” and “amendment”—have an enormous potential substantive difference. The constitution may be “amended” by (i) “two-thirds of the membership of each house concurring”⁴¹ or by (ii) petition signatures of voters “equal in number to . . . 8 percent . . . of the votes for all candidates for Governor at the last gubernatorial election,” followed by voter approval.⁴² However, the constitution may only be “revised” by two-thirds of the membership of each house, followed by voter approval⁴³ or by a constitutional convention called in a like manner.⁴⁴ In short, while the voters retain the power to initiate amendments, one-third-plus-one of the members of either house of the legislature can prevent any fundamental change to the constitution.

In California, as elsewhere,⁴⁵ super-majorities are exceedingly difficult to achieve. Thus, we remain stuck in a state of seemingly permanent impasse. To the extent that California’s problems—

provision that the measure will substantially alter the basic governmental framework of our Constitution” is also significant. *Id.* at 1319.

Unfortunately, these seemingly simple rules have been difficult to apply. For example, in *Raven v. Deukmejian*, 801 P.2d 1077 (Cal. 1990), the California Supreme Court struck down Proposition 115 as being an impermissible revision because it restricted state courts from granting criminal defendants rights in excess of those guaranteed by the U.S. Constitution. *Id.* at 1096. The Court reasoned that Proposition 115’s propensity to force state courts to follow federal courts’ criminal-procedure precedents constituted a severe limitation on “the independent force and effect of the California Constitution”—hence, a revision. *Id.* at 1088. On the other hand, the California Supreme Court in *Legislature of California v. Eu* upheld Proposition 140—which imposed the nation’s strictest term limits (and, according to many scholars and other experts, fundamentally changed the California Legislature)—as a permissible amendment because Proposition 140 fell short of substantially changing the “fundamental structure of the Legislature.” 816 P.2d at 1318. Under *Eu*, the possible long-term consequences of Proposition 140 and its future effects on California government were not relevant to the distinction between amendment and revision. *See id.*

In light of even this highly abbreviated history, we conclude that it is difficult to predict how the California Supreme Court would categorize various proposed reform initiatives (i.e., as permissible amendments or as impermissible revisions).

41. CAL. CONST. art. XVIII, § 1.

42. CAL. CONST. art. II, § 8(b); accord CAL. CONST. art. XVIII, § 3 (“The electors may amend the Constitution by initiative.”).

43. CAL. CONST. art. XVIII, § 1.

44. CAL. CONST. art. XVIII, § 2.

45. For example, the Illinois Constitution requires that amendments initiated in the general assembly be approved by three-fifths of each house and then approved again by the people. ILL. CONST. art. XIV, § 2. Similarly, the Texas State Constitution requires that proposed amendments be approved first by two-thirds of all members of both legislative houses and then subjected to a vote by the people. TEX. CONST. art. XVII, § 2.

persistently late and gimmick-laden budgets, underfunded elementary and secondary schools, colleges, universities, and the like—arise from the structure of state government, then the super-majority required for any constitutional revision is a severe barrier.

Much of the criticism deservedly falls on government leaders for their failure to address California's chronic problems. Nevertheless, as the ultimate sovereigns in the state's political system, the people themselves must bear principal blame. For example, a century ago, they gave themselves the power of direct democracy—the rights of initiative, referendum, and recall.⁴⁶ Yet, in the intervening years they have often exercised that political power in ways that have made matters worse. Initiatives have hobbled the government's ability to raise and spend money, to pass laws, to elect our representatives, and, worst of all, to fix the very problems the people created. Ballot measures that have gone awry, leading to unintended consequences, are often hard to remedy. This is especially true of initiatives that amend the state constitution, and there have been hundreds of them.⁴⁷

What started out in 1879 as “the third longest constitution in the world”⁴⁸ grew nearly five-fold to over 95,000 words before it was scaled back in 1974.⁴⁹ Its length defies the admonition of Chief Justice John Marshall in *McCulloch v. Maryland*,⁵⁰ as it “partake[s] of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the

46. “The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them.” CAL. CONST. art. II, § 8(a). “The referendum is the power of the electors to approve or reject statutes or parts of statutes” with certain exceptions. CAL. CONST. ART. II, § 9(a). “Recall is the power of the electors to remove an elective officer.” CAL. CONST. ART. II, § 13.

47. Symposium contributor Bruce Cain states that “[f]rom 1879 to the mid-nineties, California ranks first in the nation in proposed amendments (812) and second in adopted ones (485), averaging 4.25 per year.” Bruce E. Cain, *Constitutional Revision in California: The Triumph of Amendment over Revision*, Address at the Loyola of Los Angeles Law Review Symposium: Rebooting California—Initiatives, Conventions, and Government Reform (Sept. 24, 2010), available at www.rebootca.org/media.html.

48. BRIAN JANISKEE & KEN MASUGI, *DEMOCRACY IN CALIFORNIA: POLITICS AND GOVERNMENT IN THE GOLDEN STATE* 7 (2003).

49. PAT OOLEY, *STATE GOVERNANCE: AN OVERVIEW OF THE HISTORY OF CONSTITUTIONAL PROVISIONS DEALING WITH STATE GOVERNANCE, CONSTITUTION REVISION HISTORY AND PERSPECTIVE* 3, 6 (1996), available at www.californiacityfinance.com/CCRHistory.pdf; *California Constitution*, WIKIPEDIA, http://en.wikipedia.org/wiki/California_Constitution (last visited Oct. 11, 2010).

50. 17 U.S. 316 (1819).

public.”⁵¹ Indeed, the California “constitution” is not so much *constitutive* as it is *legislative*.⁵² Each passing fancy and political urgency, it seems, finds its way into our constitution.⁵³ This is not a new phenomenon. In 1930, the California Constitutional Revision Commission reported that “constant amendment” of the constitution had “produced an instrument bad in form, inconsistent in particulars, loaded with unnecessary detail, encumbered with provisions of no permanent value, and replete with matter which might more properly be contained in the statute law of the state.”⁵⁴

The souring promise of direct democracy did not abate as our experience with these political tools continued into the twenty-first century. In a 2009 speech, California Chief Justice Ronald George stated: “Frequent amendments—coupled with the implicit threat of more in the future—have rendered our state government dysfunctional.”⁵⁵ Notable examples support the chief justice’s concerns and illustrate unanticipated problems with direct democracy. Have the property-tax limitations of Proposition 13⁵⁶ weakened local government and school districts, putting them at the mercy of the state legislature? Have the term limits of Proposition 140⁵⁷ deprived the legislature of expertise and encouraged short-

51. *Id.* at 407.

52. See Karl Manheim & Edward Howard, *A Structural Theory of the Initiative Power in California*, 31 LOY. L.A. L. REV. 1165, 1165–74 (1998).

53. Many (perhaps most) initiatives seem ill suited for constitutional amendment. Without intending to disparage these in particular, some recent examples of voter-approved constitutional initiatives include Proposition 9, Victim’s Bill of Rights Act of 2008: Marsy’s Law, available at http://ag.ca.gov/cms_attachments/initiatives/pdfs/i771_07-0100_a1ns.pdf (requiring victims’ restitution), and Proposition 86, The Tobacco Tax Act of 2006, available at http://www.sos.ca.gov/elections/vig_06/general_06/pdf/proposition_86/entire_prop86.pdf (increasing cigarette tax). Even statutory initiatives may have quasi-constitutional status. The legislature “may amend or repeal an initiative statute” only when “the initiative statute permits amendment or repeal without [voters’] approval.” CAL. CONST. art. II, § 10(c). Thus, while approximately two-thirds of proposed initiative statutes since 1970 have permitted amendment by the legislature if consistent with the initiative’s purpose, the proponents of a statutory initiative have the option of insulating it entirely from the legislature. Robert M. Stern, *The Future of Direct Democracy*, Address at the Loyola of Los Angeles Law Review Symposium: Rebooting California—Initiatives, Conventions, and Government Reform (Sept. 24, 2010), available at www.rebootca.org/media.html; see *Amwest Surety Ins. Co. v. Wilson*, 11 Cal. 4th 1243 (1995).

54. OOLEY, *supra* note 49, at 6.

55. Joe Mathews, *The California Fix: Making Amends*, L.A. TIMES, Oct. 19, 2009, at A17.

56. This initiative has been embodied in the California Constitution, Article XIII(a).

57. The passage of Proposition 140 affected California’s constitution in several sections. The most notable are: CAL. CONST. art. IV, § 2(a) (limiting state Senators to two terms and state

sighted behavior? Have the school-funding guarantees of Proposition 98⁵⁸ tied the legislature's hands in dealing with budget shortfalls?

Our dysfunction is by now common knowledge and the focus of worldwide attention.⁵⁹ What is less understood, indeed seemingly beyond reach—or, at least, beyond consensus—is how to fix California. Many have offered solutions, some of which have real promise. But it is not known whether these proposals would be accepted by an impatient electorate or would actually work if implemented.

One of the problems is the very tool that was devised to get government out of the hands of powerful special interests and return control to the people. Direct democracy, most notably including the initiative process, was the fruit of the political reform movement of the early twentieth century,⁶⁰ an outgrowth of a populism and discontent of that time that is not all that different from that seen today in California and around the country. It is perhaps the ultimate irony that initiatives are now more likely to be used by moneyed special interests than by grassroots reformers.⁶¹ Indeed, grassroots

Assembly members to three terms); *id.* at art. V, § 2 (limiting any governor to two terms); *id.* at art. V, § 11 (limiting the lieutenant governor, attorney general, controller, secretary of state, and treasurer to two terms).

58. Proposition 98 impacted several sections of California's constitution. It added both section 5.5 and section 8.5 to Article XIII(b); in addition, it amended Article XIII(b), sections 2 and 8. *California Mandatory Education Spending, Proposition 98 (1988)*, BALLOTPEDIA, http://ballotpedia.org/wiki/index.php/California_Proposition_98_%281988%29 (last visited Nov. 20, 2010).

59. *E.g.*, Cal. Thomas Tribune Media Servs., *Time to Take on California's Bloated Budget*, SUN-SENTINEL (Fort Lauderdale), Oct. 15, 2003, at 25A, available at <http://articles.sun-sentinel.com/2003/oct/15>; Barrie McKenna, *California on 'Verge of System Failure'*, GLOBE AND MAIL (last updated Dec. 21, 2010, 1:18 PM), <http://www.theglobeandmail.com/report-on-business/economy/california-on-verge-of-system-failure/article1609891/>; Jeff Segal & Dwight Cass, *Treat California Just Like G.M.*, N.Y. TIMES, May 19, 2009, at B2; Dan Walters, *Outlook for Effective Change in California Is Poor*, SACRAMENTO BEE, Nov. 3, 2009, available at <http://www.scrippsnews.com/content/walters-outlook-effective-change-california-poor;> .

60. In California, Hiram Johnson spearheaded the movement. Johnson was elected as governor in 1910 and helped Theodore Roosevelt found the Progressive Party in 1912. *History of Initiative and Referendum in California*, BALLOTPEDIA, http://ballotpedia.org/wiki/index.php/History_of_Initiative_and_Referendum_in_California (last visited Oct. 22, 2010).

61. Perhaps no better example of this evolution can be described than that which underlaid the fate of the two proposed constitutional-convention initiatives described by attorney Steven Miller in his talk before the Symposium. Steven Miller, *Getting to a Constitutional Convention*, Address at the Loyola of Los Angeles Law Review Symposium: Rebooting California—Initiatives, Conventions, and Government Reform (Sept. 24, 2010), available at www.rebootca.org/media.html.

groups typically find initiatives to be beyond their reach: most initiatives require a minimum of \$2 million to \$3 million to pay professionals to gather the signatures that qualify an initiative for the ballot, not to mention the additional sums needed to campaign for voter approval.⁶² This upending of direct democracy is likely to accelerate now that the U.S. Supreme Court has given the green light to corporations and other moneyed interests to spend at will on elections.⁶³

As the proliferation of special-interest initiatives continues, often putting inconsistent demands on state-government structures, people wonder why government has broken down. State and local governments have fewer resources and fewer tools at their disposal to solve the problems of an increasingly complex and diverse society. But still we blame our leaders for the ensuing lack of leadership. As of mid-2010, the California Legislature's approval rating stood at a historic low—around 16 percent.⁶⁴ At 22 percent,

62. In 2010, a statutory initiative required 433,971 signatures to qualify for the ballot, and a constitutional initiative required 694,354 signatures to qualify. *How to Qualify an Initiative: Statewide Ballot Initiative Guide*, CAL. SEC'Y OF STATE, <http://www.sos.ca.gov/elections/ballot-measures/how-to-qualify-an-initiative.htm> (last visited Oct. 22, 2010). *California Signature Requirements*, BALLOTPEDIA, http://ballotpedia.org/wiki/index.php/California_signature_requirements (last visited Oct. 22, 2010). Usually, potential compensation for invalid signatures requires 20 or 30 percent more signatures. See *id.* Professional signature gatherers typically charge four to five dollars per signature. Ben van der Meer, *Tis the Season for Signature-Gatherers*, MODESTO BEE (Dec. 17, 2007), <http://www.modbee.com/2007/12/17/154626/tis-the-season-for-signature-gatherers.html> ("The gatherers are paid for every legitimate signature they get. The amount can vary, Arno said, from as little as 50 cents to up to \$9 or \$10 if organizers are running into a deadline to qualify the initiative."); *Paid Vs. Volunteer Petitioners*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=16502> (last updated June 17, 2010) ("Today, the vast majority of petition campaigns use paid circulators, who are paid between \$1 and \$3 per signature.").

63. See *Citizens United v. FEC*, 130 S. Ct. 876, 884 (2010) (extending the line of cases starting with *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 767 (1978), which held that corporations could spend money to influence ballot measures). For a recent example of industry's use of the initiative process to bypass or overturn the legislature, see Adam Nagourney, *California Braces for Showdown on Emissions*, N.Y. TIMES, Sept. 16, 2010, at A16, available at <http://www.nytimes.com/2010/09/17/us/17pollute.html?pagewanted=print> ("Charles and David Koch, the billionaires from Kansas who have played a prominent role in financing the Tea Party movement, donated \$1 million to the campaign to suspend the Global Warming Solutions Act, which was passed four years ago, and signaled that they were prepared to invest more in the cause. With their contribution, proponents of the proposition have raised \$8.2 million, with \$7.9 million coming from energy companies, most of them out of state.").

64. MARK DICAMILLO & MERVIN FIELD, FIELD RESEARCH CORP., THE FIELD POLL 1 (2010), available at <http://www.field.com/fieldpollonline/subscribers/RIs2346.pdf>; see also Jim Sanders, *California Redistricting Commission Wants a Few Good Citizens*, SACRAMENTO BEE,

the governor's was not much better.⁶⁵ And only 13 percent thought the state was moving in the right direction.⁶⁶ Californians are unhappy but are unsure how to proceed.

Perhaps it will take a revamping of the entire state constitution, or much of it, to restore a semblance of order to our government structures. Traditionally, a constitutional convention is the body that accomplishes wholesale revision of a constitution. It is there that "the people" come together in an act of ultimate sovereignty and assert their original political power. If a convention is successful, frailties and limitations imposed by existing structures are swept aside. We may write on a "clean slate," more than metaphorically.

But we may have overly romantic notions of constitutional conventions. The federal convention of 1789 produced a document that has proven to be one of the most successful foundational instruments of recent time. That convention operated illegally and was shrouded in secrecy,⁶⁷ but the intellectual giants and pragmatic leaders who attended and debated in Philadelphia begat a government that has endured and prospered through more than two centuries of tumult and change.

California's own experience with constitutional conventions is also the stuff of legend. Our first constitutional convention, in 1849, occurred in the aftermath of the U.S. military's conquest of California,⁶⁸ during the gold rush, and with an eye to prospective statehood's ramifications in Washington, D.C. It is not so much that California's then-existing government was inadequate. Rather there was no existing government,⁶⁹ despite a series of six disinterested or overwhelmed U.S. military governors beginning with the military

Dec. 16, 2009, at 1A, available at <http://www.sacbee.com/2009/12/15/2395982/california-redistricting-commission.html> (finding a 13 percent approval rating for the California Legislature).

65. DICAMILLO & FIELD, *supra* note 64, at 1.

66. *Id.*

67. DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 275–76 (2d ed. 2005).

68. *Constitutional Convention History*, CITY OF MONTEREY, <http://www.monterey.org/museum/conventhis.html> (last visited Sept. 1, 2010).

69. California's legal status was inchoate more than three years after the military conquest and even after the 1848 Treaty of Guadalupe Hildago. *Early Monterey History*, CITY OF MONTEREY, <http://www.monterey.org/museum/history.html#2> (last visited Oct. 21, 2010).

conquest in 1846.⁷⁰ The convention chose statehood, and, in 1850, Congress approved it.⁷¹

The delegates to the 1849 constitutional convention in Monterey had the opportunity to invent the state's government.⁷² They used the U.S. Constitution and other existing state constitutions as models, but California was the "Wild West" and it faced different conditions. So the delegates innovated.⁷³ For instance, California became officially as well as de facto bilingual, with the new constitution published in both English and Spanish.⁷⁴ Perhaps presaging later attempts to "legislate" via the constitution, the right of married women to own separate property—an unusual right then in the United States—was guaranteed.⁷⁵

This first constitution lasted a scant thirty years. By 1878, it was already apparent that Sacramento was unresponsive to emerging needs. A second convention was called, and this produced the constitution of 1879. This constitution incorporated important changes: for example, it instituted "home rule" for cities and counties, increasing their power and autonomy. But our second constitution also enshrined in the state's fundamental law provisions that reflected and enforced the rampantly anti-Chinese political climate of the 1870s and '80s. For this and other reasons, the 1879 constitution also lasted barely thirty years.⁷⁶

The years 1909 to 1911 saw not a third convention, but the emergence of constitutional reform at least as profound as the 1879 product. The initiative, the referendum, and the recall, which were adopted in 1911, have permanently shaped our government in no small way.⁷⁷ Since then, California has resorted to less-sweeping

70. *Id.*

71. *Id.*

72. *Id.*

73. See Eugene C. Lee, *The Revision of California's Constitution*, 3 CPS BRIEF 2 (Apr. 1991), available at http://www.repaircalifornia.org/Docs/california_history.pdf.

74. *Constitutional Convention History*, *supra* note 68.

75. *Id.*

76. See generally CAL. STATE ARCHIVES, CAL. SEC'Y OF STATE, INVENTORY OF THE WORKING PAPERS OF THE 1878–1879 CONSTITUTIONAL CONVENTION (1993), available at <http://www.sos.ca.gov/archives/collections/1879/archive/1879-finding-aid.pdf> (providing historical context and background to the 1878–1879 California Constitutional Convention).

77. *California Proposition 7 (1911)*, WIKIPEDIA, [http://en.wikipedia.org/wiki/California_Proposition_7_\(1911\)](http://en.wikipedia.org/wiki/California_Proposition_7_(1911)) (last visited Nov. 10, 2010).

changes to its governing document. The legislature has commissioned three separate Constitutional Revision Commissions.⁷⁸ The last disbanded in 1996.⁷⁹ These commissions spurred some important reforms, but they were fairly modest in scope.⁸⁰ We have not had a real constitutional convention for 130 years.⁸¹ As California has changed drastically since the nineteenth century, we may need to rethink the way we govern ourselves.

In 2009, two reform groups—perhaps despairing of nothing but continued, inadequate reforms—began efforts to call a constitutional convention. Under the current constitution, the legislature is the only body that can place a call for a constitutional convention on the ballot, just as it is the only body that can approve constitutional revisions.⁸² Such a call requires a two-thirds vote in each legislative house.⁸³ Yet the legislature is unlikely ever to muster the two-thirds majorities required.⁸⁴ Indeed, the last time the people asked for a convention, the legislature refused.⁸⁵ (This intransigency is not unique to California. Legislators elsewhere also see conventions as a threat to their power. And where they do accede to popular demands for a convention, they may seek the opportunity to control it.)⁸⁶ Accordingly, these two reform groups sought to bypass the legislature to call a convention. As the California Supreme Court

78. *California Constitution*, *supra* note 49.

79. *California Constitutional Convention*, BALLOTPEDIA, http://www.ballotpedia.org/wiki/index.php/California_constitutional_convention (last visited Nov. 10, 2010).

80. *Id.*

81. *Id.*

82. CAL. CONST. art. XVIII, § 2 (“The Legislature by rollcall vote entered in the journal, two-thirds of the membership of each house concurring, may submit at a general election the question whether to call a convention to revise the Constitution. If the majority vote yes on that question, within 6 months the Legislature shall provide for the convention. Delegates to a constitutional convention shall be voters elected from districts as nearly equal in population as may be practicable.”).

83. *Id.*

84. Karl Manheim et al., *The California Quagmire*, L.A. TIMES (May 24, 2010), <http://articles.latimes.com/2010/may/24/opinion/la-oew-manheim-20100524> (“However, the Legislature is unlikely to achieve such a supermajority on whether the Pacific Ocean is salty, so little chance exists that it would propose a convention or a new constitution.”).

85. Editorial, *The California Fix: Start from Scratch*, L.A. TIMES, Aug. 16, 2009, at A29.

86. The *New York Times* opposes a proposed constitutional convention for New York State for this reason. See Editorial, *The New York Convention Con*, N.Y. TIMES, Aug. 8, 2010, at A18.

observed in *Legislature of California v. Eu*,⁸⁷ “the initiative process may represent the only practical means of achieving the kind of ‘reforms’ of the Legislature involved [t]here, because the revision process can be initiated only with the consent of two-thirds membership of each house of the Legislature.”⁸⁸

A group called California Action Network realized the dual nature of the constitutional challenge ahead of it—to amend the constitution to allow a call by initiative, and then to make the call—and thus submitted two companion initiatives to the attorney general in June 2009.⁸⁹ This began the process of qualifying the initiatives for the November 2010 ballot.⁹⁰ The first initiative purported to “amend” the constitution by allowing the voters to call a constitutional convention by initiative. (In other words, the legislature would no longer be the exclusive route to a convention.) If voters approved that first initiative, the second measure would actually call a convention.

The initiatives were cleared for signature gathering, but the effort never got off the ground. Had it succeeded, the ensuing convention procedure would have been *unconventional*, indeed, *quirky*. The entire California Supreme Court would have been sequestered along with the delegates to “provide legal advice and counsel to the Convention.”⁹¹ Sequestration would be accomplished by the California Highway Patrol⁹² to “isolate [the delegates] from all contact with any efforts by any special interest, political party, non-elected third persons, and any other outside influence from any source, for the duration of the Constitutional Convention.”⁹³

87. 816 P.2d 1309 (Cal. 1991).

88. *Id.* at 1316.

89. See Paul Talcott Currier, Proposed Constitutional Amendment Article 36: Electors Right to Call for a Constitutional Convention, (June 23, 2009), http://ag.ca.gov/cms_attachments/initiatives/pdfs/i815_initiative_09-0018.pdf; Paul Talcott Currier, Proposed Constitutional Amendment Article 37: Electors Call a Constitutional Convention (June 23, 2009) (measure 09-0019), http://ag.ca.gov/cms_attachments/initiatives/pdfs/i816_initiative_09-0019.pdf [hereinafter Currier, Article 37].

90. *Id.*

91. Currier, Article 37, *supra* note 89, § 2(3).

92. *Id.* § 5(n).

93. *Id.* § 7(b).

A second and more serious effort to call a convention was undertaken in October 2009 by an initially well-funded group called Repair California. It too submitted two companion initiatives to the attorney general to begin the process of qualifying them for the November 2010 ballot. As with the California Action Network measures, Repair California's first initiative would "amend" Article XVIII of the state constitution to permit the calling of a "Citizens' Constitutional Convention" by initiative.⁹⁴ The companion initiative would have actually called the convention had voters approved the first initiative. "Amend" is in quotation marks because a lawsuit challenging the change to Article XVIII as an illegal "revision" of the constitution was inevitable. The lawsuit never materialized because the Repair California effort stalled when the group announced that it lacked the money to gather enough signatures to qualify the proposed initiatives for the ballot.

Thus, well-intentioned and highly touted efforts to reboot California by means of a constitutional convention never came about. The demise came despite strong backing from the governor⁹⁵ and from the *Los Angeles Times* ("the *Times*"), which devoted an entire editorial series to it. In "California Fix," the *Times* argued that California's constitution was so dysfunctional that it needed to "start from scratch."⁹⁶

After years of ballot measures that undermined or eradicated one another, Californians must recognize that our third convention is already underway and has been in session for more than three decades. It was called in 1978, when voters launched the property-tax revolt with Proposition 13. New resolutions come to the imaginary floor of this virtual convention. Some come from the left, creating programs and capturing funding, as with 2004's Proposition 63, which raised income taxes to fund mental health programs. Some come from the right, limiting governmental power and discretion, as with 1990's Proposition 140, which limited the time that state elected

94. See Jim Wunderman, Initiative Constitutional Amendment: Citizen's Constitutional Convention Act (Oct. 28, 2009), http://ag.ca.gov/cms_attachments/initiatives/pdfs/i863_initiative_09-0066.pdf.

95. George Skelton, *Schwarzenegger Is Getting His Second Wind as a Reformer*, L.A. TIMES (Feb. 26, 2009), <http://articles.latimes.com/2009/feb/26/local/me-cap26>.

96. See Editorial, *supra* note 85.

officials could serve in office. But instead of being considered together, these resolutions are adopted one by one, resulting in a patchwork document with a self-negating message: government must do more, and it must have less power and less money with which to do it.⁹⁷

Over the next several months, the *Times* continued with its editorial theme that California faced “so many problems, so many competing interests [that] only rewriting the Constitution will do.”⁹⁸ Yet, after the collapse of Repair California’s efforts, revising the state constitution remains a distant vision. It may be that entrenched interests simply will not let it happen. And without visionaries like Hiram Johnson, our state could easily remain in limbo for the indefinite future.

Of course, wholesale revision is not the only way to cure the most pressing problems with our constitutional structure or government institutions. We can continue with the piecemeal approach and perhaps—with luck, perseverance, and the economy’s eventual recovery—achieve meaningful reforms. Although the call for a convention did not appear on the 2010 ballot, a number of less-ambitious yet important measures did. Among these were measures prohibiting the state from seizing tax revenues dedicated to local government⁹⁹ and eliminating the legislature’s super-majority requirement to pass the state budget¹⁰⁰ or to impose fees and taxes,¹⁰¹ as well as competing initiatives to repeal or extend the non-partisan redistricting commission.¹⁰² Voters approved a June 2010 ballot measure replacing partisan primary elections with a “top-two” system. As with all of the recent amendments to the constitution, the

97. *Id.*

98. Editorial, *The California Fix: Taming the Beast*, L.A. TIMES, Sept. 30, 2009, at A29.

99. Proposition 22, which passed by a vote of 5,733,755 (60.7 percent) to 3,725,014 (39.3 percent). CAL. SEC’Y OF STATE, 2010 GENERAL ELECTION: STATEMENT OF VOTE 7 (2011), available at <http://www.sos.ca.gov/elections/sov/2010-general/complete-sov.pdf>.

100. Proposition 25, which passed by a vote of 5,262,051 (55.1 percent) to 4,292,648 (44.9 percent). *Id.*

101. Proposition 26, which passed by a vote of 4,923,834 (52.5 percent) to 4,470,234 (47.5 percent). *Id.*

102. Propositions 20 (extend) and 27 (repeal), of which Proposition 20 passed by a vote of 5,743,069 (61.3 percent) to 3,636,892 (38.7 percent). *Id.*

jury is still out, necessarily, on what these measures might accomplish, especially in the long term.

III. THE SYMPOSIUM ARTICLES AND ESSAYS

The notion of “rebooting” is derived from the computer operation where a malfunctioning operating system is shut down and restarted, clearing out any corrupted memory cells and software glitches.¹⁰³ Hopefully, rebooting California does not entail shutting the system down, although parts of it seem headed in that direction. Nonetheless, we may need to clear out malfunctioning components to get our “central processing unit” (state government) functioning again at the level we need.

Continuing with computer metaphors, our state seems to be “closed source”: various structural “locks” (e.g., legislative obstacles such as super-majority requirements for budgets and constitutional reform) impede our ability to adapt to challenges. This Symposium was an effort to move to an “open source” model in two senses—first, by examining those locks and advocating the removal of those that have become obsolete, and second, by seeking ideas from new sources. Thus, we invited some of the best political and legal minds to offer their solutions to particular problems in California governance.

This part summarizes the diagnoses and prescriptions offered at the Symposium, many of which are more fully developed in the articles and essays that follow this Introduction. The major issues have been divided into four categories: (1) budgetary and fiscal; (2) electoral; (3) constitutional reform; and (4) direct democracy. Each of these might justify a symposium in its own right. But they are all related, and they all contribute to California’s condition. Whether piecemeal or comprehensive reform is preferred is itself an issue discussed in the Symposium. All told, there are some excellent ideas in the pages that follow. We believe that some, at least, will

103. Starting a computer is often referred to as “booting” because older Disk Operating Systems (DOS) used a “boot” disk to initialize the operating system. The boot disk contained the initial instructions that the computer needed to talk to its various parts, including the central processing unit. *Booting*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Booting> (last visited Nov. 10, 2010).

take hold and that California's operating system will get a much-needed upgrade.

A. *The Symposium Panels*

Seventeen panelists and four moderators¹⁰⁴ explored the critical issues facing California.¹⁰⁵ Participants presented articles in the second, third, and fourth panels and offered provocative analyses in all of them.

1. Fiscal and Budgetary Problems and Reforms

The day before the Symposium, Governor Schwarzenegger and legislative leaders announced a “framework agreement” on the 2010–2011 state budget. Details were not released until just before the budget was approved on October 8, more than 100 days beyond the constitutional deadline,¹⁰⁶ making it the latest budget in California history.¹⁰⁷ The budget pleased no one. The *Times* called it “[a]n ugly, temporary answer to California’s intractable budget problems.”¹⁰⁸

Once again, California faced unsolvable budgetary constraints. Sacramento needed to close a \$19 billion gap between revenue and expenditures. The governor refused to entertain any tax increases, so the legislature resorted to the only tools at its disposal—spending cuts and budgetary gimmicks.¹⁰⁹ The cuts were brutal, including \$3.5 billion in public education¹¹⁰ and \$820 million in prison medical facilities (despite a federal court order that the state improve prisoner

104. *See supra* notes 13–33.

105. Video of the panels can be found on the Symposium website: <http://rebootca.org>.

106. CAL. CONST. art. IV, § 12 (“The Legislature shall pass the budget bill by midnight on June 15 of each year.”).

107. Shane Goldmacher & Evan Halper, *Lawmakers Sweat the Small Stuff; Budget OK Comes Only After Hours of Parochial or Partisan Wrangling*, L.A. TIMES, Oct. 9, 2010, at A1.

108. Evan Halper, *An Ugly, Temporary Answer to California’s Intractable Budget Problems*, L.A. TIMES (Oct. 10, 2010), <http://latimes.com/news/local/la-me-late-budgets20101010,0,2660478.story>.

109. Sheila Kuehl referred to this as “an all-cuts budget,” which the governor has proposed for five of the last six years. Sheila Kuehl, *Tax and Budget Issues*, Address at the Loyola of Los Angeles Law Review Symposium: Rebooting California—Initiatives, Conventions, and Government Reform (Sept. 24, 2010), available at www.rebootca.org/media.html

110. Even since Proposition 13, school districts in California have relied on state revenues for the bulk of their revenues, and they cannot easily make up shortfalls due to the requirement (also in Proposition 13) that property-tax increases (the traditional source for school funding) be approved by a two-thirds vote.

medical care). Governor Schwarzenegger made an additional \$1 billion in line-item cuts when he signed the budget bill.¹¹¹ The gimmicks, which had been used before, included pushing some expenditures into the next fiscal year and using unrealistic revenue projections, such as projecting \$2 billion more in federal revenue sharing than the legislature actually expected from Washington.¹¹² Creative accounting of this sort is one reason why California's budget problems are endemic.

There is broad consensus that California's fiscal problems are not transitory.¹¹³ They are deep-seated and structural. An obvious example is Proposition 13's requirement that the legislature, by two-thirds majorities in both houses,¹¹⁴ approve any tax increases. As Joe Matthews and Mark Paul note, this feature gave the minority party power to dictate tax policy without shouldering accountability to the voters for its actions: "The legislative majority felt the burden of governing the state, but the minority could delay the most basic task of the legislature—passing a budget—without being held responsible."¹¹⁵ The minority often extracted concessions for favored constituencies—California's version of pork-barrel politics—even during times of budgetary crisis. With Proposition 13, "[t]his form of hostage-taking became the norm."¹¹⁶

For several years after Proposition 13 forever altered the state's revenue system, the government of the world's eighth-largest economy managed to limp along on accrued surpluses, the dot-com boom, and other non-recurring events. However, booms turned to

111. Jack Dolan & Shane Goldmacher, *Veto Ax Cuts into Social Programs*, L.A. TIMES, Oct. 9, 2010, at AA.

112. The *Times* reported the following:

The most optimistic projections show that the spending plan Schwarzenegger signed Friday will produce a shortfall of at least \$10 billion—more than 11% of state spending—in the next fiscal year. Many experts predict it will be billions more. The leaders mostly papered over this year's gap, punting many tough decisions forward.

Halper, *supra* note 108.

113. See MATHEWS & PAUL, *supra* note 8, at 7, 79–104; see also *supra* page 394.

114. CAL. CONST. art. XIII A.

115. MATHEWS & PAUL, *supra* note 8, at 47–48. Previously, a two-thirds vote from each house of the legislature was needed to pass California's budget, but Proposition 25, which passed on November 2, 2010, changed the two-thirds requirement to a simple majority. Proposition 13's two-thirds requirement for tax increases was unaffected by Proposition 25.

116. *Id.* at 47.

busts and the economic house came crashing down. The panelists on the Symposium's first panel had different prescriptions for putting our fiscal house back in order.

Jon Coupal—who carries the torch of the late Howard Jarvis, author of Proposition 13—rejected that tax-cutting measure as the source of the state's perpetual budget crisis.¹¹⁷ It is not the lack of revenues that plagues the state, he claimed, but the expansion of spending programs.¹¹⁸ It is the “change in the perception of government; less as an instrument to provide services for all, than more as an instrument to pick winners and losers, or even worse to redistribute wealth.”¹¹⁹ Coupal thinks California would be better off with a part-time legislature and more spending limits in order to rein in unnecessary spending, such as spending on bloated welfare rolls.

Other panelists echoed Coupal's criticism of legislative spending, although they did not necessarily agree with his analysis of cause and effect. West Hollywood Mayor John Heilman presented the perspective of California's municipalities.¹²⁰ Heilman said that one feature of Proposition 13 is that it removed revenue authority from local governments, and it was reposed in Sacramento. As a result of its fiscal dominance, the legislature often solves state-government budget problems on the backs of California cities, counties, and school districts. Heilman complains that this “raiding” of local-government revenues seriously undermines local government's ability to provide public services.¹²¹ Heilman spoke in favor of the November 2010 ballot's Proposition 22, which protects local revenue sources from the legislature.¹²² He also criticized the two-thirds-majority requirement for state budgets, claiming that it

117. Jon Coupal, Tax and Budget Limitations, Address at the Loyola of Los Angeles Law Review Symposium: Rebooting California—Initiatives, Conventions, and Government Reform (Sept. 24, 2010), *available at* www.rebootca.org/media.html.

118. *Id.*

119. *Id.*

120. John Heilman, Budgetary Impacts on California's Cities, Address at the Loyola of Los Angeles Law Review Symposium: Rebooting California—Initiatives, Conventions, and Government Reform (Sept. 24, 2010), *available at* www.rebootca.org/media.html.

121. *Id.*

122. *Id.*

generally lowers bond ratings and raises the cost of capital for municipal borrowing.¹²³

Sheila Kuehl, who served six years in the California Assembly and eight years in the state senate, reinforced Heilman's criticism of the budget process.¹²⁴ She claimed that beyond the budget process, the ideological polarization of the state (and the country) has led to an impasse.¹²⁵ Some, including then-Governor Schwarzenegger, want to cut education or services to the poor, while others seek to close tax loopholes for the wealthy and corporations. Kuehl gives property taxes under Proposition 13 as an example: homeowners are taxed on an average assessed valuation of \$16 per square foot, while Disneyland is taxed on a valuation of 5 cents per square foot.¹²⁶ Kuehl and several other panelists painted Proposition 13 as a leading cause of the state's ills.¹²⁷ Some of the panelists suggested a "split-roll," where property-tax limits would remain on residential property but would be removed from commercial property.¹²⁸

Kuehl also bemoans the deteriorating state of California public schools. Discussing the Santa Monica-Malibu Unified School District, she said it is

one of the best funded in the state, [but] we have no full-time janitors. The students do work-study to try to keep it clean. We have no school libraries, really. . . . We have no school nurses. . . . We laid off 16,000 teachers last year because of the budget.¹²⁹

123. *Id.*

124. Kuehl, *supra* note 109.

125. *Id.*

126. *Cf.* CAL. TAX REFORM ASS'N, SYSTEM FAILURE: CALIFORNIA'S LOOPHOLE-RIDDEN COMMERCIAL PROPERTY TAX 83 (2010), available at http://www.caltaxreform.org/pdf_ppt/SystemFailureFinalReportMay2010.pdf (stating that recent Disneyland property acquisitions are taxed at a valuation of 37 cents per square foot).

127. Kuehl, *supra* note 109.

128. *Id.*

129. *Id.* In actuality, most sources report layoffs exceeding 26,000, not 16,000. *See, e.g.*, News Release, Cal. Dep't of Educ., Schools Chief Jack O'Connell Joins Educators in Recognition of Record Number of Teachers Receiving Layoff Notices (Mar. 14, 2009), available at <http://www.cde.ca.gov/nr/ne/yr09/yr09rel40.asp>.

Kuehl's prescription "to cure the dysfunction" includes eliminating the two-thirds majority requirement for passing a budget "and then hold[ing] the majority responsible for the budget."¹³⁰

Bob Hertzberg, former speaker of the assembly, agreed: California's budget mess is why "we can't make California work in this globalized economy."¹³¹ At the recent World Economic Forum in China, which he attended, California was seen as an embarrassment. "The story that comes out is that we can't seem to get our government together."¹³² Hertzberg also spoke of one of Proposition 13's "unintended consequences," which was to remove revenue accountability from local government officials and centralize it (and spending policy) in Sacramento.¹³³

Hertzberg's view is widely shared.¹³⁴ Now distanced from the electoral scrutiny that accompanies responsibility for raising revenue, local governments have pursued often highly irregular spending priorities. For instance, according to Mathews and Paul, the median wage in 2008 of Sacramento Metropolitan Fire District truck drivers was \$144,274, about three times the median wage in Sacramento County.¹³⁵ No one was looking, it seems, when fiscal accountability was lifted off of local governments and sent to the state legislature. Nor did anyone understand this transfer of power and loss of accountability as one of the major reforms of Proposition 13.

From there, the fiscal picture and the shenanigans get even worse. Lower bond ratings raise the cost of borrowing for meritorious projects and create an uncertain business climate, just when we can least afford it. Since the state cannot live off borrowed money—except when it does—the legislature consistently sanitizes truly scary budgets by resorting to gimmicks, such as delaying a payday by a day, throwing it into the next fiscal year, or presuming returns on investments that will never materialize. Or "deeming" that

130. *Id.*

131. Robert Hertzberg, Bipartisan Fiscal Reforms, Address at the Loyola of Los Angeles Law Review Symposium: Rebooting California—Initiatives, Conventions, and Government Reform (Sept. 24, 2010), available at www.rebootca.org/media.html.

132. *Id.*

133. *Id.*

134. *Id.*

135. MATHEWS & PAUL, *supra* note 8, at 55.

past revenues were at a level they actually were not at.¹³⁶ “Deeming” (rewriting) history is a technique that would have made Big Brother proud.¹³⁷

Perhaps we will soon start charging for public safety services, just as we do for use of parks, education, health care, and other social services. Or we can furlough university professors and pay them only for the days they actually teach¹³⁸ and not for non-teaching days when they are idle (i.e., when they are preparing classes, doing research, meeting with students, grading papers, contributing to professional organizations, doing government and non-profit consulting, recruiting, collaborating, giving interviews, performing administrative tasks, etc.; all idle activities apparently). And remember when those pesky parking tickets were \$5? Fines, fees, excises, charges, reimbursements, assessments, and other taxes (except that the state cannot now call them taxes) fill holes in local budgets that once were the province of property taxes. And watch out for those red-light cameras. At \$500 per ticket, one might think one was single-handedly funding what is left of municipal government.¹³⁹

California government is under attack from the right because of the perception of high taxes; it is under attack from the left for failing to provide what are perceived to be essential social services

136. For instance, in 1993, Senate Bill 1135 allocated \$2.6 billion of local property-tax revenues to newly created Educational Revenue Augmentation Funds within each county to partially offset the legislature’s Proposition 98 funding requirements. CAL. REV. & TAX. CODE §§ 97.02, 97.035 (West 2009). To further reduce the legislature’s funding obligations, the California Education Code provided that “fund revenues appropriated for school districts and community college districts, respectively, in fiscal year 1986–1987 . . . shall be deemed to be” a different amount than was actually appropriated by the legislature seven years earlier. CAL. EDUC. CODE § 41204.5 (West 2009) (emphasis added).

137. Cf. GEORGE ORWELL, NINETEEN EIGHTY-FOUR (1949) (rewriting history constantly to reflect current policies).

138. While many states, including California, have begun to furlough university professors, Arizona State University seems to have perfected the scheme with its 8–12 percent salary reduction. “Faculty members will take furloughs on days they don’t teach class, and supervisors of staff members will be staggering furloughs so that the university remains fully operational.” Michael Crow, *Message from President Michael Crow*, ASU NEWS (Jan. 28, 2009), http://asunews.asu.edu/20090128_furloughprogram (last visited Oct. 10, 2010).

139. See *All Things Considered: \$500 for Running a Red Light? Blame the Camera*, National Public Radio (Apr. 14, 2010), available at <http://www.npr.org/templates/story/story.php?storyId=125990368>. Traffic cameras are big-time money generators for municipalities, and it is no wonder that “to help solve California’s \$20 billion dollar crisis, Governor Arnold Schwarzenegger has suggested retrofitting 500 city and county traffic cameras to generate even more money.” *Id.* The fine for running a red light in Culver City can be \$540. *Id.*

(education, health care, elder care, and so forth). Likewise, both Wall Street (which has downgraded both the state and local governments' bonds) and public-employee labor unions (which saw their members furloughed and once faced the threat of Governor Schwarzenegger's minimum-wage order) have declining confidence in the state's government. Also, the trickle-down effects on local governments have included broad employee furloughs, superior court staff layoffs, school librarian layoffs, early releases of jailed inmates, closing of public libraries, elimination of cultural and recreational programs, and so on and on and on. Is anyone pleased with the state's government or financial picture?

2. Electoral and Structural Reforms

The foundational idea of democracy is that government exists with the consent of the governed. Yet in 2010, California's government was so broadly unpopular that one may have wondered about its legitimacy. Governor Arnold Schwarzenegger, who replaced former Governor Gray Davis after the latter's recall in 2003, has ratings as low or lower than those of the governor he ousted.¹⁴⁰ The legislature, in turn, is even less popular than the governor.¹⁴¹ That the state's government is so unpopular with so many major constituencies cannot be the mere result of enacting a controversial statute or two. Such statutes might well draw criticism from opponents, but they should draw support from proponents. In California it is difficult to find any supporters of the current government.

Under these circumstances, it is reasonable to ask whether the very structure of California government is at least partly responsible. State fiscal problems may underlie many features of life in California that its citizens find unsatisfactory. Underlying those fiscal problems, however, are aspects of governmental structure (e.g., the relationship between the state and subordinate governmental entities and the role of initiatives and referenda in legislation) and political process (e.g.,

140. David Siders, *Arnold Schwarzenegger Approval Drops to Record Low—Tied with Gray Davis*, SACRAMENTO BEE (Nov. 30, 2010, 10:19AM), <http://www.sacbee.com/2010/07/14/2888500/arnold-schwarzenegger-approval.html>.

141. *Id.*

direct democracy again, term limits, voting methods, the role of money) that must be addressed if we hope to accomplish reform.

Going beyond this general answer, that governmental structure is at least in part to blame, involves substantial debate, as various constituencies assess the likelihood that a particular restructuring may or may not be of future benefit. We should not shy away from such debates, as democracies are supposed to allow—indeed, encourage—them. That is the focus of some of the articles in this Symposium.

First, and most important, what type of government do we want for the long term? By that, we do not mean to ask whether we want a dictatorship or a democracy, or even whether we should have a republican form of government as guaranteed by Article IV of the U.S. Constitution. Just as within that guarantee, there is a wide range of possible democratic structures.

*a. Allan Ides—Proportional representation in the legislature*¹⁴²

Professor Ides explores the possibility of replacing our bicameral legislature with a unicameral one based on mixed membership, in the following sense.¹⁴³ Such a body would be selected in part using the single-member district, plurality-takes-all system we currently have.¹⁴⁴ But an equal part of the legislature would be selected based on proportional representation, as practiced in most other industrial democracies.¹⁴⁵ He posits that such a system would better reflect voter preferences and would release us from the duopolistic (two-party) political system that has, recently at least, failed to responsibly govern the state.¹⁴⁶

Ides argues that our bicameral legislature (and that of every other state but Nebraska) is a relic of the class-based division of power in the British Parliament, where one house represented the

142. Allan Ides, Proportional Representation in the Legislature, Address at the Loyola of Los Angeles Law Review Symposium: Rebooting California—Initiatives, Conventions, and Government Reform (Sept. 24, 2010), available at www.rebootca.org/media.html; see Allan Ides, *Approximating Democracy: A Proposal for Proportional Representation in the California Legislature*, 44 LOY. L.A. L. REV. 437 (2011) [hereinafter Ides, *Approximating Democracy*].

143. Ides, *Approximating Democracy*, *supra* note 142, at 441.

144. *Id.* at 455.

145. *Id.*; see *id.* at 440.

146. *Id.* at 441.

aristocracy and royalty, a feature long gone (one hopes) from this continent.¹⁴⁷ It also emulates the structure of the U.S. Congress but lacks basis in federalism for having two houses differently composed.¹⁴⁸ Given that the California Senate and Assembly are now both selected in the same manner and represent similar constituencies, a bicameral legislature serves only one purpose—to impede the enactment of majority-supported legislation.¹⁴⁹ It is anti-democratic in that it gives the party out of power two chances to defeat popular legislation.¹⁵⁰ This is especially apparent with the super-majority requirements noted above for the adoption of budgets, tax policy, and any meaningful reform measures. A bicameral legislature may have been an innocuous feature of earlier, smaller governments, but it has become an obstacle to effective governing in modern times, especially given the extreme partisan battlefield that American politics has become.¹⁵¹

Ides further argues that half of the legislature should be selected through an “open party list” system, where each party appearing on the ballot is awarded seats in proportion to their respective shares of the regional vote as long as they surpass a qualifying threshold (Ides suggests 5 percent of the total vote).¹⁵² He argues that the advantages of proportional representation are several: to break the duopoly’s hold, to promote minority and female representation, to better reflect California’s political pluralism, and to create the truly representative democracy that we cherish.¹⁵³

147. *Id.* at 455.

148. At one time, the senate and assembly emulated the U.S. Congress in that the two houses represented different political communities. Assembly districts were based on population, while senators represented counties. *Reynolds v. Sims*, 377 U.S. 533 (1964), held that that structure violated the 14th Amendment’s equal protection clause. *Id.* at 568.

149. Ides, *Approximating Democracy*, *supra* note 142, at 456.

150. *See id.*

151. *See* Harold Meyerson, *A One-House Legislature*, L.A. TIMES, Aug. 21, 2009, at A35 (“In the name of fostering transparency, ending gridlock, curtailing backroom deals and creating a more responsive government, why doesn’t California just abolish the Senate and create a larger Assembly?”).

152. Ides, *Approximating Democracy*, *supra* note 142, at 459–60.

153. *Id.* at 444, 462.

*b. Jessica Levinson—The constitutionality of open primaries*¹⁵⁴

Jessica Levinson questions the constitutionality of one of California's latest ventures into constitutional change: Proposition 14.¹⁵⁵ Passed in the June 2010 election, Proposition 14 creates open primary elections in which only the top two vote-getters—regardless of their party affiliations—proceed to the general election.¹⁵⁶ Levinson explains the problems created by an open primary for third-party and independent candidates. However, before sounding the death knell for these candidates in California, Levinson examines whether Proposition 14 could survive scrutiny by the U.S. Supreme Court.¹⁵⁷

Here, she provides a comprehensive survey of the Court's decisions surrounding the ballot access of minor parties and independent candidates. While the case law is anything but clear, Levinson projects that Proposition 14 would ultimately not survive scrutiny under the Court's current test for determining the constitutionality of ballot access restrictions.¹⁵⁸ However, Levinson does not rely on the Court to remedy the problems that Proposition 14 has created. Rather, she proposes legislative solutions: changing the election code's qualification threshold and allowing write-in votes.¹⁵⁹

154. Jessica A. Levinson, *The Constitutionality of Open Primaries*, Address at the Loyola of Los Angeles Law Review Symposium: Rebooting California—Initiatives, Conventions, and Government Reform (Sept. 24, 2010), available at www.rebootca.org/media.html; see Jessica A. Levinson, *Is the Party Over? Examining the Constitutionality of Proposition 14 as It Relates to Ballot Access for Minor Parties*, 44 LOY. L.A. L. REV. 463 (2011) [hereinafter Levinson, *Is the Party Over?*].

155. Levinson, *Is the Party Over?*, *supra* note 154, at 467–68.

156. *Id.* at 467.

157. *Id.* at 507–13.

158. *Id.* at 511.

159. *Id.* at 513.

*c. Justin Levitt—The potential of citizen redistricting*¹⁶⁰

In his Symposium remarks, Professor Levitt explores the experiment that is citizen redistricting. While Levitt is conscious of the advantages implicit in entrusting the redistricting process to incumbent legislators—such as political accountability, negotiation skills, and expertise—he is equally mindful of the challenges that such trust implicates.¹⁶¹ Here, Levitt uses examples to demonstrate that giving legislators the redistricting responsibility poses the danger that the public interest will be conflated with both personal and partisan interests, somewhat like giving the fox the keys to the henhouse.¹⁶² With this in mind, Levitt turns to the alternatives—from hypothetical computer programs to Iowa’s non-partisan legislative staff agency model—focusing his exploration on California’s experiment with citizen redistricting.¹⁶³ Two measures on the November 2010 ballot implicated citizen redistricting. One measure aimed to repeal the existing but not yet active citizen-redistricting experiment, and the other sought to extend the citizen-redistricting panel’s powers to include not only the state legislature but also Congress.¹⁶⁴

While Levitt admits that citizen redistricting is no “magic bullet” for all of California’s ills, he thinks that the redistricting process—if entrusted to a group of people without any natural conflicts of interest in the lines they are charged to draw—would be a powerful tool. As Levitt explains, California’s model involves careful screening to ensure that the redistricting commission is politically balanced and mirrors the diversity of the state.¹⁶⁵ Though it is not definite that citizen redistricting will actually happen, Levitt notes that perhaps open minds are the most important tools for

160. Justin Levitt, *The Potential of Citizen Redistricting*, Address at the Loyola of Los Angeles Law Review Symposium: Rebooting California—Initiatives, Conventions, and Government Reform (Sept. 24, 2010), available at www.rebootca.org/media.html [hereinafter Levitt, Address]; see Justin Levitt, *The Potential of Citizen Redistricting*, 44 LOY. L.A. L. REV. 513 (2011) [hereinafter Levitt, *Potential*].

161. Levitt, *Potential*, *supra* note 160, at 519–21.

162. *Id.* at 520–21.

163. *Id.* at 522–42.

164. *Id.* at 515.

165. *Id.* at 534–35.

individuals on the commission to have.¹⁶⁶ The commission must move beyond preconceived notions of what good districts look like because people do not live in “little boxes and nice little circles.”¹⁶⁷ Rather, in order to draw districts that work to serve their communities’ needs, the commission must be prepared and trained to perform technically tricky drawing. Entrusting a commission that embodies all these qualities with citizen redistricting could, as Levitt concludes, be a “very promising experiment.”¹⁶⁸

*d. Bruce McPherson—Get real, and reform*¹⁶⁹

Bruce McPherson states that California is already being reformed in part. Proposition 11, passed in 2008, established a non-partisan citizens’ commission for drawing boundaries for state senate and assembly districts.¹⁷⁰ Also, Proposition 14, passed in 2010, created top-two primaries for all congressional and state elections. These two propositions may result in more moderate legislators and executives being elected in California.

In terms of future reforms, McPherson recommends relaxing term limits. In that regard, an initiative to that effect has already qualified for the 2012 ballot. That measure would allow legislators to serve in the state senate or assembly for up to twelve years total. He also recommends reforming the initiative process. These reforms might include banning paid signature gatherers, demanding coordination between initiative proponents and the legislature, and requiring initiatives that contain any spending mandates to identify funding sources.

3. Mechanisms for Constitutional Reform

As we peel back the layers of causation of the state’s problems, we come to the 1879 constitution, which is still in effect, albeit

166. Levitt, Address, *supra* note 160.

167. *Id.*

168. *Id.*

169. Bruce McPherson, Get Real, and Reform, Address at the Loyola of Los Angeles Law Review Symposium: Rebooting California—Initiatives, Conventions, and Government Reform (Sept. 24, 2010), available at www.rebootca.org/media.html.

170. Proposition 20 in November 2010 expanded the non-partisan citizens’ commission’s role to drawing boundaries for congressional districts. See CAL. SEC’Y OF STATE, CALIFORNIA GENERAL ELECTION: VOTER INFORMATION GUIDE 95–97 (2010).

absent many of the racial provisions that, at least in part, motivated the 1879 convention. It can be persuasively argued, and some among our authors have done so, as has the *Times*, that the constitution is the primary source of California's ills and that substantially amending or revising it, or even replacing it entirely, is a necessary predicate to real reform.¹⁷¹

*a. Steven Miller—Getting to a citizens' constitutional convention*¹⁷²

Symposium contributor Steven Miller was the principal drafter of the Repair California initiatives.¹⁷³ His article reviews the process that led up to Repair California's convention effort and the problems it faced had the call for a convention actually qualified for the ballot. For instance, the first of Repair California's initiatives would have "amended" article 18, section 2 of the California Constitution to break the monopoly the legislature currently has over calling a convention.¹⁷⁴

Legislative control over the convention process is part of the problem, not just in California but elsewhere.¹⁷⁵ But fixing that problem runs headlong into another—actually, the same—problem, just stated differently. Bypassing the requirement that two-thirds of the legislature must call a convention might itself require a constitutional "revision," which can only be proposed by, you guessed it, two-thirds of the legislature.

From Repair California's perspective, "[i]t seemed clear that the legislature would never act."¹⁷⁶ The group's stance was demonstrated by its end run to "amend" the constitution by initiative, in the hope that the California Supreme Court would permit the effort. Miller

171. Editorial, *supra* note 85; Editorial, *supra* note 98.

172. Steven Miller, Getting to a Constitutional Convention, Address at the Loyola of Los Angeles Law Review Symposium: Rebooting California—Initiatives, Conventions, and Government Reform (Sept. 24, 2010), available at www.rebootca.org/media.html; see Miller, *supra* note 12.

173. *Supra* note 26.

174. CAL. CONST. art. XVIII, § 2.

175. See, e.g., *The New York Convention Con*, N.Y. TIMES, Aug. 8, 2010, at A18 ("The Legislature has to start the process of calling this constitutional convention. Then, the political establishment—mainly the Legislature—gets to pick most of the delegates. If it sounds like an inside job, it is.").

176. Miller, *supra* note 12, at 549.

explores the legal implications of the convention initiatives and investigates whether the distinction between “amendment” and “revision” is an insurmountable barrier to citizen-initiated reform. Miller’s article is also designed as a practical guide for future reformers “with an eye toward improving on [Repair California’s initiatives] and trying in the future to chart a more successful path to a constitutional convention.”¹⁷⁷

*b. Thad Kousser—The blessings and curses of piecemeal reform*¹⁷⁸

Professor Kousser examines the three routes to creating constitutional change in California: calling a constitutional convention, crafting reform through the legislature, or placing individual amendments on the ballot.¹⁷⁹ While Kousser evaluates each approach in informative detail, he focuses much of his analysis on the last of these three paths—California’s piecemeal approach to constitutional change.¹⁸⁰ Focusing on this third path is, of course, appropriate since, as Kousser notes, it has become the “most-trafficked avenue to constitutional change.”¹⁸¹

Here, Kousser details the blessings and the curses of the piecemeal approach.¹⁸² One of the most important theoretical benefits that the piecemeal approach provides is the opportunity for reformers to make incremental change, adjusting their proposals after observing the effects of their efforts.¹⁸³ This approach, Kousser implies, must be addressed to efforts at reform that are both comprehensive and successful. Of course, as California well knows, the piecemeal system is also cursed with troubles. Kousser details these as well, and with these critiques in mind, proposes an alternative fourth path to California constitutional change—a series of bipartisan, single-subject “logrolls”—that Kousser contends will

177. *Id.* at 548.

178. Thad Kousser, *The Blessings and Curses of Piecemeal Reform*, Address at the Loyola of Los Angeles Law Review Symposium: Rebooting California—Initiatives, Conventions, and Government Reform (Sept. 24, 2010), *available at* www.rebootca.org/media.html; *see* Kousser, *supra* note 9.

179. Kousser, *supra* note 9, at 573.

180. *Id.* at 573–74.

181. *Id.* at 583.

182. *Id.* at 573–74.

183. *See id.* at 584.

balance the blessings and the curses of the piecemeal approach, enabling effective reform.¹⁸⁴

*c. Ann Lousin—How to conduct a constitutional convention*¹⁸⁵

Drawing in part on her experience with the Illinois Constitutional Convention in 1970,¹⁸⁶ Professor Lousin outlines the steps a state—such as California—should take to hold a successful constitutional convention.¹⁸⁷ Lousin guides reformers through her top ten list of suggested factors that should be common to all modern and successful constitutional conventions.¹⁸⁸ Underpinning each factor are the intertwined concepts of preparation and transparency that, for Lousin, are the two undeniable keys to a successful convention.¹⁸⁹

While Lousin's list is drawn from her experiences in Illinois, and is customized for California, it is easily broadened for any sort of political climate in the fifty states. This wide applicability likely stems from the universality implicit in Lousin's two key concepts: preparation and transparency. As Lousin notes, a successful constitutional convention—no matter the particular political stage—will take hard work, goodwill, and compromise, both to draft a sound constitution and also to persuade voters to adopt it.¹⁹⁰ Preparation and transparency may sound like lofty goals, but, as Lousin concludes, the constitution they can help to produce is worth the effort.¹⁹¹

184. *Id.* at 574.

185. Ann Lousin, How to Conduct a Constitutional Convention, Address at the Loyola of Los Angeles Law Review Symposium: Rebooting California—Initiatives, Conventions, and Government Reform (Sept. 24, 2010), available at www.rebootca.org/media.html; see Ann M. Lousin, *Essay: How to Hold a State Constitutional Convention in the Twenty-First Century*, 44 LOY. L.A. L. REV. 603 (2011) [hereinafter Lousin, *Essay*].

186. Lousin was a research assistant at the Sixth Illinois Constitutional Convention, where she worked on the drafting of the 1970 Illinois Constitution. Lousin, *Essay*, *supra* note 185, at 603 n.*.

187. *Id.* at 604–05.

188. *See id.* at 606.

189. *Id.*

190. *Id.* at 621.

191. *Id.*

*d. Joseph Grodin—Popular sovereignty and its limits:
Lesson for a constitutional convention in California*¹⁹²

Professor Grodin examines the impediments to achieving structural reform in California. While there are three paths to changing the California Constitution, Grodin focuses on the particular challenges presented by what might be the most elusive avenue—the constitutional convention.¹⁹³ Dismissing first the popular-initiative process as unsuitable for true structural revision and then the legislative initiative as unlikely to achieve the necessary two-thirds majority of each house of the legislature, Grodin is left with the third option—a constitutional convention—to achieve the structural reform that California needs to get back on the right track. However, even this remaining option presents its own challenges.¹⁹⁴

Focusing specifically on the procedural issues likely to arise from any convention proposal that departs from the format currently prescribed by the California Constitution—that only the legislature may propose a convention—Grodin models his comments after the now-defunct propositions that Repair California advanced in 2010. With an eye toward future reform, Grodin confronts two challenges: (1) whether the initiative process could be used to modify the California Constitution to allow a constitutional convention to be called through the initiative process without any legislative action; and (2) whether an initiative could also provide for the selection of convention delegates by a method different from that currently specified by the constitution.¹⁹⁵ Exploring the relevant California constitutional provisions and cases, Grodin eventually answers both in the affirmative.¹⁹⁶ While, as Grodin notes at the outset, the recent call for a constitutional convention did not qualify for the ballot, his insights remain highly relevant as California considers all its avenues to constitutional reform.

192. Joseph Grodin, *Popular Sovereignty and Its Limits*, Address at the Loyola of Los Angeles Law Review Symposium: Rebooting California—Initiatives, Conventions, and Government Reform (Sept. 24, 2010), available at www.rebootca.org/media.html; see Joseph R. Grodin, *Popular Sovereignty and Its Limits: Lessons for a Constitutional Convention in California*, 44 LOY. LA. L. REV. 623 (2011) [hereinafter Grodin, *Lessons*].

193. Grodin, *Lessons*, *supra* note 192, at 625–26.

194. *Id.* at 625.

195. *Id.* at 626, 633.

196. *Id.* at 632–33.

*e. Raphael Sonenshein—Constitutional revision commissions*¹⁹⁷

Professor Raphael Sonenshein explores an often-forgotten model of governmental reform—the citizens’ commission. While Sonenshein acknowledges that the alternative models, such as the constitutional convention, generate more excitement than the citizens’ commission, inherent in this excitement is a risk of radical change that those currently in power find threatening.¹⁹⁸ This risk provides powerful incentive for certain groups to seek control over or to interfere with the convention before any reform can even be accomplished. But while a constitutional convention has failed to materialize in California, reformers should not lose hope. Rather, they should, as Sonenshein suggests, explore alternatives.¹⁹⁹

In seeking out an alternative reform model, Sonenshein directs reformers to look up to the federal government, across to other state governments, and down to local governments.²⁰⁰ Surveying reform efforts at each of these levels, Sonenshein focuses on the citizens’ commission’s rich history in American cities.²⁰¹ Sonenshein contends that adopting a citizens’ commission model of reform would reduce the initial “cost” of undertaking reform, while offering voters and elites the possibility of well-designed reforms to gain their confidence.²⁰² As evidence, Sonenshein explores the constitutional revision commissions in Florida and Utah as viable models for California to follow.²⁰³ In explaining these models’ utility, Sonenshein suggests slight alterations customized for California’s unique political climate.²⁰⁴ Of course, there are difficulties with the citizens’ commission model—which are openly acknowledged—that

197. Raphael Sonenshein, *Constitutional Revision Commissions*, Address at the Loyola of Los Angeles Law Review Symposium: Rebooting California—Initiatives, Conventions, and Government Reform (Sept. 24, 2010), available at www.rebootca.org/media.html; see Raphael Sonenshein, *Can a Citizens’ Commission Help Repair California Government? Lessons from Local Charter Reform*, 44 LOY. L.A. L. REV. 637 (2011) [hereinafter Sonenshein, *Citizens’ Commission*].

198. Sonenshein, *Citizens’ Commission*, *supra* note 197, at 639–41.

199. *See id.* at 643–44.

200. *Id.*

201. *Id.* at 649.

202. *Id.* at 652.

203. *Id.* at 654.

204. *See id.* at 655.

would require careful consideration to overcome. But as Sonenshein notes, California reform would be well worth the effort.²⁰⁵

4. The Future of Direct Democracy

In contrast to those scholars who feel that the constitution is California's primary problem, and its amendment the essential solution, are those who take a more focused view. They contend that the institution early in the twentieth century of the initiative, the referendum, and the recall has been perverted by subsequent developments, particularly the rise to a dominant position of money's influence on the initiative process. The pieces in this part of the Symposium present aspects of this debate and provide important guidance for future actors in this field, both academic and governmental.

*a. Gerald Uelmen—Enforcing the Single-Subject Rule for Initiatives*²⁰⁶

Professor Uelmen examines and laments the California Supreme Court's failure to exercise meaningful control over California's "fourth branch of government"—the initiative process.²⁰⁷ For Uelmen, the court's failure comes as a great disappointment, especially after he hailed the court's removal of the Let the Voters Decide Act of 2000 from the ballot in *Senate v. Jones*²⁰⁸ as a sign that the single-subject rule had grown teeth and could be used as an effective means of pre-election review. Uelmen reviews California Supreme Court decisions since *Jones* that examine initiatives for compliance with either the single-subject rule or the prohibition of constitutional revision. He argues that both doctrines "have again been reduced to historical artifacts" and that pre-election review of initiatives has been greatly limited.²⁰⁹

205. *See id.* at 658.

206. Gerald Uelmen, *Enforcing the Single-Subject Rule for Initiatives*, Address at the Loyola of Los Angeles Law Review Symposium: Rebooting California—Initiatives, Conventions, and Government Reform (Sept. 24, 2010), available at www.rebootca.org/media.html; see Gerald F. Uelmen, *Review of Initiatives by the California Supreme Court, 2000–2010*, 44 LOY. L.A. L. REV. 659 (2011) [hereinafter Uelmen, *Review*].

207. Uelmen, *Review*, *supra* note 206, at 660–61.

208. 988 P.2d 1089 (Cal. 1999).

209. Uelmen, *Review*, *supra* note 206, at 661.

At the end of his chronology, Uelmen concludes that *Jones* was a mere “hiccup” and that the court’s subsequent decisions minimizing the ability of the single-subject rule and the prohibition against constitutional revision to work as effective tools of pre-election review of initiatives have strangled California’s ability to reconsider and improve its political ideas.²¹⁰ Instead, the state is left without any “ability to regulate and fine-tune the application of any changes.”²¹¹ Where the court has failed to enforce constitutional limits on the currently “unbridled power of the initiative in twenty-first century California,”²¹² the state is left to amend its amendments, as that is the only effective means of evolving its political ideas.

*b. Robert M. Stern—Improving the initiative process*²¹³

Robert Stern suggests that rather than continue down the path of direct democracy, California should return to voluntary indirect democracy.²¹⁴ Under that system, the legislature reviews an initiative before it appears on the ballot; if the legislature votes to pass the proposal, then the initiative is adopted without appearing before the voters.²¹⁵ Stern examines the history of voluntary indirect democracy in California, arguing that its infrequent use reflects not that it failed as a process but that it was the result of a now-defunct constitutional provision.²¹⁶ Although California repealed indirect democracy in 1966, Stern shows that indirect democracy is viable by examining its various forms and uses in ten of the twenty-four states that employ the initiative process.²¹⁷

Stern issues a rallying cry, designating 2012 as the election year to propose an initiative amending the initiative process itself.

210. *Id.* at 661.

211. *Id.* at 670.

212. *Id.* at 669.

213. Robert M. Stern, *Improving the Initiative Process*, Address at the Loyola of Los Angeles Law Review Symposium: Rebooting California—Initiatives, Conventions, and Government Reform (Sept. 24, 2010), available at www.rebootca.org/media.html; see Robert M. Stern, *California Should Return to the Indirect Initiative*, 44 LOY. L.A. L. REV. 671 (2011) [hereinafter Stern, *California Should Return*].

214. Stern, *California Should Return*, *supra* note 213, at 673.

215. *Id.*

216. See *id.* at 674–75.

217. *Id.* at 676–79.

Suggesting a mandatory version of indirect democracy different from its predecessor, Stern argues that indirect democracy will lessen two problems produced by direct democracy—that voters are overwhelmed by both too many ballot measures and poorly drafted measures.²¹⁸ Citing his forty years of experience as a faithful observer of the legislature, Stern estimates that indirect democracy would reduce the number of ballot measures in each election by one or two initiatives.²¹⁹ While Stern acknowledges that some Californians may be reluctant to return additional responsibility to the legislature, indirect democracy will produce better-drafted initiatives since circulation to the legislature will increase the likelihood that errors will be caught and remedied so that the text better reflects the proponents' intent.²²⁰

*c. Bruce Cain—Fixing ballot box budgeting*²²¹

Bruce Cain says that it would be important to change the initiative process, but adds that nothing will be changed. He also explains that courts are no longer a substantial check on the process. Specific California Supreme Court decisions demonstrate the court's reluctance to enforce strictly the single-subject requirement and its reluctance to strike down constitutional initiatives as being revisions instead of amendments. Cain also explains that not all of California's current problems may be blamed on initiatives. For example, the budget problems—including the pension underfunding—are not unique to California. state budgeting is always difficult, he says, because most states do not permit deficit budgeting. There are, however, problems specific to California that come as a result of the initiative process, which he calls "ballot box budgeting."²²² Cain noted that these are not necessarily partisan, or liberal versus conservative, features of the process.²²³ For example, budgeting

218. *Id.* at 679 & nn. 61–62.

219. *Id.* at 681.

220. *Id.* at 681–83.

221. Bruce Cain, *Fixing Ballot Box Budgeting*, Address at the Loyola of Los Angeles Law Review Symposium: Rebooting California—Initiatives, Conventions, and Government Reform (Sept. 24, 2010), available at www.rebootca.org/media.html.

222. *Id.*

223. *Id.*

mistakes are usually made during good economic times, but the consequences do not appear until economic downturns. Part of the reason that voters do not trust legislatures, and thus turn to initiatives, is that legislatures are often placed in the untenable position of having to fix problems created by prior initiatives.

The most important problem in this area is what Cain labels “fiscal federalism,” meaning that the state government, for the most part, collects the taxes, while local entities make the spending decisions.²²⁴ This creates incentives that are “out of line.”²²⁵ As with other aspects of the initiative process, Cain remains pessimistic as to the likelihood of reform, primarily because powerful special interests are well served by keeping the system as it is.

In the question period, Cain pointed out another anomaly in California’s budgetary system: ordinary policy changes often require a supermajority, while basic structural changes—such as those often carried out through initiative constitutional amendments—pass with a simple majority.²²⁶ This is a complete reversal of the standard theory of democratic government.

*d. Christopher Elmendorf—Why sensible judicial enforcement of the amendment/revision distinction requires a constitutional revision*²²⁷

Professor Christopher Elmendorf discussed the California Supreme Court’s jurisprudence regarding challenges to initiative changes to the constitution based on the distinction between “amendments” and “revisions.” to the constitution. The basic tenet is that a “revision” is a change that works a “revisional effect” on our “basic plan of government.”²²⁸ According to Elmendorf, the court has stated that this distinction is fundamental to the very idea of the constitution as an “instrument of a permanent and abiding nature,”²²⁹

224. *Id.*

225. *Id.*

226. *Id.*

227. Christopher Elmendorf, *Why Sensible Judicial Enforcement of the Amendment/Revision Distinction Requires a Constitutional Revision*, Address at the Loyola of Los Angeles Law Review Symposium: Rebooting California—Initiatives, Conventions, and Government Reform (Sept. 24, 2010), available at www.rebootca.org/media.html.

228. *Id.*

229. *Id.*

This is why the revision procedure is “high-cost, difficult, and time-consuming.”²³⁰

However, the court’s actual doctrinal test for a “revision” does not track this idea. The court’s test asks whether, as to the challenged change in the constitution, its “revisionary purpose” is revealed on its face at the time of the challenge, or whether it has been demonstrated that the change will “necessarily or inevitably produce a revisionary effect.”²³¹ This test has led the court to reject challenges to many nominal-appearing changes that have had a substantial revisionary effect on the plan of government.

Elmendorf suggested three principal reasons for the court’s reluctance to invalidate initiative-based changes to the constitution: the court’s reluctance to decide so-called political questions; its disinclination to overturn the will of the people; and its concern that rejection of the change will simply send the issue back into a “legislative stranglehold.”²³²

Finally, Elmendorf proposed a solution to the problem of the court’s reluctance: a legislative constitutional amendment (to be ratified by the voters) that would (1) declare the “basic principles of the Constitution” as a guide to the court in ruling on initiative challenges; (2) instruct the court to resolve such challenges on the basis of empirical evidence as to how the change would work; (3) create periodic constitutional-review commissions to propose changes to the constitution; and (4) provide for the automatic placement of a constitutional-convention initiative on the ballot every twenty years.²³³ In the question period, Elmendorf explained why he thought that the legislature might act to put such an amendment on the ballot: because of its strong interest in getting the court to overturn term limits.²³⁴

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

*e. John S. Caragozian—From crisis to solution—
California's problems in two books: A review of
Remaking California and California Crackup*²³⁵

A Symposium organizer, and a co-author of this Introduction, John Caragozian reviews two timely books that deal with this Symposium's theme—California's problems and solutions.²³⁶ The first, *Remaking California*, edited by R. Jeffrey Lustig, categorizes events such as Proposition 13, the three-strikes law, and Proposition 140 into three structural problems: (1) the governance crisis, (2) the representation crisis, and (3) the social order crisis.²³⁷ Several experts, including Symposium moderator Dan Walters of the *Sacramento Bee*, explore these crises.²³⁸ The second book, *California Crackup*, by Joe Mathews and Mark Paul, also lists California problems, noting that the worst problem of all is that under California's current governmental system, none of the other problems can be fixed.²³⁹

Both books t to place California on the road to reform by suggesting a variety of solutions that parallel the Symposium's themes. For example, Mathews and Paul propose mandating that initiatives be drafted by professional governmental staff so as to avoid incomprehensible, self-contradictory, or otherwise improper language.²⁴⁰ This concern with poorly drafted initiatives reminds us of Stern's hope that the legislative review of initiatives implicit in a switch back to indirect democracy would increase the likelihood that errors in initiative drafts would be remedied in order to better reflect the proponents' intent. While Mathews and Paul propose a different means, they share an end similar to that of Stern's. This is just one of the commonalities the Symposium shares with both *California Crackup* and *Remaking California*, and as California considers all of its routes to reform, the combination serves as an important and informative review of today's proposals.

235. John S. Caragozian, *From Crisis to Solution—California's Problems in Two Books: A Review of Remaking California and California Crackup*, 44 LOY. L.A. L. REV. 687 (2011).

236. *Id.* at 687.

237. *Id.* at 687–88.

238. *See id.* at 688–89.

239. *Id.* at 697.

240. *Id.* at 702.

B. Keynote Addresses

1. Governor Gray Davis²⁴¹

Former Governor Gray Davis provided the Symposium's keynote address at the event's luncheon.

The theme of the governor's remarks was his prescription for what is needed to repair California's problems to "get Sacramento back on track."²⁴² The problem, he said, is that legislators' interests are not aligned with the public interest. Both political parties have conflicting but legitimate points of view, to which their legislators strictly adhere. Nothing positive will happen, however, until legislators in both parties are willing to challenge their respective party's orthodoxy.

Two recently passed laws provide some hope that this will happen in the future. One of these is an initiative that removes control of redistricting from the legislature and turns it over to a citizen panel. The other is the open-primary reform, which passed in June 2010. This reform should provide more centrist legislators by giving the general voter "two cracks" at voting for legislators in each election cycle. A previous similar reform was struck down by the U.S. Supreme Court, but that decision was, in the governor's opinion, based on a misunderstanding of California politics.

Because of these two reforms, at least 20 percent of the legislators should be willing to tackle the big problems that the current legislature will not deal with. If those 20 percent do not, they will lose their seats in the 2012 election.

To these two reforms, the governor would add two others: a "rainy day fund" included in each budget and a mandatory spending cap. The rainy-day fund would smooth out the effect of the business cycle on the state's revenues. The state will be forced to show the same restraint in its spending that citizens do in their family budgets.

The governor then listed four additional reforms that he feels would help to alleviate the problems caused by chronically late state budgets. The first two would permanently dock the pay of legislators

241. *Supra* note 34.

242. Gov. Gray Davis, Keynote Luncheon Address at the Loyola of Los Angeles Law Review Symposium: Rebooting California—Initiatives, Conventions, and Government Reform (Sept. 24, 2010), available at www.rebootca.org/media.html.

and the governor for every day after July 1 of each year that the budget is late and would forbid political fundraising as long as the budget is late. The third would limit legislative sessions to four months out of each year, providing less time in Sacramento for legislators to pass unnecessary laws and more time out of Sacramento for constituent service. Finally, the governor advocated a basic reform of the initiative process that would deny a place on the ballot to any initiative that did not specify a funding source for its proposal.

Expanding on the initiative issue, the governor cautioned that Proposition 27, a provision on the November 2010 ballot, would be a “poison pill” that could repeal the redistricting initiative that he had lauded at the beginning of his remarks.²⁴³

Governor Davis completed his remarks by reminding the group that California still has a positive influence because it “provides innovation to the world.”²⁴⁴

2. Dan Schnur²⁴⁵

Dan Schnur, the Symposium’s tribute-dinner keynote speaker, opened with an optimistic message to participants and sponsors: “As dire a picture as today’s panelists have painted, there is hope for the state of California and its processes of government and politics simply because there are at least small groups of people who care enough to think about it, to talk about, and to worry about” fixing California.²⁴⁶

Schnur’s second and related point was that “politics is way too important to leave to the politicians.”²⁴⁷ A politician’s goal, “first, foremost, and always, is to get re-elected,” not to bring necessary reforms.²⁴⁸ That job is for the people of California. While all the proposed or recently enacted structural reforms are important, they

243. *Id.*

244. *Id.*

245. *Supra* note 35.

246. Dan Schnur, Keynote Dinner Address at the Loyola of Los Angeles Law Review Symposium: Rebooting California—Initiatives, Conventions, and Government Reform (Sept. 24, 2010), available at www.rebootca.org/media.html.

247. *Id.*

248. *Id.*

are not ends unto themselves but means to allow substantive change. That requires not merely the reform movement, of which Schnur is a proud member, but the active involvement of people who do not otherwise live, eat, and breathe politics. “California will overcome its sea of intractable public policy challenges, but not because of a constitutional convention or even initiative reform, but because we convince ordinary people there is a place for them in the political process.”²⁴⁹

How does this come about? How can regular citizens be motivated to take up Steve Jobs’s challenge to “make a dent in the universe”?²⁵⁰ One way “is to make it as easy as possible for average citizens to participate in the process, rather than make it harder.”²⁵¹ Schnur asserts that that is his principal goal as Chair of the California Fair Political Practices Commission. “The political process belongs to the people, not to the politicians.”²⁵²

IV. CONCLUSION

We offer this Symposium issue of the *Law Review* to its readers, as was the live Symposium to its attendees, in the spirit of open inquiry, open expression, and open debate that the organizers feel must precede any meaningful reform that can provide relief for California’s manifold problems.

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*